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1933.

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Government Advocate.

Sir S. Sultan Ahmed, Kt., D.L.

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PATNA HIGH COURT
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APPELLATE CRIMINAL.

1932.

January 29.

Ref. 55 CWN 331.

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

KAULASHIA

v.

KING-EMPEROR.*

Penal Code, 1860 (*Act XLV of* 1860), *section* 228—*marrying a minor girl while in the custody of a guardian appointed by court, whether constitutes an offence under section* 228—*Contempt of Courts Act*, 1926 (*Act XII of* 1926), *applicability of—section* 2(3), *significance of—single act, whether may be both an offence under Penal Code and a contempt of court.*

Where *K* gave away in marriage a minor girl while she was in the custody of a guardian appointed by the court, the appointment being well understood to involve the forbidding of anybody to deal with the minor by marriage or otherwise while she was under that guardianship.

Held, that the conduct of *K* was merely a disobedience of the order of the court, and did not constitute an offence punishable under section 228 of the Penal Code, 1860.

Held, however, that the facts of the case attracted the operation of the Contempt of Courts Act, 1926, which empowers the High Court to punish the contempts of courts subordinate to it in just the same way and in just the same circumstances as if the contempt had been of the High Court itself.

Section 2(3) of the Contempt of Courts Act, 1926, provides :

" No High Court shall take cognisance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code."

* Criminal Appeal no. 311 of 1931, against an order of Rai Bahadur A. N. Chatterji, Esq., District Judge of Gaya, dated the 9th October, 1931.

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Held, that the meaning of clause (3) of section 2 is that where under the Penal Code there is already a provision for punishing a contempt of court as a contempt of court, the Contempt of Courts Act itself shall have no application; it does not mean that when the act which has constituted the contempt of court also constitutes an offence under the Penal Code it may not be punished under the Contempt of Courts Act.

A single act may be both an offence under the Penal Code and may also be a contempt of court and may be punishable in either or both capacities.

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

W. H. Akbari and *S. A. Khan*, for the appellants.

Assistant Government Advocate, for the Crown.

COURTNEY TERRELL, C.J.—This is an appeal from an order of the District Judge of Gaya directing a complaint against the appellants for the offence of contempt of court. The circumstances which gave rise to the order may for all material purposes be shortly stated. There is a minor girl named Mahmudan. She is the daughter of a woman named Kaulashia who was a widow and who has married or is living with a man named Nooruddin. An application was made before the District Judge by the sister of Kaulashia, named Naulashia, that the minor girl be removed from the custody of her mother on the allegation that the mother was living a life which rendered her an unsuitable custodian for her daughter. Opposition was entered to that application by the mother. Ultimately on the 30th June, 1931, Naulashia filed a petition stating that she had taken charge of the minor on the 24th June, 1931, and she undertook before the judge not to marry the minor without the permission of the court. The learned judge directed that that petition should remain upon the file of the court and it appears to have been taken by all the parties that until further orders Musammat Naulashia was to act as the guardian of the person of the minor. Indeed on the 22nd August Musammat Naulashia put in a petition asking that her name be cancelled from her guardianship and that her brother

Chandu Mian may be appointed guardian. In that state of affairs Musammat Kaulashia, the mother of the minor, and the man Nooruddin with whom she was living, appear to have effected the marriage of the minor with a person whom they considered to be a suitable match but the young girl was not sent to her husband and we are informed that she remains in fact under the custody of the mother and has remained throughout under the custody of the mother notwithstanding the order of the court on the 30th June that Musammat Naulashia should be appointed guardian.

An application was made by Chandu Mian that the mother and Nooruddin, having removed the child from the custody of her maternal aunt and given her away in marriage, had committed contempt of court and should be punished. The learned District Judge after deciding that a contempt of court had in fact been committed made an order for a complaint to be lodged against the mother and Nooruddin under section 476 of the Criminal Procedure Code alleging an offence by the accused persons under section 228 of the Indian Penal Code, that is to say, for having committed the offence of intentionally offering an insult to a public servant whilst sitting in a stage of a judicial proceeding. It is perfectly clear that whatever offence has been committed by Kaulashia and Nooruddin it is not an offence under section 228 of the Indian Penal Code. The insult or interruption of a public servant while sitting in a judicial proceeding is not a phrase which applies to conduct of this kind which is merely a disobedience of the order of the court by marrying the minor while she was in the custody of a guardian appointed by the court, the appointment of a guardian being well understood to involve the forbidding of anybody to deal with the minor by marriage or otherwise while she was under that guardianship. The attention of the learned judge was not called to the provisions of the Contempt of Courts Act (XII of 1926). This was an Act which was passed to remedy a defect in the law which was disclosed by a decision of the High Court of Calcutta

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in the course of which it had been decided that the superior courts possess no inherent right to punish contempts committed against the lower courts and it empowered the High Court to punish contempts of courts subordinate to it in just the same way and in just the same circumstances as if the contempt had been of the High Court itself subject to a limitation as to the extent of the punishment.

It was suggested in the course of the argument that possibly the Contempt of Courts Act was not applicable to circumstances like the present because the taking away of the minor girl from lawful custody and marrying her to someone else was already an offence punishable under the Indian Penal Code and attention was directed to sub-section (*3*) of section 2 which says that

> "No High Court shall take cognisance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code."

But the meaning of that clause is that where under the Indian Penal Code there is already a provision for punishing a contempt of court as a contempt of court the Contempt of Courts Act itself shall have no application. It does not mean that when the act which has constituted the contempt of court also constitutes an offence under the Indian Penal Code, it may not be punished under the Contempt of Courts Act. Indeed it has already been held by this Court that a single act may be both an offence under the Indian Penal Code and may also be a contempt of court and may be punishable in either or both capacities.

The best course to take in the peculiar circumstances of this case and having regard to the very humble position of the parties is to allow this appeal so that the criminal proceedings founded upon the complaint of the District Judge may come to an end, to accept the undertaking which has been offered to us by learned Counsel on behalf of the appellants that pending the order of the District Judge they will not part with the custody of the ward, that they will

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not allow her husband to have access to her nor will they allow anybody else to interfere with her and that they will produce her as and when required by this Court or by the District Judge. We will direct the District Judge to proceed at once with the appointment of a suitable guardian for the minor in his discretion. It must be distinctly understood that if Musammat Kaulashia or Nooruddin commit the slightest breach of the undertaking offered by them they will be committed to prison.

When the matter of the appeal came up for admission we directed a rule to issue against the appellants to shew cause why they should not be punished under the Contempt of Courts Act. In the circumstances we see no reason to proceed further with that matter and the rule is discharged.

ROWLAND, J.—I agree.

Order accordingly.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

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

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April, 22.

MAHARAJADHIRAJ OF DARBHANGA

v.

COMMISSIONER OF INCOME-TAX.*

Income-tax Act, 1922 (*Act XI of* 1922, *as amended by Act III of* 1928), *section* 26(2), *meaning and significance of* —"*succession*" *what amounts to—test—legal opinion, statement of, in petition, whether proper.*

Section 26(2) of the Income-tax Act, 1922 (as amended by Act III of 1928), provides :—

"Where, at the time of making an assessment under section 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year."

Held, (*i*) that the words "where at the time of making an assessment under section 23" merely mean "when the time comes to make an assessment";

* Miscellaneous Judicial Case no. 41 of 1931.

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(*ii*) that the plain meaning of the words " succeeded in such capacity by another person " is that if a business, profession or occupation which was formerly carried on by a person has been taken over by another person who continues the business that transference of ownership, whether it be by operation of law or by transfer inter vivos, amounts to a succession.

The real test of whether there has been a succession or not is to be decided by an examination of the business.

Where, therefore, there had been no change in the character of the business or in its management or where the business had not been wound up and restarted, and where the business was continued after a change of ownership in the business, *held*, that there was a succession within the meaning of section 26(*2*).

Bell v. *National Provincial Bank of England*(1), followed.

No petition to any officer who has to administer the law should contain or have annexed to it any opinion by members of the legal profession. The correct course for the tribunal in such cases is to state that the petition cannot be considered until the statements as to the opinion are removed.

Reference under section 66(*2*) of the Income-tax Act, 1922.

The facts of the case material to this report will appear from the judgment of Courtney Terrell, C.J.

Sir Sultan Ahmed (with him *K. P. Jayaswal*, *S. M. Gupta* and *R. Misra*), for the assessee.

C. M. Agarwala, for the Commissioner of Income-tax.

COURTNEY TERRELL, C.J.—The late Maharajadhiraj of Darbhanga died on the 3rd July, 1929, and was succeeded by the present Maharajadhiraj. The deceased at the time of his death was the owner of a very extensive money-lending business and of other business undertaking and on the death of his father the present Maharajadhiraj immediately came into ownership of these concerns. A notice had been

(1) (1904) 4 K. B. 149.

served by the Income-tax Officer under section 22(*2*) of the Income-tax Act on the late Maharajadhiraj in respect of the income for the year ending on the 30th September, 1928. It was served upon a person who had no authority to receive it and it was accordingly cancelled and a fresh notice was served on the person who admittedly was in a position to deal with it. Time was requested of the Income-tax Officer for the purpose of making a return which time was granted. Before the extended time for making the return had expired the late Maharajadhiraj died. Later on the Income-tax Officer purported to apply section 26(*2*) of the Income-tax Act and decided that under that section the present Maharajadhiraj had become liable for the tax which the Income-tax Officer assessed after a return by the present Maharajadhiraj of the income of the late Maharajadhiraj for the year ending the 30th September, 1928. The return made by the present Maharajadhiraj was made together with a statement of his contention that he was not liable to be assessed in respect of this particular period of his father's ownership of the estate but he very properly supplied the necessary figures and the principal matter of the liability remained over for subsequent decision. It is that matter of liability which is raised for our decision in the form of the questions ultimately stated by the Commissioner of Income-tax.

The questions which have been stated for this Court are thus formulated :—

(*a*) Does the law contemplate taxation of a dead man's income in the hands of an heir?

(*b*) Does section 26 (*2*) apply to the petitioner in the circumstances of the case? And if it does apply, was there a succession in law to justify an assessment on the petitioner?

The broad matter raised in question (*a*) does not really arise at all and it is not necessary for us to answer it whatever the right answer may be. The really material question is involved in question (*b*).

Two main contentions are raised on behalf of the assessee upon the question as to whether section 26(*2*)

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is applicable to the circumstances of the case. The first contention is made with regard to the opening sentence of the sub-section

"Where at the time of making an assessment under section 23."

It is contended that section 23, which is the only section of the Act which deals with the matter of assessment, does not come into operation unless and until there has either been a return made by the assessee or he has failed to make an accurate return, and the assessee (for this purpose) being the late Maharajadhiraj of Darbhanga, he had not at the time of his death either made a return or failed to make a return and accordingly it is said that section 23 had not come into operation and, therefore, sub-section (*2*) of section 26 has no application at all. In my opinion this contention is not well founded. Section 23 is the only section under which an assessment can be made and, therefore, the real meaning of the words "where at the time of making an assessment under section 23" merely mean "when the time comes to make an assessment". Secondly, the assessee is the person liable for the payment of the tax and the assessee in this particular case is not the late Maharajadhiraj but is the present Maharajadhiraj and he has in fact made a return and, therefore, an assessment could be made and was properly made under section 23.

The second contention on behalf of the assessee is based upon the words "succeeded in such capacity by another person" and the argument throughout on his behalf has been that such words can only apply to a transference of ownership of the business, profession or occupation inter vivos and is not capable of meaning succession by operation of law. It is a little difficult to follow the subtlety with which that argument is presented but, as I understand it, it is put somewhat in this way: On the one hand it is said that although the present Maharajadhiraj may have succeeded to the late Maharajadhiraj in ownership of his property he has not succeeded in the capacity of being the person to carry on the business, profession or occupation

but has succeeded by reason of the filial relationship existing between himself and his father. On the other hand it seemed that there was another way of putting the argument and I may attempt to summarise it thus:—It was said that the new Maharajadhiraj might, had he so chosen, have wound up the business from the moment when he came into ownership of it and that the continuance of the business cannot be treated as being the business of the late Maharajadhiraj but must be considered in law as being the business of the present Maharajadhiraj, in other words, the argument is that the present Maharajadhiraj has succeeded to a capital asset and that there has not been a continuing business. The argument does not appeal to me. I think that the plain meaning of the words is that if there is a business, profession or occupation which was formerly carried on by a person and that property has been now taken over directly by another person who continues the business that transference of ownership whether it be by operation of law, as in this case, or by transfer inter vivos, it is a succession. The real test of whether there has been a succession or not is to be decided by an examination of the business. Given the fact that there has been a business carried on by one person and after a certain date carried on by another, the question of whether or not it is a new business or it is the old business which is carried on in succession is to be found in the case which was cited on behalf of the assessee, the case of *Bell* v. *National Provincial Bank of England*(1). The court in that case had also to apply the word "succession". The material words of the rule which were being applied are quoted by the Master of the Rolls in his judgment as follows:—

"If any person shall have succeeded to any trade, manufacture, adventure, or concern, or any profession within such respective periods as aforesaid."

Now what had happened in that case in fact was this. A large banking company had purchased the business of a small local bank and carried it on. It

(1) (1904) 4 K. B. 149.

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carried it on in the same premises with the same clerks and apparently with no material alteration in the character of the business. It was argued by the purchasing company that there had been no succession to the old business but that it was simply a new capital adventure by the purchasing company and that it was, if anything, the start of a new business or that the new concern when taken over became part of the business carried on by the purchaser. The test applied by Cozens Hardy, L.J. in his judgment is expressed in the following words :—

" Since the time of that purchase the respondents have been carrying on a business of the same character as was previously carried on by the County of Stafford Bank, on the same premises, and with the same staff of clerks as before. It appears to me impossible to say that there was not a succession by the respondents to the business of the County of Stafford Bank, within the meaning of the Fourth Rule, unless we are to hold that the Rule only applies to cases where the successor was not, at the time of the succession, carrying on a business of the same kind as that succeeded to, or where that business is isolated and kept apart from any other similar business previously carried on by him."

Applying that test to the circumstances of this case the facts are all the more clear. It is not suggested for a moment that there has been any change in the character of the business, any change in the character of its management, that the business has been wound up and restarted or anything of the sort and, therefore, in my opinion, the business having been continued and there having been a change of ownership in the business there has been a succession to the business within the meaning of section 26(*2*).

It is not, in my opinion, necessary to answer the broad question as to whether the law contemplates the taxation of a dead man's income in the hands of his heir because no problem arises for solution in this case requiring an answer to that question but as to the second question as to whether section 26(*2*) applies to

the petitioner in the circumstances of this case, I would answer it in the affirmative in agreement with the very clear and logical opinion expressed by the Commissioner of Income-tax. The assessee will pay Rs. 250 as the costs.

We notice upon an examination of the record that the Income-tax Officer, in the course of hearing the learned Advocate on behalf of the assessee, seems to have asked him for opinions in favour of his contention and thereupon with that pressure upon him and, we are told, as the result of a practice which has sprung up the learned Advocate supplied the Income-tax Officer with the opinions of a large number of very eminent practitioners. This practice is to be deprecated. It would be in the highest degree improper for an assessee who was presenting what might be a novel, but at the same time a perfectly sound, point to be unable to impress the Income-tax Officer unless he could produce opinions which might even be against him or which might involve him in a great deal of expense. It is just as undesirable that that practice should be followed as that the learned Advocate who is conducting the case on behalf of a client should be asked what his own opinion of the matter is. That is obviously impossible and we have not the Roman custom of fortifying an argument by the opinion of " jurisconsults " especially when they are still in actual practice. I would recommend that the Department cease this custom forthwith. The opinions are often embarrassing to the Advocates who have to support the argument and not only so but they tend to embarrass the tribunal before which the case comes for decision.

FAZL ALI, J.—I agree.

COURTNEY TERRELL, C.J. AND FAZL ALI, J.—*September* 1.—Mr. Manohar Lal on behalf of the Commissioner of Income-tax has recalled our attention to this case. He informs us that most careful enquiries have revealed the fact that we were misinformed as to the practice prevailing before Income-tax-Officers in the matter of requiring from assessees

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legal opinions in support of their case. It appears that in fact no such practice exists and we accept the statement of the officer that no such request was in fact made by him in this case but the petitions of assessees sometimes have annexed to them, as in the case under consideration, opinions by learned members of the legal profession. The Income-tax Officer has not felt justified in rejecting the petitions on this ground though neither he nor any superior officer has been influenced by the names of those who furnish the opinions. We are glad to find that the supposed practice which we reprobated has no existence in fact. Nevertheless we think it necessary to say that no petition to any officer who has to administer the law should contain or have annexed to it any such opinions. It is quite legitimate that the petitioner should state his legal contentions but the fact that such contentions have the support of the opinion of any practitioner is entirely irrelevant and the statement of such fact is improper. The correct course for the tribunal in such cases is to state that the petition cannot be considered until the statements as to the opinion are removed. It is not open to petitioners to include in their petitions improper and irrelevant matters and the position is analogous to that in which a petitioner might set forth matters of an irrelevant and scandalous nature, and in all such cases the petition should be returned for excision of such matter and after such excision, but not until it shall have been effected, the petition may be considered on its merits. These observations will form part of our judgment.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

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April 27.

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

MOTIRAM ROSAN LAL COAL COMPANY, LIMITED

v.

COMMISSIONER OF INCOME-TAX.*

Income-tax Act, 1922 (*Act XI of* 1922), *section* 10(2) (*vi*)—"*original cost thereof to the assessee*", *meaning of—words*,

* Miscellaneous Judicial Case no. 2 of 1931.

whether refer to the original cost to the assessee or his predecessor—cost must be taken to refer to genuine original cost.

Section 10, Income-tax Act, 1922, provides :—

"(*1*) The tax shall be payable by an assessee under the head "Business" in respect of the profits or gains of any business carried on by him.

(*2*) Such profits or gains shall be computed after making the following allowances, namely :—

.....

(*vi*) in respect of depreciation of such buildings, machinery, plant, or furniture being the property of the assessee, a sum equivalent to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed....."

Held, (*i*) that the words "original cost thereof to the assessee", occurring in section 10(*2*) (*vi*), mean the original cost to the assessee and not to his predecessor, the previous owner of the business.

Commissioner of Income-tax, Bombay v. *The Saraspur Mills Company, Ahmedabad*(1), followed.

Massey and Company v. *Commissioner of Income-tax, Madras*(2), dissented from.

(*ii*) that the words must be strictly construed and must be taken to refer to the genuine original cost to the assessee and not necessarily to anything which the assessee may have stated to be the original cost.

Reference under section 66(*2*) of the Income-tax Act, 1922.

The facts of the case material to this report will appear from the following statement of the case by the Commissioner of Income-tax.

SIR,

I have the honour to submit for the decision of the Hon'ble Court a statement of case on two questions of law arising out of the assessment of Messrs. Motiram Roshan Lal Coal Company, Limited, for the year 1929-30.

2. The facts of the case are as below :—

The Motiram Coal Company was a partnership running a colliery.

(1) (1931) I. L. R. 56 Bom. 129.
(2) (1928) 115 Ind. Cas. 814, F. B.

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The partners were:

(1) Baijnath Gopalka, Hindu undivided family—4 annas.

(2) Roshan Lal Choudhry, Hindu undivided family—5¼ annas.

(3) Nine separate Hindu undivided families, all branches of the same family " Choudhary "—aggregating 2¼ annas.

(4) Two separate Hindu undivided families, branches of " Nawalgarias "—2¼ annas.

(5) Rookman and Nawalgaria (personally)—2¼ annas.

Some years ago, there was a dispute among the partners which culminated in a Title suit before the Sub-Judge of Dhanbad (Roshan Lal Marwari *versus* Motiram Marwari and others).

To quote from an Indenture, dated 30th September 1924 :—

" Whereas the partners hereto of the 1st, 2nd, 3rd, 4th and 5th parts (the five partners referred to above in this reference) are the persons interested in the result of such suit and also in the Colliery and its business and whereas with a view to avoid the costs of litigation and with a view to compromise all disputes between them, the parties hereto of the 1st, 2nd, 3rd, 4th and 5th parts have arrived at and entered into an agreement on amongst others the terms that the parties hereto would float a private company under the name and style of Motiram Roshan Lal Coal Company, Limited, and the said colliery lands with plants, tools and implements, machineries, coal, etc., and all claims and outstandings and rights whatever including the business of Motiram Coal Company would be sold, conveyed and delivered to the Company.

The purchase price paid by the company to the partnership was Rs. 6 lacs and according to the indenture Rs. 5 lacs represented the value of the moveable properties and rupees one lac that of the immoveable properties. Possession was delivered of the moveable properties some time before the 30th September 1924 and possession of the immoveable properties was delivered by the Indenture of the 30th September 1924. The price paid to the partnership was not in cash, but in the shape of shares in the new private company which was floated. There were no other share-holders in the private company beyond the persons who were allottees of the above shares paid as consideration. The share-holders were all members of the families which constituted the partnership. The relative shares allotted to the members of each of the families were not exactly identical with the relative share of the families in the partnership, apparently because the allotment was the result of a compromise in a suit. The company also had two ladies of the family as share-holders. In other words, each family or individual constituting the partnership received shares, some in the name of the family and some in the names of individual members thereof.

Under the same indenture of 30th September 1924, referred to above, it was agreed and declared that the company " would pay all liabilities of the firm of Motiram Coal Company " and there were the usual mutual Indemnities against the various possible contingencies arising out of the sale.

3. So far as can be traced by me the partnership had been running the colliery since 1912. The assessments in the past both on the company and probably also on the firm had been made year after year under section 23(4) of the Indian Income-tax Act XI of 1922 by estimate to the best of the Income-tax Officer's judgment owing to some default or other on the part of the assessee. The company claim to have taken over from the firm machinery, plant and buildings for a sum of about Rs. 3—8 lacs. The company have made subsequent additions to the plant, machinery, etc., at a cost of about Rs. 54,000.

4. The point in dispute between the department and the assessee company relates to the machinery, plant, etc., taken over from the firm for Rs. 3—8 lacs in 1924. Under section 10 (2) (*vi*) of the Indian Income-tax Act, the profits or gains of an assessee carrying on business shall be computed after making the following allowances, namely :—

" In respect of depreciation of such buildings, machinery, plant or furniture being the property of the assessee as sum equivalent to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed ".

The Income-tax Officer understood the expression " original cost to the assessee " occurring in the above section to mean the cost paid by the assessee company to the predecessor firm in 1924 and allowed the claim to depreciation on that basis. The Assistant Commissioner, to whom the assessee went up on appeal on other points, held, on the other hand, that " the original cost to the assessee " in the above section meant the cost originally paid by the predecessor in business and therefore asked the assessee to produce evidence to show when the various items of machinery, plant and buildings were purchased by the predecessor firm and at what price. On the evidence produced before him he was prepared to allow depreciation only on a capital cost of Rs. 30,949 against depreciation on 3—8 lacs as claimed. The Assistant Commissioner accordingly enhanced the assessment after giving the usual notice to the assessee to show cause against the enhancement. The assessee appealed to my predecessor under section 32 against the enhancement made by the Assistant Commissioner. Following the ruling of the Madras High Court in *Commissioner Income-tax* v. *Massey and Company*(1), in which the same point had been already decided, my predecessor held that the enhancement made by the Assistant Commissioner was correct. The present reference arises out of his appellate order.

5. The assessee has raised two questions of law, namely,—

(*1*) Whether the application of section 26 of the Act is confined for the purpose of assessment only to the year during which one business has succeeded another or during which there has been a change of ownership? And

(*2*) Whether the " original cost " appearing in sub-clause (*vi*) of clause (2) to section 10 of the Act means the original cost paid by the assessee or that paid by the predecessor in business of the assessee?

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6. I am unable to see how the first question of law arises in this case. The assessment in dispute now was not made under section 26 and the question cannot therefore arise on the facts. In the judgment of the Madras High Court in *Massey and Company's*(1) case, apparently the Hon'ble Judges were influenced by section 26(2). Apparently they argued that if an assessee is treated as successor for one purpose, he must be treated as successor for all purposes. The answer to this argument appears to me to be that in the year after succession the depreciation always is calculated on the cost to the predecessor while in subsequent years there is no question of treating the assessee as successor for any purpose. The first question therefore is not referred.

7. As regards the second question of law, I am unable to see any material distinction between the case of *Massey and Company*(1) and the present case. In the application for a reference to the High Court the assessee points out the following features distinguishing this case from *Massey and Company's*(1) case.

(*a*) In *Massey and Company's case*(1), both the predecessor and the successor were " going on concerns ", whereas in present case, the predecessor was a " going on concern ", while the successor was " just then formed " i.e., a newcomer to the business.

(*b*) The successor in the present case did not purchase the old firm as a " going on concern ", but merely purchased the coal, land, building, etc.

(*c*) In *Massey and Company's*(1) case, the successor paid the predecessor's nominees a sum of Rs. 10 lacs in addition to the price of machinery building, etc., " to represent the price of the concern as going on that date ".

The assessee company also puts forward another ground, viz., the share-holders of the successor company in the present case were not identical with the partners of the predecessor firm.

8. I am unable to see how the last ground referred to above is relevant at all. It is obviously not necessary in order to establish succession that the shareholders of the purchaser company should be identical with the partners of the vendor firm. If that were so, there could be no succession in the case of business, of one individual by another. The argument used by the assessee is so obviously unsound that it needs no further discussion.

9. Taking now the distinguishing features of this case referred to by the assessee, the fact that in *Massey and Company's*(1) case, the successor was already in business, whereas in the present case, the successor was not already in business, does not affect the question whether there was a succession, which is the material point in common between the two cases. The second argument of the assessee that the assessee company did not purchase the business of the old partnership, but only certain specific assets is at variance with facts. According to the Indenture of 30th September 1924, already referred to, the Company received from the partnerships not merely specific assets and liabilities, but " all claims and outstandings and rights whatever including the business of Motiram Coal Company ". If that

(1) (1928) 115 Ind. Cas. 814, F. B.

did not constitute succession, nothing can. As regards the third argument, the assessee appears to have misread the facts in *Massey and Company's*(1) case. Paragraph 3 (*a*) of the statement of the case in that case is as below:—

'By a resolution of the Directors, dated 5th January 1924 the petitioners Company resolved to purchase the business of the old company as a going concern as from 1st January 1924 for the consideration following, *viz.*, Rs. 10 lakhs of ordinary shares in Massey and Company, Limited, (Petitioner Company) issued as fully paid up to the nominees of the Madras Engineering Works, Limited, (Old Company) Rs. 32,000 and Rs. 3,76,000 being the consideration for the land and buildings, respectively, Rs. 3,52,000 being the consideration for the moveable plant consisting of machinery etc., Rs. 2,00,000 fixtures and fittings, Rs. 70,000 loose tools, Rs. 18,000. Motor cars and launches, Rs. 14,000 electric plant, Rs. 50,000 and Rs. 2,40,000 being the consideration for the remaining assets after providing for liabilities and expenses".

The assessee interprets this to mean that it will be evident from the facts as stated in the letter of reference to the High Court that besides the price for machines, buildings, lands and other assets after making allowance for the liability paid by the new Company to the old Company, a further sum of Rs. 10,00,000 was paid to the nominees of the old Company in the shape of fully paid up shares and this amount represents the price of the concern as going on at that date. This is clearly wrong. The assessee probably intends to say that in *Massey and Company's*(1) case there must have been some consideration paid for goodwill, whereas in the present case none was paid. Even so, the non-payment of anything for goodwill can make no difference to the fact of succession, when according to the Indenture as quoted above, the business of the predecessor as taken over in its entirety by the successor.

10. The distinguishing features referred to by the assessee have therefore no significance. The ruling in *Massey and Company's*(1) case is that if there is succession to a business, " the original cost to the assessee " in section 10(*2*) (*vi*) should be calculated with reference to the price paid by the predecessor in business both for the purpose of that clause and for the purpose of the proviso to that clause.

11. The Department has hitherto followed the above ruling, but the question is a question in regard to which possibly more than one view might reasonably be taken. The Hon'ble Judges of the Madras High Court followed *Scottish Shire Line Ltd.*, v. *Letham*(2) holding that " there was no material difference in the language of the Indian and English Acts regarding allowance for depreciation and that the aims and objects of the two Acts were the same in respect of such allowance ". But, whereas the English Acts allow " a deduction representing the diminished value by reason of wear and tear " simply, the Indian Act [Section 10(*2*) (*vi*)] specifies a percentage on the original cost to the assessee and " assessee " means the person by whom income-tax is payable [Section 2 (*2*)]. It might possibly be argued, not unreasonably, that here there is material difference between the language of the English and Indian Acts.

K. P. Jayaswal and *A. K. Mitra*, for the assessee.

C. M. Agarwala, for the Commissioner of Income-tax.

(1) (1928) 115 Ind. Cas. 814, F. B.
(2) 6 T. C. 91.

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COURTNEY TERRELL, C.J. AND FAZL ALI, J.—The question which has been formulated for our decision is

"Whether the 'original cost' appearing in sub-clause (*vi*) of clause (*2*) to section 10 of the Act means the original cost paid by the assessee or that paid by the predecessor in business of the assessee."

Our attention has been called to the decision of the Madras High Court in the case of *Massey and Company* v. *Commissioner of Income-tax, Madras*(1) and to the decision of the Bombay High Court in the case of *Commissioner of Income-tax, Bombay* v. *The Saraspur Mills Company, Ahmedabad*(2). In our opinion the decision in the latter case is right and we are unable to agree with the decision of the Madras High Court. The words in section 10(*2*) (*vi*) "original cost thereof to the assessee" must be strictly construed and refer of course to the genuine original cost to the assessee and not necessarily to anything which the assessee may have stated to be the original cost. No question of fact, however, arises in the particular case before us and we merely make this latter observation with a view to preventing possible frauds on the Department by reason of a fictitious price being placed in the purchase of a business upon the portion of the purchase price to be allocated to business machinery or plant. The answer to the question propounded should be in the affirmative. The assessee is entitled to his costs which we fix at two hundred rupees.

Order accordingly.

APPELLATE CIVIL.

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

1932.

May 4, 5, 6. July 28.

BASHIST NARAIN SAHI

v.

SIA RAMCHANDRA SAHI.*

Succession Act, 1925 (*Act XXXIX of* 1925), *section* 124, *meaning of—specified uncertain event must happen before the testator's death when the fund or property is distributable.*

* First Appeals nos. 237 and 243 of 1928, against a decision of F. F. Madan, Esq., I.C.S., District Judge of Muzaffarpur, dated the 28rd August, 1928.

(1) (1928) 115 Ind. Cas. 814, F. B.

(2) (1931) I. L. R. 56 Bom. 129.

Section 124, Succession Act, 1925 (corresponding to section 111 of Act X of 1865), provides :—

" Where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable ".

Held, that the word " period " referred to in the section does not mean an indefinite period after the testator's death during which the specified uncertain event may happen but the lawful period for distribution by the executors and that the words " before the period " mean " before the commencement of such period ".

Where, therefore, the testator bequeathed a part of his estate to *S* and, in the event of his death without issue, to certain deities and *S* survived the testator, having died issueless after the testator's death.

Held, that the specified uncertain event having happened after the death of the testator, the legacy to the deities could not take effect, and, therefore that *S* took an absolute and indefeasible estate.

Norendra Nath Sirkar v. *Kamalbasini Dasi*(1), followed.

Appeals by the objectors.

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

S. Dayal and *B. B. Sahai*, for appellants in Appeal no. 237.

S. M. Mullick (with him *Rai T. N. Sahai* and *R. Prasad*), for appellants in Appeal no. 243.

Sir Sultan Ahmad (with him *Rai T. N. Sahai*, *R. Prasad*, *B. P. Sinha*, in Appeal no. 237, *A. K. Mitra* and *A. N. Lall*, in Appeal nos. 237 and 243), for the respondents.

COURTNEY TERRELL, C.J.—One Chengan Sahi of Muzaffarpur died on March 18th, 1904. He left a

(1) (1896) I. L. R. 23 Cal. 563, P. C.

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widow Musammat Rajo Kuer and a son Sheoratan. Some years before his death he had built a temple to house certain deities and maintained it at his own cost. Under his will executed on the day before his death he bequeathed three properties to be dedicated to the deities and to be managed by his widow as shebait and after her death (which has not yet occurred) by his son Sheoratan (who however died in 1908). The residue of his property he bequeathed to Sheoratan but in the event of Sheoratan's death without issue then absolutely to the deities aforesaid and in such circumstances the entire income of the estate was to be applied to various charitable, educational and religious purposes and the administration of the estate was directed to lie

> " in the hands of five respectable persons of mauzas Chandrapati and Kamtaul, but in case of difference of opinion amongst them and in case of mismanagement or irregular expenses the direction of the Collector of the district shall prevail."

After his death the widow obtained a limited grant of probate in common form in so far as the three dedicated properties were concerned and Sheoratan came into possession of the residue of the property under the terms of the will and, as stated above, died in 1908. In 1910 one Musammat Rama Kuer claiming to be a daughter of the testator lodged an objection to the widow's probate alleging that the will was a forgery and the widow surrendered the probate in court and it was revoked without contest. In 1924 the widow executed a surrender of her interest in the properties in favour of Musammat Rama Kuer.

The present case arises out of a joint application for probate of the will as to the whole estate by six persons. No. 6 claims to be the Pujari of the temple. The others claim to be inhabitants of mauzas Chandrapati and Kamtaul and to be qualified under the terms of the will as quoted above. There are caveats by Musammat Rajo Kuer who has not appeared, by Musammat Shampati Kuer, the widow of a cousin of the testator who supports the will but herself asks

for probate by a group of reversioners and gotias of Sheoratan, by Musammat Rama Kuer and her son who deny the genuineness of the will, by creditors of Musammat Rajo Kuer and by others.

The learned District Judge has held upon the evidence, and we are not asked to disturb that finding, that the will is genuine. The Judge has also decided in favour of the joint application for probate. Two sets of objectors have appealed. The only points for our decision are (*a*) whether or not the legacy of the entire estate to the deities had failed owing to the fact that Sheoratan had survived the testator, and (*b*) as to the locus standi of the applicants. It is contended by Sir Sultan Ahmad on behalf of the applicants that the will must first be construed and that having regard to the fact that the will was made by the testator on the day before his death, that he was sixty years old and ill at the time, he could not have contemplated the death of his son Sheoratan issueless before his own expected death and, therefore, that he must have intended that Sheoratan should take an absolute estate on the death of the testator and subsequently if and when Sheoratan died without issue the estate should devolve upon the deities. This argument is, in my opinion, beside the point. Section 124 of the Indian Succession Act, 1925, corresponding to section 111 of the Succession Act of 1865, is quite specific and is as follows :—

> "Where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable."

Illustrations (*i*) and (*ii*) are as follows :—

> "(*i*) A legacy is bequeathed to *A* and, in case of his death, to *B*. If *A* survives the testator the legacy to *B* does not take effect.
>
> (*ii*) A legacy is bequeathed to *A*, and, in case of his death without children, to *B*. If *A* survives the testator or dies in his lifetime leaving a child, the legacy to *B* does not take effect."

The two illustrations are different cases of the same principle, and embody the English law on the

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matter. The intention of the testator is immaterial and the section specifically prevents the legacy, even if made, from taking effect unless the event happens before the period when the fund bequeathed is payable or distributable. This view of the section was adopted by Lord Macnaghten who delivered the judgment of the Privy Council in *Norendra Nath Sircar* v. *Kamalbasini Dasi*(1) and there is no longer any room for doubt about the matter. The " period " here referred to does not mean an indefinite period after the testator's death during which the contingency of the death issueless may occur, but the lawful period for distribution by the executors and " before the period " means " before the commencement of such period ". In my opinion it is clear that Sheoratan took an absolute estate indefeasible by the fact that he died issueless after the death of the testator and the application for probate must, therefore, fail.

Moreover the applicants are a self-appointed body. Worthy persons no doubt with the purest motives but they have no locus standi whatever. In any case probate is granted for the purpose of winding up the estate, that is to say, paying the debts and legacies and not, as the applicants seem to believe, for the purpose of carrying on the management of a trust. But the interest of the deities has completely vanished and there is in any case no trust to manage.

I would allow the appeals of the contesting caveators, reverse the decision of the District Judge and set aside the grant of probate. Since the estate on the death of Sheoratan passed to the reversioners there is no need for a grant of probate to any one else. The applicants should pay to the contesting defendants one set of costs here and below and of this appellants in appeal no. 243 will get 80 per cent. of the hearing fee in each court and the appellants in appeal no. 237 will get 20 per cent.

FAZL ALI, J.—I agree.

(1) (1896) I. L. R. 23 Cal. 563, P. C.

APPELLATE CIVIL.

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

1932.

August, 10, 11.

MAHARAJA BAHADUR KESHO PRASAD SINGH

v.

RAM BARAN CHAUBEY.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 47—" *occupation* ", *nature of—suit in ejectment on the ground of expiry of lease—defendant relying on anterior occupation—onus on defendant to prove occupation as a raiyat.*

Section 47 of the Bengal Tenancy Act, 1885, provides :

" Where a raiyat has been in occupation of land and a lease is executed with a view to a continuance of his occupation, he is not to be deemed to be admitted to occupation by that lease for the purposes of this Chapter, notwithstanding that the lease may purport to admit him to occupation ".

Held, that in order to avail himself of section 47, the raiyat must show that he was in occupation of the land *as a raiyat* before the *kabuliyat* and that the lease was executed with a view to continuance of that occupation, that is to say, occupation as a raiyat.

If, therefore, a raiyat, who is sued by his landlord in ejectment on the ground that his lease has come to an end, calculates his occupation from a period anterior to the commencement of the *kabuliyat*, he must establish, as a matter of fact, that his relationship with his landlord prior to that created by the *kabuliyat* was that of landlord and raiyat, the onus being upon him to establish that contention of fact.

Appeal by the plaintiff.

The facts of the case material to this report will appear from the judgment of Courtney Terrell, C.J.

S. M. Mullick (with him *Sunder Lal* and *R. N. Prasad*), for the appellant.

P. Dayal and *D. N. Verma*, for the respondent.

* Appeal from Original Decree no. 139 of 1929, from a decision of Babu Debi Prasad, Subordinate Judge of Shahabad, dated the 28th day of February, 1929.

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MAHARAJA BAHADUR KESHO PRASAD SINGH v. RAM BARAN CHAUBEY.

COURTNEY TERRELL, C.J.—This appeal arises out of a suit for ejectment brought by the Maharaja Bahadur of Dumraon against one Ram Baran Choubey. It is alleged by the plaintiff that the defendant entered into a lease with him for the occupation of certain land and that the period of the lease had expired and, therefore, that the plaintiff was entitled to possession.

The defence to the suit was that this lease which, by the way, the defendant says he had been fraudulently induced to execute, was a raiyati lease, and that even if the term of the lease had expired the plaintiff had no right to eject him for the following reason :—It is argued by the defendant that a non-occupancy raiyat cannot be ejected except for the reasons set forth in section 44 of the Bengal Tenancy Act and whereas the plaintiff claimed that the lease had expired, in fact the defendant had not been admitted to occupation by reason of the lease but had been admitted to occupation before the date of the lease and had acquired occupancy rights and, therefore, could not be ejected. The defendant also relied on section 47 of the Bengal Tenancy Act which enacts :—

> " Where a raiyat has been in occupation of land and a lease is executed with a view to a continuance of his occupation, he is not to be deemed to be admitted to occupation by that lease for the purposes of this Chapter, notwithstanding that the lease may purport to admit him to occupation."

The defendant alleged that he had been in occupation prior to the date of the lease and that the lease was merely executed with a view to continuance of his occupation and, therefore, that he could not be deemed to be admitted to occupation by reason of the lease, no matter what the lease itself might say.

The point first arises as to the proper construction of section 44(*c*) and section 47 of the Bengal Tenancy Act. The effect of these two sections to my mind is this : It must be remembered first that the general object of the Act is the protection of raiyats and it may well be that a person who has been a raiyat may be inveigled by his landlord into executing a lease

imposing upon him no harder terms than he has hitherto borne but stating that the lease is to come to an end after a certain fixed period of time. The object of these two sections is to defeat this manoeuvre on the part of the landlord and, for the purpose of counting the period of occupancy, the real period of occupation as a raiyat is to be taken into account and not the period of occupation which may happen to be stated in the lease. If, therefore, a defendant who is sued by his landlord in ejectment on the ground that his lease has come to an end, is able to shew that in fact before the date of the lease he was a raiyat and in occupation of that same land in that capacity, he is entitled to count the period of his occupation from the period when in fact he came into occupation as a raiyat.

It has been argued by Mr. Parmeshwar Dayal on behalf of the defendant in this case that the meaning of the sections is not as I have just stated. He contends that provided the person sued (the defendant) can shew that under the terms of the lease he is a raiyat and provided that he can shew that prior to the lease which constituted him a raiyat he was in occupation of the land in any capacity, the period of occupation as a raiyat is to date from the beginning of his period of occupation in fact, notwithstanding that such earlier occupation before the date of the *kabuliyat* was not that of a raiyat. That that interpretation is erroneous may, I think, be illustrated by a simple example. We may suppose that *A* and *B* are two adjacent landlords, that *A* sells a portion of his land to *B* and that *B* in consideration of the price being low allows *A*, under the terms of a *kabuliyat*, notwithstanding the sale of the portion of *A's* land, to remain in cultivation as a raiyat for a fixed period of years, and that at the end of that period when *B* desired to eject *A* from the portion of the land *A* says " Not so. It is true that I have sold you this piece of land subsequently cultivating it as a raiyat for five years but whereas I was in occupation of the land long before the commencement of the *kabuliyat*—it is true

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as an owner—nevertheless I was in occupation long before the commencement of the *kabuliyat* and you cannot eject me. I am tied to you for ever and I am a raiyat for ever of this land under your landlordship." Such an illustration demonstrates the impossibility of the construction for which Mr. Parmeshwar Dayal contends. In my opinion the true construction of section 47 is this:—The defendant must shew that he was in occupation of the land as a raiyat before the *kabuliyat* and that the lease is executed with a view to continuance of that occupation, that is to say, occupation as a raiyat.

We approach the facts of this case now upon the basis of that construction of the sections. A great deal of time has been spent in discussing the precise nature of the *kabuliyat*. To my mind that is not very material for the determination of the case. It is true that if the *kabuliyat* is, as is contended by the plaintiff, one which does not create the relationship of landlord and raiyat but creates the relationship of landlord and tenure-holder then neither section 44 nor section 47 of the Bengal Tenancy Act has any application, but even if the *kabuliyat* does in fact create the relationship of landlord and raiyat, if the raiyat, whose term under the *kabuliyat* has expired, wishes to calculate his occupation from a period anterior to the commencement of the *kabuliyat* he must establish, as a matter of fact, that his relationship with his landlord prior to that created by the *kabuliyat* was that of landlord and raiyat, and the onus is upon him to establish that contention of fact.

The learned Subordinate Judge who has dismissed this suit has done so by reason of the fact that he has omitted to take into account the proper construction of the sections of the Bengal Tenancy Act and he has agreed with the view set forth in this appeal by Mr. Parmeshwar Dayal and has held, as a matter of fact, that the defendant has shewn that he was in occupation prior to the date of the *kabuliyat*. His attention has not been directed to the proper view that

that is not sufficient but that the defendant must shew that he was in occupation as a raiyat. In order to deal with the evidence on this point no simpler method can be employed than to approach the evidence of the defendant himself. According to his evidence it would appear that the land in dispute had formerly belonged to one Maulvi Ahed, and that these lands were sold in execution of a rent decree which was obtained by the Dumraon Raj some considerable time before the *kabuliyat*. The Raj got delivery of possession after the execution sale and the defendant, under some oral agreement the precise nature of which was not specified by him. came afterwards into possession of the land. He states that some of the land was in possession of raiyats and some remained in his possession. As to the raiyats he says that he realised rent from them and as to the rest he either realised the fruits of the *bagicha* land or cultivated that land which was not occupied by raiyats and he states that that state of affairs has continued. There are seven raiyats under the tenure. he says. He produced a series of counterfoil rent receipt books showing the rents which he has taken from the raiyats and the learned Subordinate Judge has accepted the genuineness of these receipts. They are Exhibits C to C-40 and what the learned Judge says is

> "These raiyats have produced rent receipts the genuineness of which I see no reason to doubt and from these receipts it is clear that Rambaran has been realising rent from the year 1326 Fasli."

Now the *kabuliyat* was not executed until the year 1327 F. and the series of receipts go back for several years. It is perfectly clear, therefore, that the position of the defendant before the date of the *kabuliyat* was that of one who held land which was in the cultivation of other persons from whom he received rent. He in his turn paid rent in respect of the entire land to the landlord, the Dumraon Raj.

A remark may be made as to the position of the actual cultivating tenants of the land. These persons appear to have been in cultivating possession for quite a long time anterior to the date of the *kabuliyat* and

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anterior to the date when the Maharaja purchased the land. After the purchase by the Maharaja, it is contended by him (the Maharaja) that they paid their rents to him although, as the learned Subordinate Judge points out, he has not been able to prove that to the Subordinate Judge's satisfaction. Nevertheless there being no intervening holder between the Maharaja and themselves, the tenants cannot occupy any position other than that of raiyats and the person who succeeded to the position of the Maharaja in the right to receive the rents cannot also be in the position of a raiyat in respect of the land for which the original raiyats still continue to pay him rent. The position, therefore, of the defendant prior to the date of the *kabuliyat* is certainly not established as that of a raiyat even if it be not conclusively established what precise position he held. I am inclined to think from the evidence that he was in fact in the position of taking rent from the tenants and cultivating the soil which was not in fact occupied by the tenants. In that capacity he is not a raiyat and may properly be described as a tenure-holder. It has, therefore, in my opinion, not been established by the defendant, as it was his duty to establish if he wished to avail himself of the defence he raised, that prior to the tenancy he held as a raiyat. In these circumstances and in view of what I consider the true construction of section 47 of the Bengal Tenancy Act, he is unable to take advantage of such occupation as he had, if any, prior to the date of the *kabuliyat*. Section 44(*c*) applies to the case, the period of tenancy has expired, in default of the defendant shewing that he had a prior occupation as a raiyat his occupation as a raiyat must be deemed, in the absence of other evidence, to have commenced from the time of his *kabuliyat* and it must be presumed, therefore, that he was inducted upon his raiyati occupation by reason of that *kabuliyat*. The plaintiff is, therefore, entitled to eject the defendant. I would allow this appeal and set aside the judgment of the learned Subordinate Judge and decree the plaintiff's suit with costs throughout. The case will

now go back to the lower court for determination of the amount of mesne profits.

AGARWALA, J.—I agree.

Appeal allowed.

FULL BENCH.

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

RAJENDRA PRASAD MISSIR

v.

KING-EMPEROR.*

1932.

August, 15, 19.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 386(*1*)(*a*)—*attachment of undivided share of offender in moveable property belonging to joint family, whether legal.*

An undivided share of the offender in a moveable property belonging to the joint family of which the offender is one of the members cannot be attached under section 386(*1*)(*a*), Code of Criminal Procedure, 1898.

Queen Empress v. *Sita Nath Mitra*(1), followed.

The facts of the case material to this report are stated in the judgment of the court.

B. N. Mitter (with him *B. P. Jamuar*), for claimant in Criminal Revision 251 of 1932:—The undivided share of the offender in a moveable property belonging to the joint family of which he is one of the members cannot be seized under section 386(*1*)(*a*) of the Code of Criminal Procedure.

[*Chief Justice.*—Suppose it was a debt, could not the undivided share be proceeded against?]

It can be attached in execution of a Civil Court decree—*Deendyal Lall* v. *Jugdeep Narain Singh*(2). But it cannot be seized under section 386(*1*)(*a*) as a property "belonging to" the offender.

* Criminal Reference nos. 18 and 19 and Criminal Revision no. 251 of 1932. Reference made by S. Bashiruddin, Esq., Sessions Judge of Darbhanga, in his letter nos. 665 Criminal and 690 Criminal, dated respectively the 12th and 14th April, 1932 and Application for revision of the order of F. F. Madan, Esq., I.C.S., Sessions Judge of Shahabad, dated the 7th of May, 1932.

(1) (1892) I. L. R. 20 Cal. 478.

(2) (1877) I. L. R. 3 Cal. 198, P. C.

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[*Chief Justice.*—The crops are moveable property and a share in it is *a fortiori* a moveable property. Why can't you proceed against it?]

Because the Criminal Court cannot fix the share of the offender in this summary proceeding. Unless a partition is effected the undivided share cannot become the separate property of any particular coparcener.

[*Chief Justice.*—What will you do if the magistrate makes an order for the attachment of a moveable property?]

I will object on the ground that the property is mine and cannot be proceeded against.

[*Chief Justice.*—You can say that as no rule has been framed under section 386, the magistrate cannot proceed under the general rule when special cases are not provided for.]

Exactly. I rely on *Queen Empress* v. *Sita Nath Mitra*(1), which supports my contention. My next point is that the magistrate cannot, merely on a Police report, summarily dispose of the objection of a party who contends that the property cannot be seized.

Harnarayan Prasad, for the claimant in Criminal Reference 18 of 1932:—The magistrate could at best attach the right, title and interest of the offender in the attached property. The entire property belonging to the joint family cannot be seized and sold.

[*Chief Justice.*—Do you concede that the right, title and interest of the offender could be attached?]

I submit that these questions can only arise under section 386(*b*) of the Code; but under clause (*a*) only the property "belonging to" the offender can be proceeded against. The case of *Shivalingappa Nijappa Tubchi* v. *Gurlingava*(2) does not really decide anything against me.

(1) (1892) I. L. R. 20 Cal. 478.
(2) (1925) I. L. R. 49 Bom. 906.

Baldeo Sahay, for the claimant in Criminal Reference 19 of 1932:—Section 386(*1*) is inoperative and will remain inoperative so long as rules under sub-section (*2*) are not framed by the Local Government.

[*Fazl Ali*, J.—The section says "Local Government *may* frame rules....."]

[*Agarwala*, J.—Section 146 of the Code of Criminal Procedure authorises the court to attach a property. No rule regarding the mode of attachment is provided for. But nevertheless attachments are made under that section.]

But section 146 does not require the Local Government to frame rules as the Legislature has done in sub-section (*2*) of section 386. As a matter of fact there is no question of any claim by a third party in a proceeding under section 145 or section 146. Section 145 further requires a notice to be hung at the disputed property. The order operates as an order in rem. Therefore, the considerations arising in cases under section 88 or section 386 do not arise in a case under section 146. "Moveables" do not include "shares in moveables." It is the article which can be seized and not a share in the article, seizure of which would be physically impossible.

Jaffer Imam, *Assistant Government Advocate*, for the Crown:—There is no authority for the proposition that the property sought to be attached must be the sole property of the offender. In section 88 of the Code the words used are "property..... belonging to the proclaimed person". The words "belonging to" are common to both the sections 88 and 386. It has been held in *Secretary of State for India in Council* v. *Rangasamy Ayyangar*(1) that the interest of an absconder in an undivided property can be attached under section 88. Similarly in *Musammat Gulab Koonwur* v. *Collector of Benares*(2) and *Juggo-*

(1) (1916) I. L. R. 39 Mad. 831, F. B.
(2) (1847) 4 Moo. I. A. 246.

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mohun Bukshee v. *Roy Mothoornath Chowdry*(1) it was held that the purchaser acquired the right, title and interest of the absconder in the undivided property of the joint family. These cases were decided under the Bengal Regulation XI of 1796 where the words used were " held by the absconder ". I submit that the principle laid down in these cases applies to the present case.

In *Queen-Empress* v. *Kandappa Goundan*(2) it was held that same considerations apply to section 88 as well as section 386.

The undivided share is as much a moveable property as the whole of it. We cannot read the word " property belonging to the offender " to mean " property solely belonging to the offender."

[*Fazl Ali, J.*—It is a debatable question whether you can take away and sell the entire thing which does not belong to the offender.]

We might apply the analogy of clause (*5*) of section 88.

B. N. Mitter, in reply.

S. A. K.

Cur. adv. vult.

COURTNEY TERRELL, C.J., AND FAZL ALI AND AGARWALA, JJ.—The facts giving rise to Criminal Reference no. 18 of 1932 were as follows :—

One Ramnandan Missir was convicted under sections 143 and 188 of the Indian Penal Code and under section 17(*2*) of the Criminal Law Amendment Act. Under the latter section he was sentenced to eighteen months' rigorous imprisonment. Under each of the sections 143 and 188 of the Indian Penal Code he was sentenced to a month's rigorous imprisonment and a fine of Rs. 50. The fine was not paid, with the result that a warrant was issued for its realization. In execution of the warrant a buffalo

(1) (1867) 11 Moo. I. A. 223.
(2) (1896) I. L. R. 20 Mad. 88.

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and three chairs which were found on the premises occupied by Rajendra Prasad Missir, father of Ramnandan Missir, were seized. Thereafter Rajendra Prasad Missir appeared before the Magistrate who had issued the warrant and claimed the attached buffalo and chairs, alleging that they belonged not to Ramnandan but to the joint family of which he and the petitioner were members. Rajendra Prasad's objection to the attachment was overruled.

In Criminal Reference no. 19 of 1932 one Mahesh Kand Chaudhry was convicted under section 17 of the Criminal Law Amendment Act and sentenced to pay a fine of Rs. 50. The fine not having been paid, a warrant of attachment was issued and in execution of the warrant twenty-five maunds of paddy, three maunds of marua and certain other articles were seized. Thereupon Deonarain Chaudhry, father of Maheshkant, appeared before the Magistrate, who had issued the warrant, and objected to the seizure. He claimed that the grain and other articles seized belonged to the joint family of which he and his son were members and that they were not the exclusive properties of his son. The objection was overruled by the Magistrate.

The Sessions Judge of Darbhanga has referred both these cases to the High Court under section 438 of the Code of Criminal Procedure. In the opinion of the Sessions Judge the property of the joint family was not attachable in either case in execution of the warrants that were issued, and he therefore recommended that the things seized should in both cases be released from attachment.

The question for decision in Criminal Revision no. 251 of 1932 is precisely the same.

In all these cases the Magistrates who issued the warrants elected to adopt the procedure provided in section 386 (*1*) (*a*), i.e., they issued, in each case, a warrant for the levy of the amount of the fine by

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attachment and sale of the moveable property belonging to the offender and the objections in all the cases are that moveable property not belonging to the offender has been seized in execution of the warrant.

Section 386 (*1*) (*a*) does not authorize the attachment of any property other than the moveable property belonging to the offender and the question, therefore, arises: in what manner can the moveable property of an offender be attached under that clause when the only moveable property of the offender is an undivided share in the moveable property of the joint family of which he is a member? It is to be observed that the second sub-section of section 386 empowers the Local Government to make rules regulating the manner in which warrants under sub-section (*1*) (*a*) are to be executed. We have been unable to ascertain that any rules have been made under this sub-section. Assuming that an undivided share in the moveable property of a joint family may "belong" to an individual member of the family, the assumption premises that other undivided shares belong to other members and I can find nothing in section 386 (*1*) (*a*) which authorizes the attachment of these shares. What has been done in the present cases is that things in which the respective offenders as well as others have undivided shares have been physically seized in execution of the warrants that were issued. If this amounts to a legal attachment of the shares in those things of the respective offenders, it is also an attachment of the shares of others for which there is no warrant and which is not authorized by the statute. That seizure is not the proper method by which to reach an undivided share was pointed out by the Privy Council as long ago as 1871 in *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad*(1). In that case, under a remit from the Privy Council to the Court of first instance, to refer to arbitration the accounts of a partnership firm, a reference was duly made to arbitrators. Before any award was made the rights

(1) (1871) 14 Moo. I. A. 40, 50.

and interests of one of the parties were sold by Court in execution of a decree against him in another court by a third party. The question before the Privy Council was whether the expectant claim under an inchoate award was " property " within the meaning of section 205 of the Code of Civil Procedure of 1859, so as to be saleable in execution of a decree. In support of the view that the sale was valid it was argued that the case was analogous to the sale of an undivided share in a joint Hindu family, the contention being that such an undivided share was " property " and was saleable in execution of a decree. The judgment of the Privy Council was delivered by Lord Justice James who said: " No doubt can be entertained that such a share is property and that a decree-holder can reach it. It is specific, existing and definite; *but it is not property the subject of seizure* under this particular process " (i.e. a writ of attachment issued under section 205 of the Code of Civil Procedure of 1859).

We can conceive of no method by which the undivided share of an individual in moveable property can be seized in the literal physical sense, without at the same time seizing the undivided shares of other persons, and as the statute does not authorize the seizure of such other shares, we are driven to the conclusion that the undivided share of an individual cannot be seized under section 386(*1*)(*a*). This was also the conclusion reached by Pigot and Hill, JJ., in *The Queen-Empress* v. *Sita Nath Mitra*(1). It is perhaps not without significance that although that case was decided in 1892, the Legislature, when amending section 386 in 1923, left that decision untouched.

In each of these cases, therefore, the property attached will be released.

Order accordingly.

(1) (1892) I. L. R. 20 Cal. 478.

APPELLATE CIVIL.

1932.

August, 24, 25.

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

DOMI LAL SAHU

v.

BIJOY PRASAD SINGH.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 53—*money decree, whether can be sold in execution—attaching creditor should proceed to execute the attached decree.*

A money decree cannot be sold in execution and once such a decree is attached the procedure indicated in Order XXI, rule 53, Code of Civil Procedure, 1908, should be followed, and the attaching creditor may proceed to execute the attached decree as if he was the representative of the holder of that decree.

Tiruvengada Chari v. *Vythilinga Pillai*(1), *Jotindro Nath Chowdhry* v. *Dwarka Nath Dey*(2), *Sultan Koer* v. *Gulzari Lall*(3), *Vithaldas Prabhu* v. *Subraya Manjappa*(4), *Maung Lun Bye* v. *Maung Po Nyun*(5) and *Lachman Ojha* v. *Chariter Ojha*(6), followed.

Appeal by the decree-holders.

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

Sarjoo Prasad, for the appellants.

B. P. Sinha, for the respondents.

FAZL ALI, J.—A preliminary point was raised on behalf of the respondents that one of these appeals (Appeal no. 12 of 1932) is barred by limitation. It

* Appeals from Appellate Order nos. 9 and 12 of 1932, from an order of Mr. Pramatha Nath Bhattacharji, District Judge of Monghyr, dated the 1st August, 1931, affirming an order of Babu Kishen Sahay, Subordinate Judge, 2nd Court of Monghyr, dated the 25th November, 1930.

(1) (1883) I. L. R. 6 Mad. 418.
(2) (1891) I. L. R. 20 Cal. 111.
(3) (1879) I. L. R. 2 All. 290.
(4) (1920) I. L. R. 45 Bom. 343.
(5) (1923) I. L. R. 1 Rang. 360.
(6) (1918) 4 Pat. L. J. 336.

appears that the appellate order against which these appeals are directed was passed by the court below on the 1st August, 1931. Two appeals were filed in this court against this order on the 2nd November, 1921, but only one copy of the order appealed against was filed and that copy was filed by the appellants in appeal no. 9 of 1932. On the report of the Stamp Reporter that another copy of the order should have been filed in appeal no. 12 an order was made directing the appellants concerned to file a copy and it was filed on the 12th January, 1932. It is contended by the respondents that as the copy of the order appealed against was filed on the 12th January, 1932 , the appeal must be taken to have been duly presented on that date and not on the 2nd November, 1931, on which date the memorandum of appeal was filed. Technically that would be so, but, in my opinion, this is a fit case in which the period of limitation should be extended under section 5 of the Limitation Act.

Passing now to the merits of the case a few facts may be briefly stated. On the 29th October, 1918, the appellants obtained a mortgage decree as well as a decree for costs against one Domi Lal Sahu, a namesake of one of the appellants. The mortgage decree was satisfied by the sale of the mortgaged properties and in 1926 the appellants applied for execution of the decree for costs. It appears that Domi Lal Sahu, the judgment-debtor, had taken out execution against the predecessors-in-interest of the respondents in respect of a money decree which he held against them. This decree was sold in execution of the appellants' decree and was purchased by the appellants with the result that the execution case in the course of which this decree was purchased was dismissed in 1927. Subsequently in 1929 the appellants started a fresh execution case and in the course of this execution they purchased certain properties belonging to the respondents. It may be mentioned here that on the 13th January, 1930, three days before the sale, certain objections were raised by the respondents to the execution proceedings but they were dismissed for default

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FAZL ALI, J.

on the 16th January, 1930. On that day the properties in question belonging to the respondents were sold and purchased by the appellants. The respondents then preferred certain objections against the sale both under section 47 and under Order XXI, rule 90, of the Civil Procedure Code. One of these objections was that the money decree which Domi Lal Sahu, the judgment-debtor of the appellants, had obtained against the respondents could not be sold in execution of the appellants' decree and that the appellants should have followed the procedure laid down in Order XXI, rule 53, of the Civil Procedure Code to realise their decree. Another objection was that one Narendra Prasad Singh, one of the judgment-debtors against whom Domi Lal Sahu sought to execute his decree and who also represented the other minor judgment-debtors, had died before the passing of the decree and so the decree obtained by Domi Lal Sahu was a nullity and incapable of execution. The third objection was that the processes in the execution proceedings were not served at all and in fact could not have been served because they were directed against a dead person, amongst others.

The executing Court before which these objections were preferred held that the sale of the money decree was illegal and that the decree-holders not having proceeded under Order XXI, rule 53, the sale of the properties of the respondents could not be upheld. It also came to the conclusion on certain oral and documentary evidence adduced on behalf of the respondents that Narendra Prasad Singh had died before the passing of the decree in favour of Domi Lal Sahu, the appellants' original judgment-debtor.

The sale having been set aside the appellants appealed to the District Judge of Monghyr who also upheld the contention of the respondents that the sale of the money decree was not provided for under the Code and that the procedure followed by the appellants was not in accordance with law. The learned District Judge, however, did not record a finding on the

question as to whether Narendra Prasad Singh had died before the passing of the decree or not.

The main question argued before us is whether the view taken by the courts below that the money decree could not be sold is correct. Mr. Sarjoo Prasad who appears for the appellants contends that Order XXI, rule 53, being only one among the many sections of the Civil Procedure Code which provide for the various modes in which various kinds of properties are to be attached in execution of a decree, cannot override Order XXI, rule 64, which provides that the court executing a decree may order that any property attached by it and liable to sale may be sold by the executing court and the proceeds of such sale paid to the party entitled to receive the same. It is urged that the words of rule 64 are wide enough to include a money decree and that there is no express provision either in Order XXI, rule 53, or anywhere else in the Code prohibiting the sale of a money decree by the executing court. The argument is not without substance and receives some support from the language used in Order XXI, rule 16, where it deals with a case in which a decree is transferred by operation of law. But, on the other hand, almost all the High Courts in this country seem to have taken the view that a money decree cannot be sold in execution and once such a decree is attached the procedure indicated in Order XXI, rule 53, should be followed; *see Tiruvengada Chari* v. *Vythilinga Pillai*(1); *Jotindro Nath Chowdhry* v. *Dwarka Nath Dey*(2); *Sultan Koer* v. *Gulzari Lall*(3); *Vithaldas Prabhu* v. *Subraya Manjappa*(4); *Maung Lun Bye* v. *Maung Po Nyun*(5) and *Lachman Ojha* v. *Chariter Ojha*(6). It appears to me on a careful consideration of these decisions that the view which has been expressed in them must be adhered to and it is now too late to question its correctness.

(1) (1883) I. L. R. 6 Mad. 418.
(2) (1891) I. L. R. 20 Cal. 111.
(3) (1879) I. L. R. 2 All. 290.
(4) (1920) I. L. R. 45 Bom. 343.
(5) (1923) I. L. R. 1 Rang. 360.
(6) (1918) 4 Pat. L. J. 336.

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Upon an examination of the various provisions with regard to the attachment of properties it would appear that in no other rule is there any provision corresponding to sub-clause (*2*) of Order XXI, rule 53. That clause runs as follows:—

"(*2*) Where a Court makes an order under clause (*a*) of sub-rule (*1*), or receives an application under sub-head (*ii*) of clause (*b*) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed to execute the attached decree and apply the net proceeeds in satisfaction of the decree sought to be executed."

The sub-rule thus provides that the attaching creditor may at once proceed to execute the attached decree as if he is the representative of the holder of that decree. It is clear that if this mode is adopted no sale of the attached decree would be necessary and it appears to me to be permissible to argue that if the framers of the Code contemplated the sale of the attached decree it was unnecessary for them to make this provision. It further appears to me that this provision has been inserted in the Code not only to avoid multiplicity of execution proceedings but also to safeguard the interests of the holder of the attached decree. If the procedure indicated by sub-rule (*2*) of Order XXI, rule 53, is followed the surplus, if any, which might be left after satisfying the decree of the attaching creditor will become available for the benefit of the holder of the attached decree but if the decree was liable to be sold in execution this result may not always follow. In the other provisions which relate to the mode of executing and attaching varying kinds of property no express provision is made as to the mode in which the decree is to be realised and it may, therefore, be inferred that in those cases the attachment must be followed by the sale of the property attached. The reference in Order XXI, rule 16, to those cases where the decree is transferred by operation of law is capable of explanation inasmuch as sub-rule (*2*) of Order XXI, rule 53, applies only to a decree for money and for sale in enforcement of a mortgage or charge and some provision had to be made in respect of other kinds of decree. I am, therefore, of opinion that the

courts below were correct in holding that the sale of Domi Lal Sahu's money decree was not warranted by law and the question now is whether the appellants could proceed to sell the properties of the respondents in their capacity as purchasers of that decree. It was contended by Mr. Sarjoo Prasad that the sale of the money decree should in the circumstances of the case be regarded as a merely redundant step and, therefore, liable to be ignored and it should be held that the appellants have substantially complied with the requirements of Order XXI, rule 53, in this case. The difficulty, however, in the way of the appellants seems to be this. When they proceeded to get the money decree sold and purchased it their decree against Domi Lal Sahu was satisfied and their execution case was dismissed. Under Order XXI, rule 57, upon the dismissal of an application for execution the attachment must be deemed to cease. It follows that the attachment ceased on the 9th May, 1927, upon which date the execution case was dismissed. The present execution case was started by the appellants two years later in the year 1929 and the steps which they took in this proceeding could be deemed to have been taken under Order XXI, rule 53, only if it was shewn that the property was still under attachment under that provision, but, as I have already stated, the attachment had ceased to exist and in the present execution proceeding the appellants have proceeded in a new capacity, that is to say, in the capacity of persons who have purchased the money decree obtained by Domi Lal Sahu against the respondents. The procedure which was, therefore, adopted was not really the procedure which is contemplated in Order XXI, rule 53, and it appears to me that the courts below rightly held that the sale of the properties of the judgment-debtor in those circumstances could not be upheld. The respondents have further urged that Narendra Prasad being dead before the decree was passed the decree of Domi Lal Sahu was a nullity. This is no doubt a substantial point and it appears that the respondents have adduced both oral and documentary evidence in support of their allegation but unfortunately the lower

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appellate court has not gone into the question as it should have done and in view of the fact that the appeals fail on the first point it is not necessary to deal with the matter any further. These appeals must be dismissed with costs.

COURTNEY TERRELL, C.J.—I agree.

FAZL ALI, J.

Appeals dismissed.

APPELLATE CIVIL.

1932.

August 29.

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

RAMESHWAR PRASAD BHAGAT

v.

RAM RATAN RAM.*

Execution—decree in favour of two coparceners of joint Hindu family—death of one coparcener—execution by the surviving coparcener decree-holder—Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 16, *whether applies—rule* 15, *applicability of—omission to mention fact of death of the deceased decree-holder, whether fatal to execution.*

Upon the death of a coparcener of a joint Hindu family his share and interest in the family property becomes extinct and the surviving coparceners become the full owners of the whole estate. It is really not a case of the transfer of the interest held by the deceased coparcener but the total extinction or absorption of that interest.

Order XXI, rule 16, Code of Civil Procedure, 1908, is intended primarily for those cases where the name of the applicant for the execution of the decree does not appear as a decree-holder in the decree and he bases his right to execute the decree on the ground that the interest of one or more of the decree-holders has been assigned to him in writing or transferred to him by operation of law.

Where, therefore, the application for execution is on behalf of one of the decree-holders as the sole surviving coparcener and he bases his title not as a transferee but as the surviving decree-holder, the provision of Order XXI, rule 16, does not apply.

* Appeal from Original Order no. 68 of 1931, from an order of Babu Rabindra Nath Ghosh, Subordinate Judge of Santal Parganas, dated the 3rd January, 1931.

Held, further, that the provision of Order XXI, rule 15, applies to such a case and that the mere omission to mention the fact of death of the deceased decree-holder in the application for execution is not such a vital omission as to entitle the court to reject the petition.

Appeal by the decree-holder.

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

S. C. Mazumdar, for the appellant.

S. N. Bannerji, for the respondents.

FAZL ALI, J.—This is an appeal by a decree-holder whose application for execution has been struck off by the Subordinate Judge of the Santal Parganas. The facts of the case are briefly these:—The decree which is sought to be executed was passed in favour of two persons, namely, Ganesh Lal Bhagat and the appellant Rameshwar Prasad Bhagat, on the 8th January, 1918, in the Birbhum district. On the 23rd June, 1928, it was transmitted to the court at Rajmahal for execution. On the 30th July, 1929, Ganesh Lal Bhagat, one of the decree-holders, died. On the 13th December, 1929, Rameshwar Prasad Bhagat applied for execution of the decree. It may be stated here that both Ganesh Lal and Rameshwar Prasad Bhagat were members of a joint family and as a result of the death of Ganesh Lal Bhagat, Rameshwar Prasad Bhagat became the sole person interested in the decree by right of survivorship.

Two objections were taken on behalf of the judgment-debtors before the learned Subordinate Judge. It was urged in the first place that the appellant should have, under Order XXI, rule 15, of the Code of Civil Procedure, mentioned the fact of Ganesh Lal Bhagat's death in the execution petition itself and that fact not having been mentioned, the petition for execution could not be amended at a later stage. The second objection was that properly speaking the interest of Ganesh Lal Bhagat had been transferred to the appellant by operation of law and,

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therefore, under Order XXI, rule 16, of the Code of Civil Procedure the appellant should have made his application for execution to the court which originally passed the decree.

The learned Subordinate Judge has held that in this case the appellant should have made his application under Order XXI, rule 16, before the court which passed the decree and the application could not, therefore, be entertained by him. The real question thus is whether Order XXI, rule 16, is applicable to the present case. It is urged on behalf of the respondents that in this case the interest of Ganesh Lal Bhagat has been transferred by operation of law to the appellant but I do not think that this is a correct view. It is well recognised that upon the death of a coparcener of a joint Hindu family his share and interest in the family property becomes extinct and the surviving coparceners become the full owners of the whole estate. It is really not a case of the transfer of the interest held by the deceased coparcener but the total extinction or absorption of that interest. It seems to me that Order XXI, rule 16, is intended primarily for those cases where the name of the applicant for the execution of the decree does not appear as a decree-holder in the decree and he bases his right to execute the decree on the ground that the interest of one or more of the decree-holders has been assigned to him in writing or transferred to him by operation of law. Here the appellant is not a stranger but one of the decree-holders and he claims to execute the decree not as a transferee but as the surviving decree-holder. In my opinion, therefore, the present case falls under Order XXI, rule 15, which provides that where a decree has been passed jointly in favour of more persons than one and any of them has died any one or more of such persons may apply for the execution of the whole decree for the benefit of the survivors and the legal representatives of the deceased. Here one of the decree-holders has died without leaving any legal representative and without leaving any other survivor except the appellant and, therefore, it is permissible

for the appellant decree-holder to apply for the execution of the decree as if he was the sole decree-holder.

It is urged on behalf of the respondents that even though it may be assumed that the case will be governed by Order XXI, rule 15, the fact of the death of Ganesh Lal Bhagat should have been mentioned in the execution petition and it should have been stated there that the appellant was executing the decree as a survivor. What has, however, to be remembered is that this provision has been enacted in order to protect the interests of the persons other than the decree-holder applying for the execution of the decree and with this object sub-rule (*2*) of Order XXI, rule 15, provides that where the court sees sufficient cause for allowing the decree to be executed on an application made under that rule it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application. It is thus clear that the information is required under the rule merely to enable the court to protect the interests of the persons who have not joined in the application. In this particular case there are no persons other than the appellant who are interested in the decree and it was not necessary for the court to pass any orders under sub-rule (*2*) of Order XXI, rule 15. The facts that Ganesh Lal Bhagat is dead and that Rameshwar Prasad now claims to execute the decree as a survivor have been brought to the knowledge of the court in the course of the execution proceedings and I do not think that the mere omission to mention the death of Ganesh Lal Bhagat in the execution petition is such a vital omission as to entitle the court to reject the petition. In my opinion the court should proceed to execute the decree after making a note of the fact that Ganesh Lal Bhagat is dead and that Rameshwar Lal Bhagat is the surviving decree-holder. I would, therefore, set aside the order of the court below and allow this appeal with costs.

COURTNEY TERRELL, C.J.—I agree.

Appeal allowed.

FULL BENCH.

1932.

Aug. 15, 16.
Sept. 2.

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

RADHA KISHUN MARWARI

v.

KING-EMPEROR.*

Evidence Act, 1872 (*Act* 1 *of* 1872), *section* 25—" *Excise Officer* ", *whether is a* " *Police Officer* "—*confession made to Excise Officer in course of investigation, whether is admissible.*

Held, per curiam, that an Excise Officer is not a " Police Officer " within the meaning of section 25 of the Evidence Act, 1872, and, therefore, that a confession made to such an officer in course of his investigation is admissible in evidence.

Rukumali v. *The Emperor*(1), *Ah Foong* v. *Emperor*(2), *Harbhanjan Sao* v. *Emperor*(3), *Matilal Kalowar* v. *The Emperor*(4) and *Tura Sardar* v. *Emperor*(5), followed.

Nanoo Sheikh Ahmed v. *Emperor*(6), *Ibrahim Ahmed* v. *King-Emperor*(7) and *Queen-Empress* v. *Salemuddin Sheikh*(8), dissented from.

Queen v. *Hurribole Chunder Ghose*(9) distinguished.

Queen-Empress v. *Bepin Behari Dey*(10) and *Nazir Jharudar* v. *The Emperor*(11), referred to.

Per COURTNEY TERRELL, C.J.—Courts of Justice are not concerned with the objects with which the legislature enacts

* Criminal Revision no. 206 of 1932, against the order of Pandit R. C. Chaudhuri, Esq., Sessions Judge of Monghyr, upholding an order of Babu Mutukdhari Singh, Deputy Magistrate, 1st class of Monghyr, dated the 10th February, 1932.

(1) (1917) 22 Cal. W. N. 451.
(2) (1918) I. L. R. 46 Cal. 411.
(3) (1927) I. L. R. 54 Cal. 601.
(4) (1931) 36 Cal. W. N. 163.
(5) (1930) 52 Cal. L. J. 177.
(6) (1926) I. L. R. 51 Bom. 78, F. B.
(7) (1931) I. L. R. 58 Cal. 1260.
(8) (1899) I. L. R. 26 Cal. 569.
(9) (1876) I. L. R. 1 Cal. 207.
(10) (1897) 2 Cal. W. N. 71.
(11) (1905) 9 Cal. W. N. 474.

any particular law unless in the particular enactment the object is stated as a guiding principle to be followed in interpretation.

Where, therefore, the legislature has not thought fit to express its intention otherwise than by the use of the words of the section, those words must be followed.

Per FAZL ALI, J.—The definition of the term " Police Officer " in section 1 of the Police Act is not exhaustive and the term is not confined merely to persons enrolled under the Police Act.

The distinction between a person who is nothing but a Police Officer and one who is primarily not a Police Officer but merely invested with the powers of a Police Officer is material and cannot be ignored for the purpose of construing section 25 of the Evidence Act.

Per AGARWALA, J.—No person is a Police Officer unless he is enrolled in, or appointed a member of, the Police force or is declared by statute to be a member of that force.

The mere possession of certain of the powers of a Police Officer, even though those powers include the power of investigation under the Code, does not suffice to convert into a Police Officer one who has no other claim to that status.

The case was originally heard by Courtney Terrell, C.J., and Fazl Ali, J., who referred it to a larger Bench.

On this reference

Naqi Imam (with him *K. K. Banerji*), for the petitioner :—

The definition of " police officer " in section 1 of the Police Act is not exhaustive. The word " includes " does not indicate that only officers enrolled under the Act and none else are police officers.

[*Agarwala, J.*—What do you say to sections 2 and 7 of the Act?]

A person may be a police officer although he may not be enrolled under the Act, e.g., a special police officer.

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[*Agarwala, J.*—If Excise Officers do not come under section 4 (as being members of the establishment .....) how can they be called " Police Officers " ?]

The test is whether an Excise Officer has got the essential powers of a police officer.

[*Chief Justice.*—What are those essential powers?]

Powers of search, arrest, investigation, etc.

[*Fazl Ali, J.*—Is a person to whom a complaint has been sent for enquiry under section 202 of the Code of Criminal Procedure a Police Officer simply because he has got all the powers of investigation?]

If he has got all those powers which a police officer possesses, he will be deemed to be a police officer.

[*Chief Justice.*—Does section 22 which applies to all police officers apply to an Excise Officer?]

This section does not apply to a special police constable. Therefore, in order to be a police officer it is not necessary that the officer should come within the operation of section 22.

[*Fazl Ali, J.*—How do you say that the section does not apply to special police constables?]

The section must be taken to apply to those officers who are enrolled under the Act.

[*Fazl Ali, J.*—Not necessarily.]

I rely on *Nanoo Sheikh Ahmed* v. *Emperor*(1) for the proposition that Excise Officers are police officers to all intents and purposes although they may not be called police officers. The words " Police Officer " in section 25 of the Evidence Act should not be read in the limited technical sense but should be given the comprehensive popular meaning.

(1) (1926) I. L. R. 51 Bom. 78, F. B.

[*Agarwala, J.*—Supposing a murderer comes before an Excise Officer and makes confession, is that confession inadmissible?]

Yes.

[*Fazl Ali, J.*—Section 25 of the Evidence Act speaks of a confession to a Police Officer irrespective of his powers and irrespective of whether he was actually holding an enquiry or not. When, therefore, you say that an Excise Officer is a police officer, all confessions made to him would be inadmissible, whether or not he is actually making any investigation or is in charge of a case and irrespective of the powers vested in him. The question of powers having been conferred on an Excise Officer in relation to a particular excise case would be immaterial.]

I rely on section 85(*3*) of the Excise Act which says that the Excise officers making arrests, seizures, searches and to whom a warrant is directed by the Collector, shall be deemed to be police officers.

[*Chief Justice.*—The correct interpretation is that for the purposes of making a search, arrest, etc., he shall have the powers of a police officer.]

The idea of section 85(*3*) is to give a special status to Excise Officers while they are discharging these particular duties.

Once it is conceded that section 1 of the Police Act is not exhaustive and has not got any restrictive meaning, I submit there is nothing in the Act to exclude an Excise officer from the category of police officers. I rely on the leading case of *Queen* v. *Hurribole Chunder Ghose*(1).

[*Chief Justice.*—That case is clearly distinguishable.]

I further rely on *Queen-Empress* v. *Salemuddin Sheikh*(2), *Queen-Empress* v. *Amarsang Jetha*(3),

(1) (1876) I. L. R. 1 Cal. 207.
(2) (1899)I. L. R. 26 Cal. 569.
(3) (1885) I. L. R. 10 Bom. 506.

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Queen-Empress v. *Bhima*(1), *Emperor* v. *Akia*(2), in support of the proposition that police officers need not necessarily be those enrolled under the Act. The case of *Ah Foong* v. *Emperor*(3), has been distinguished and commented on in *Ibrahim Ahmed* v. *King-Emperor*(4), which supports my contention. The principle is that if an officer is discharging the duties of a police officer, he is to all intents and purposes a police officer. The case of *Matilal Kalowar* v. *The Emperor*(5) simply follows the earlier cases which in turn are based on *Ah Foong* v. *Emperor*(3); but that case is not in keeping with the present Bengal Excise Act, the position of the Excise officer under this Act not being the same as under the Opium Act. Their Lordships in *Matilal Kalowar* v. *The Emperor*(5) have failed to notice that in *Ibrahim Ahmed* v. *King-Emperor*(4) the learned judges were careful to point out the altered condition of an Excise Officer under the Bengal Excise Act.

Jafar Imam, for the Crown :—A Police Officer is one who is appointed under the Police Act. The Dangerous Drugs Act itself recognises the distinction between the Excise Department and the Police Department. The decision in *Nanoo Sheikh Ahmed* v. *Emperor*(6) is based merely on the ground that powers of investigation being given to an Excise officer, he must be deemed to be a Police Officer. But if that argument be pushed to its logical conclusion it will come to this that even a private individual entrusted with an investigation under section 202 of the Code must be taken to be a police officer. The whole object of section 25 is to exclude a certain class of people how high they may be. A confession made to an Inspector-General of Police would be inadmissible, although nothing wrong can be suggested against him. The discussion in subsequent cases is based on the

(1) (1892) I. L. R. 17 Bom. 485.
(2) (1926) 101 Ind. Cas. 599.
(3) (1918) I. L. R. 46 Cal. 411.
(4) (1931) I. L. R. 58 Cal. 1260.
(5) (1931) 36 Cal. W. N. 163.
(6) (1926) I. L. R. 51 Bom. 78, F. B.

observations of Garth, C.J. in *Queen* v. *Hurribole Chunder Ghose*(1).

If the learned Chief Justice meant to say that because powers are given to an officer he must necessarily be called a police officer, I respectfully submit that it is a wrong decision. What, however, was decided was that although the Commissioner of Police was a magistrate a confession made to him was inadmissible on the ground that he belonged to that class of officers who were excluded under section 25 of the Evidence Act.

There is no charm in the word "enrolled" in section 1 of the Police Act. In subsequent sections the word "appointed" has been used. Therefore, the word "enrolled" must mean "appointed".

The learned Judges who decided *Ibrahim Ahmed* v. *King-Emperor*(2) overlooked the previous decisions of their High Court and their decision has not been followed in a subsequent case of that court—*Matilal Kalowar* v. *The Emperor*(3).

Naqi Imam, in reply.

Cur-adv-vult.

S. A. K.

COURTNEY TERRELL, C.J.—The question for decision in this case is whether an Inspector of Excise acting in the course of his duties is a "Police Officer" within the meaning of section 25 of the Evidence Act and whether a confession made to him is admissible. The trend of the decisions in Bengal, with one exception to which I shall refer, has been to answer this question in the negative but a difficulty has arisen owing to a judgment of a Full Bench of the Bombay High Court in the case of *Nanoo Sheikh Ahmed* v. *Emperor*(4) in which the learned Judges arrived at the

(1) (1876) I. L. R. 1 Cal. 207.
(2) (1931) I. L. R. 58 Cal. 1260.
(3) (1931) 36 Cal. W. N. 163.
(4) (1926) I. L. R. 51 Bom. 78, F. B.

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opposite conclusion. With the greatest respect to the Bombay High Court I find myself in complete disagreement with the arguments which found favour in that case and have been presented before us and I think the fallacy is attributable to two causes. In the first place a judgment of Sir Richard Garth in the case of *The Queen* v. *Hurribole Chunder Ghose*(1) has been misunderstood and this misunderstanding has been the source of frequent error. The facts in that case were of a very simple character. The Deputy Commissioner of Police for Calcutta who was also a Magistrate had issued a warrant for the arrest of the accused Hurribole. He was brought before the Deputy Commissioner at his private residence over the police office and there made a confession in the presence of the Deputy Commissioner and of two Inspectors of Police. One of the said Inspectors reduced the confession to writing and it was signed and acknowledged by Hurribole as correct in their presence. It was argued that the Deputy Commissioner was not a member of the Calcutta Police force. It was admitted that he was a police officer but, although a Superintendent of Police in the mufassil, he was a Deputy Commissioner only in Calcutta where the confession was recorded and the confession was recorded before him as a Magistrate. The Court held that although the Deputy Commissioner of Police in Calcutta was not a member of the police force within the meaning of Bengal Act IV of 1866 he was nevertheless a police officer quite as much as the more ordinary members of the force. In other words, Sir Richard Garth held that the term " Police Officer " in the Evidence Act included all police officers and not merely a member of the police force within the meaning of the Bengal Act. He said " I consider that the term " police officer " should be read not in any strict technical sense, but according to its more comprehensive and popular meaning. In common parlance and amongst the generality of people, the Commissioner and Deputy Commissioner of Police are

(1) (1876) I. L. R. 1 Cal. 207.

understood to be officers of Police, or in other words "police officers", quite as much as the more ordinary members of the force; and, although in the case of a gentleman in Mr. Lambert's position, there would not be, of course, the same danger of a confession being extorted from a prisoner by any undue means, there is no doubt that Mr. Lambert's official character, and the very place where he sits as Deputy Commissioner, is not without its terrors in the eyes of an accused person; and I think it better in construing a section such as the 25th, which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification".

This very sound decision that the term "police officer" in section 25 of the Evidence Act includes all kinds of police officers has been misunderstood as a decision that the term includes not only police officers but anyone on whom is conferred the powers of a police officer, although it has nowhere been decided what minimum aggregation of functions will constitute any person a police officer within the meaning of the section. The fact is that the term "police officer" is sufficiently well understood to allow of its use without any precise definition. Thus it is well recognised that different countries and states confer upon their respective police officers different powers. Nevertheless it is not difficult to decide whether any particular individual is, or is not, a police officer in any particular country and it has been held that a confession made to a police officer of a foreign force in the country where he is in fact a police officer is not admissible in an Indian trial.

Another source is the adoption of an erroneous canon of construction of statutes, that is, the consideration of what is supposed to be the object of this section of the Evidence Act and the adoption as an initial hypothesis of the theory that that object was to make inadmissible confessions made before persons possessing the power of investigation, search and

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arrest so that whereas a Sub-Inspector of Excise had been given these functions he came within the term " police officer ". Now in the first place Courts of Justice are not concerned with the objects with which the legislature enacts any particular law unless in the particular enactment the object is stated as a guiding principle to be followed in interpretation. It may well be that the promoters of any particular bill in the legislature may have particular objects in view but any section as ultimately enacted may well be the result of compromise and it may be that the words ultimately agreed upon have been passed by the legislature in such a form that one or all of the objects of the promoters is defeated. In cases, therefore, where the legislature has not thought fit to express its intention otherwise than by the use of the words of the section those words must be followed.

There is one case, that of *Ibrahim Ahmad* v. *King-Emperor*(1), in which a Bench of the Calcutta High Court while affirming a conviction upon other grounds excluded a confession made to an Excise Officer on the basis of the Bombay decision but strangely enough, notwithstanding the former decisions of the Calcutta High Court, the question was not referred to a Full Bench. The decision has been treated as obiter dictum in a subsequent case before the same Court and in any case it contains what I consider to be the same errors apparent in the Bombay decision. Indeed the learned Judge who delivered the opinion of the Bench introduced a curious test which I have not seen suggested in any other case. He said " On principle also, the position of a police officer cannot be distinguished from that of an excise officer, with regard to an offence under the Excise Act, because an excise officer is also interested in the conviction of the accused and in a position to dominate him. Outwardly also, there is hardly anything to distinguish the one class of officers from the other, for they wear uniforms which are not dissimilar and take part

(1) (1931) I. L. R. 58 Cal. 1260.

in the investigation in the same way". In other words, the learned Judge suggests that if a man looks like a police officer then he is a police officer according to law. The position of persons in authority who are not police officers is amply dealt with by section 24—such persons, for example, as Magistrates and those deputed by Magistrates under section 202 of the Criminal Procedure Code to enquire into complaints. These have many of the powers of police officers but certainly are not police officers in any accepted sense, and are not affected by section 25 of the Evidence Act.

It is unnecessary to consider the numerous cases cited in the course of the argument. The question is really a simple one. The confession in this particular case which is, in my opinion, admissible is sufficient to justify the conviction and I would reject the petition for revision.

FAZL ALI, J.—I agree. The question to be decided in this case is whether a confession made before an Excise Inspector who under the Dangerous Drugs Act (II of 1930) not only has the power to arrest and search but has also been invested by the Local Government with the powers of an officer in charge of a police station for the investigation of an offence under that particular Act is admissible in evidence. The view which prevails in the Calcutta High Court is that a confession made before an excise officer is admissible. [*See Rukumali* v. *The Emperor*(1); *Ah Foong Chinaman* v. *Emperor*(2); *Harbhanjan Sao* v. *The King Emperor*(3) and *Matilal Kalowar* v. *The Emperor*(4).] A Full Bench of the Bombay High Court has, however, decided that an *abkari* officer who exercises the powers conferred by the Code of Criminal Procedure on an officer in charge of a police station for the investigation of a cognizable offence is a police officer within the meaning of section

(1) (1917) 22 Cal. W. N. 451.
(2) (1918) I. L. R. 46 Cal. 411.
(3) (1927) I. L. R. 54 Cal. 601.
(4) (1931) 36 Cal. W. N. 163.

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25 of the Indian Evidence Act and any confession made to such an officer in course of his investigation under the Abkari Act or the Code of Criminal Procedure is inadmissible in evidence. In view of this decision which represents the view of no less than five eminent Judges of the Bombay High Court and is undoubtedly entitled to great weight it becomes necessary to examine the question before us with care.

The term " police officer " has not been defined anywhere, but there can be no doubt that section 1 of the Police Act is not exhaustive and the term is wide enough to include not only the persons enrolled under the Police Act, but also such persons as the police officers of the Indian States and possibly a police patel of the Bombay Presidency. It seems to be now well settled that, as was pointed out in *Queen Empress* v. *Haribol Chandra Ghosh*(1), the term " police officer " should not be read in any technical sense but in its more popular and comprehensive meaning. In its popular meaning a police officer is certainly a different person from a revenue officer and it was conceded before us in course of the argument that an excise officer is primarily a revenue officer and not a police officer. It is, however, contended that a confession made before him would be inadmissible, because he is vested by law with the powers of a police officer for certain purposes. It appears to me that the distinction between a person who is nothing but a police officer and one who is primarily not a police officer but merely invested with the powers of a police officer is material and cannot be ignored for the purpose of construing section 25 of the Evidence Act. It may be noticed that it is not only certain revenue officers, such as officers of the excise and salt departments, who are sometimes invested with the powers of a police officer in charge of a police-station but a private individual may also under certain circumstances be invested with such powers; for instance, under section 202 of the Code of Criminal Procedure

(1) (1876) I. L. R. 1 Cal. 207.

if an inquiry or investigation under that section is delegated to a private person, such person is to exercise all the powers conferred by the Code of Criminal Procedure on an officer in charge of the police station except that he is not to have the powers to arrest without warrant. Are we then to suppose that such a private individual should also be regarded as a police officer within the meaning of section 25 of the Evidence Act? To take this view would, in my opinion, be to ignore the popular meaning of the term "police officer" and enlarge unduly the scope of the section. There was nothing to prevent the framers of the Evidence Act from saving expressly that confessions made to a police officer as well as those persons who are for the time being and for certain limited purposes invested with the powers of a police officer are inadmissible in evidence. The section, however, is limited merely to a police officer and we cannot read into it words which it does not contain. In the Evidence Act itself the terms police officer and revenue officer have been used to connote two different classes of officers as is evident on reading section 125 of the Act. It is true that section 125 of the Evidence Act was inserted in the Act subsequently but that should not, in my opinion, make any difference, as both the sections are now part of the same Act and we cannot construe certain words used in one section in one way and the same words as used in the other in a different way.

It is argued before us, and apparently this was also one of the arguments used before the Full Bench of the Bombay High Court, that the object of section 25 of the Evidence Act must have been to prevent the police officers in this country from abusing their extensive powers in extorting confession from persons in their custody and as there are the same possibilities of evil when an excise officer investigates a case, section 25 should be extended to include such an officer also. There is, however, nothing before us to lead us to suppose that in enacting section 25 the framers of the Evidence Act had any other class of officers in

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view than the police officers as they are understood in popular language and we cannot extend the provisions of that section merely because we feel that it should have been wide enough to cover all persons, whether they be police officer or not, who are in a position to extort a confession from an accused person. It appears to me that it is one thing to say that it is desirable to have a certain provision in the Evidence Act and another that such a provision already exists.

The matter may be looked at from another point of view. What seems to have greatly weighed with the learned Judges of the Bombay High Court was that in the particular case which they had before them the abkari officer had the power to investigate like a police officer in charge of a police station. But is that to be the real test for excluding a confession? A police constable has generally no power to investigate a criminal offence but nevertheless a confession made before him would be inadmissible because he is a police officer. Such would also be the case if a confession is made before a police officer who though invested with the powers of investigation within his own jurisdiction is not engaged in the particular investigation in the course of which the confession is made. Again if a confession is to be made inadmissible merely because the person before whom it is made is in a position to extort it from the accused, why should not section 25 be extended to those persons who have the power to arrest and detain an accused person for some time and yet have not the power to investigate the offence with which he is charged? Thus once it is held that section 25 refers not only to those who are popularly known as police officers but also to persons who have certain powers ordinarily exercisable by a police officer, it becomes material to consider what is the minimum power or powers to be exercised by such persons so as to make section 25 applicable to them. I think that the question is capable of being answered in more than one way and this fact by itself would introduce an element of great uncertainty and confusion in administering the law.

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As I have already indicated, the question is not altogether free from difficulty, but the view that I have formed on a consideration of the numerous authorities cited before us is that section 25 was intended to apply to police officers and police officers alone and that if the framers of the Act did not have in view, at the time of framing the section, any class of persons other than the police officers, we cannot read the term " police officers " as including men who are provisionally and for a limited purpose only invested with some of the powers of police officers. Under the Evidence Act as it stands section 25 and section 24 are to be read together, both being exceptions to the general rule laid down in section 21 that admissions may be proved as against the person who makes them. Section 25 was intended to apply to police officers and must be applied to police officers alone. Section 24 relates to a confession made before any person in authority provided that the confession appears to have been caused by any inducement, threat or promise, having reference to the charge against the accused person. The framers of the Evidence Act were, therefore, not unmindful of those cases in which a confession made before a person other than a police officer may have to be excluded from evidence. It is contended that at the time when the Evidence Act was framed excise officers had not the powers which are now conferred upon them. But this appears to me to support the view that the framers of the Evidence Act could not have intended that a confession made before an excise officer should be made inadmissible. The language used in section 25 is so comprehensive that it covers not only the police officers of smaller rank but also police officers of the highest rank who cannot be suspected of using any unfair means for the purpose of extorting a confession. This also would go to show that the real test is not merely whether a person is in a position to abuse his powers but whether he is really a police officer or not. On the whole, therefore, I am inclined to follow those decisions of the Calcutta High Court where it has been

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held that a confession made before an excise officer is admissible and respectfully differ from the view taken in *Nanoo Sheikh Ahmed* v. *King-Emperor*(1). I have refrained from referring to the case of *Ibrahim Ahmed* v. *King-Emperor*(2) which is the onlv case of the Calcutta High Court in which a discordant note was struck and it was suggested that a confession made before an excise officer during investigation was inadmissible in evidence. The learned Judges who decided that case did not refer the matter to a Full Bench and their view did not find favour with another Division Bench of the Calcutta High Court in a later case—*Mati Lal Kalowar* v. *Emperor*(3).

AGARWALA, J.—The petitioner has been convicted under section 14(*a*) of the Dangerous Drugs Act, 1930, and sentenced to rigorous imprisonment for a year and a fine of Rs. 100. On a previous occasion he was convicted and sentenced for an offence under section 47(*a*) of the Bihar and Orissa Excise Act, 1915.

On the present occasion the petitioner was arrested by an Inspector of Excise at the Purabsarai Railway station while alighting from a train from Calcutta. When the Inspector announced his intention of searching the person of the petitioner, the latter united a handkerchief which was wound round his thigh and produced therefrom a paper packet saying that it contained cocaine. A search list was immediately prepared by the Inspector and signed by the persons whom he had produced for the purpose of witnessing the search. The petitioner wrote on the search list an endorsement to the effect that the packet had been recovered from him and contained cocaine worth Rs. 100, and signed the endorsement. The Inspector sealed the packet in the presence of the search-witnesses. Unfortunatelv the contents of the packet have not been analysed by the Chemical

(1) (1926) I. L. R. 51 Bom. 78. F. B.
(2) (1931) I. L. R. 58 Cal. 1260.
(3) (1931) 36 Cal. W. N. 163.

Examiner. The Inspector's explanation with regard to this is that owing to pressure of work he put it in a box at his residence which was stolen before he was able to send the packet for analysis. At the trial, therefore, the only evidence that the packet contained cocaine was the statement of the accused made to the Inspector at the time of his arrest. The defence objected to the admissibility of this evidence, but the objection was overruled. At the trial the defence of the accused was that the packet contained boric powder and not cocaine. In his examination under section 342 he admitted having made the endorsement on the search list; but in a written statement, which he filed subsequently, he said that the endorsement had not been made voluntarily. It has not been contended before us that the admission made to the Magistrate that the accused made the endorsement on the search list amounts to an admission that the packet contained cocaine.

In revision the petitioner contends that the evidence on which the prosecution relied to prove the contents of the packet in this case was inadmissible by reason of section 25 of the Evidence Act, which renders inadmissible a confession made to a police officer. It is contended that the Excise Inspector is a "Police officer" within the meaning of that section. The argument in support of this proposition is of a twofold nature. In the first place it is urged, on the authority of an observation in *The Queen* v. *Hurribole Chunder Ghose*(1) and on certain observations in cases which have followed that decision, that the term "Police officer" in section 25 should be construed in its widest and popular sense, and that in this sense "Police officer" connotes any person possessing some of the attributes of a Police officer and popularly supposed to be a Police officer. The second branch of the argument is that an Excise Inspector, by reason of the powers conferred on him, is in fact a Police officer while exercising those powers.

(1) (1876) I. L. R. 1 Cal. 207.

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In the case of *Queen* v. *Hurribole Ghose*(1) the prosecution sought to put in evidence a confession made by the accused to the Deputy Commissioner of Police, at the Police office and recorded by a Police officer and attested by the Deputy Commissioner of Police in his capacity of a Magistrate. It was contended on behalf of the accused that the Deputy Commissioner of Police was a Police officer and that a confession made to a Police officer under any circumstances is inadmissible in evidence. With the latter part of this contention the learned Judges, Garth, C.J. and Pontifex, J., agreed. Garth, C.J., however, held that the Deputy Commissioner of Police was not a Police officer within the meaning of the Calcutta Police Act, 1866. With regard to section 25 of the Evidence Act, however, he said, " But in construing the 25th section of the Evidence Act of 1872, I consider that the term ' Police officer ' should be read not in any strict technical sense, but according to its more comprehensive and popular meaning ". Speaking for myself I should have thought that in its popular sense the term " Police officer " connotes nothing more or less than a " Member of the Police force ", and I do not think that the observation of Garth, C.J. was intended to go beyond that. It is true that the learned Judges, who decided the case of *Queen* v. *Hurribole Chunder Ghose*(1), considered that the Deputy Commissioner of Police was not technically a member of the Police force. But the officer whose status was there being considered, if not enrolled in or appointed to the force recruited under the Calcutta Police Act, was at least a person who, by a notification in the *Calcutta Gazette* of the 24th of July, 1872, had been appointed as Superintendent of Police in the muffassil, and it may well be that when a person is Superintendent of Police in one part of the Province and is appointed as a Deputy Commissioner in another part of the Province he may popularly be supposed to be a Police officer.

(1) (1876) I. L. R. 1 Cal. 207.

I do not think that Garth, C.J. ever intended that a person totally unconnected with the Police force is a Police officer within the meaning of section 25 merely because he is popularly supposed to be a Police officer. The officer to whom the confession was made in the present case is in no way connected with the Police force. He is an officer of the Excise Department and in my opinion no popular misconception as to his status can suffice to make him a Police officer within the meaning of section 25.

A number of later cases have been referred to at the Bar, in which the learned Judges who decided these cases have purported to base their decisions on the observations of Garth, C.J. quoted above. With great respect to those learned Judges I am unable to agree that the observations of Garth, C.J. go further than I have indicated above. In particular, reference was made to the decision in *Queen-Empress* v. *Salemuddin Sheikh*(1) in which the observation of Garth, C.J. was quoted and in which it was held that a confession made to a chaukidar is excluded by section 25. In the judgment of that case no reference is made to an earlier decision by a Division Bench of the same Court in *Queen-Empress* v. *Bepin Behari Dey*(2) that section 25 does not exclude a confession made to a chaukidar The conflict of judicial opinion in the Calcutta High Court on this point was commented on in *Nazir Jharudar* v. *The Emperor*(3). Section 47 of the Police Act of 1861 empowers the Local Government to declare that " an authority, which now is or may be exercised by the Magistrate of the District over any village-watchman or other village police-officer for the purposes of police, shall be exercised, subject to the control of the Magistrate of the District, by the District Superintendent of Police ", and at least with respect to some of the districts in this province such a declaration has been made (*vide* B. & O. Statutory Rules and Orders).

(1) (1899) I. L. R. 26 Cal. 569.
(2) (1897) 2 Cal. W. N. 71.
(3) (1905) 9 Cal. W. N. 474.

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But paragraph (*1*) of section 21 of the Act provides as follows:

"Nothing in this Act shall affect any hereditary or other village police officer, unless such officer shall be enrolled as a police officer under this Act. When so enrolled, such officer shall be bound by the provisions of the last preceding section. No hereditary or other village police officer shall be enrolled without his consent and the consent of those who have the right of nomination."

This appears to me to make it quite clear that a village police officer, even in a district in respect of which a declaration has been made under section 47, cannot be enrolled in the police force without his own consent and the consent of those who have the right of nomination, and that, until so enrolled, he is not a member of the police force any more than an ordinary private individual is a member of that force unless and until he volunteers for appointment and is appointed under section 7 or is appointed to be a special constable under section 17. I do not understand how a person can be said to be a police officer within the meaning of one Act of the Legislature when his enrolment in the police force is expressly prohibited by another Act of the Legislature, unless the conditions which operate to bar the prohibition exist.

In my opinion no person is a police officer unless he is enrolled in, or appointed a member of, the police force or is declared by statute to be a member of that force. This brings me to the second branch of the contention of the petitioner. It is argued that an Excise Officer is a police officer by reason of the fact that some of the powers of a police officer have been conferred upon him by the Bihar and Orissa Excise Act, 1915, and reliance is placed on the decisions in *Ibrahim Ahmad* v. *King Emperor*(1) and *Nanoo Sheikh Ahmed* v. *Emperor*(2) where it was held that a confession to an Excise Officer is excluded by section 25 of the Evidence Act. In the Calcutta High Court there have been a number of decisions in which the contrary

(1) (1931) I. L. R. 58 Cal. 1260.
(2) (1926) I. L. R. 51 Bom. 78, F. B.

view has been taken, and with those decisions I respectfully agree. It will suffice to mention *Ah Foong* v. *Emperor*(1), *Harbhanjan Sao* v. *Emperor*(2) and *Tura Sardar* v. *Emperor*(3). The Bombay case is a decision of a Full Bench overruling a previous decision of a Division Bench of the same Court. The question referred to the Full Bench of the Bombay High Court was as follows:

"Is an Abkari-officer, who, in the conduct of investigation of an offence punishable under the Bombay Abkari Act, exercises the powers conferred by the Code of Criminal Procedure, 1898, upon an officer in charge of a police-station for the investigation of a cognizable offence, a 'Police officer' within the meaning of section 25 of the Indian Evidence Act?"

The Full Bench answered this question in the affirmative. The observations of Garth, C.J. in *Queen* v. *Hurribole Chunder Ghose*(4) and the decision in *Queen-Empress* v. *Salemuddin Sheikh*(5) were quoted with approval. The decision in *Ah Foong* v. *Emperor* (1), however, was distinguished by Marten, C.J. from the case before the Full Bench on the ground that the powers of Excise Officers in Bombay are far more extensive than in Calcutta. The learned Chief Justice said: "In Bombay the Opium Act has been expressly amended so as to confer upon Abkari officers certain wide police powers, which are very similar to those conferred on them as regards offences under the Abkari Act, e.g., the same powers of investigation as those possessed by an officer in charge of a police-station". If I read the judgment of the learned Chief Justice of Bombay right, the possession of powers of investigation is, in his opinion, an important element in the constitution of a police officer. Fawcett, J. expressed a similar view in the same case where his Lordship said: "I think an important fact to be borne in mind is that, prior to the amendment of the Abkari Act by Bombay Act,

(1) (1918) I. L. R. 46 Cal. 411.
(2) (1927) I. L. R. 54 Cal. 601.
(3) (1930) 52 Cal. L. J. 177.
(4) (1876) I. L. R. 1 Cal. 207.
(5) (1899) I. L. R. 26 Cal. 569.

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XII of 1912, an Excise officer, after arresting a person had forthwith to send him to the nearest police-station and the investigation was then conducted by police officers, whereas now, an Excise officer, if empowered under section 41, can exercise police powers of investigation which cover a certain amount of detention of the accused while the investigation is going on, so that he has similar opportunities of extorting a confession from an accused. This is an all-important difference which distinguishes this case from that of *Ah Foong* v. *Emperor*(1) as has been pointed out by my Lord the Chief Justice ".

It may be observed, however, that there are officers who have no powers of investigation under the Criminal Procedure Code, e.g., police constables, and yet such officers are nevertheless ' police officers ' within the meaning of section 25 of the Evidence Act. The mere possession of certain of the powers of a police officer, even though those powers include the power of investigation under the Code, does not suffice, in my opinion, to convert into a police officer one who has no other claim to that status, e.g., section 202 of the Code of Criminal Procedure empowers a Magistrate receiving a complaint to direct an enquiry or investigation to be made by any magistrate subordinate to him, or by a police officer or by such other person as he thinks fit, but it is not arguable that if such an investigation is directed to be made by a person other than a police officer, such person would be converted into a police officer even while engaged in making the investigation.

In my view an Excise Officer under the Bihar and Orissa Excise Act is not a ' police officer ' within the meaning of section 25 of the Evidence Act. I would, therefore, dismiss this application.

Rule discharged.

(1) (1918) I. L. R. 46 Cal. 411.

APPELLATE CIVIL.

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

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August, 25, 26, 29. *September*, 7.

BENGAL AND NORTH WESTERN RAILWAY COMPANY

v.

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Railways Act, 1890 (*Act IX of* 1890), *sections* 77, 80 *and* 140—*notice of claim, whether may be served on any person authorized by the railway administration to receive such notice—section* 140—" *may be served* ", *meaning of—suit for compensation for non-delivery—Limitation Act*, 1908 (*Act IX of* 1908), *article* 30 *or* 31 *applicable—terminus a quo-contract with one railway company—goods carried on another railway—suit against latter company, whether is suit founded in tort or statutory liability—contract silent as to date of delivery —time, how should be determined—single contract—part of goods not delivered—cause of action, when arises.*

Section 140 of the Railways Act, 1890, provides :—

" Any notice or other document required or authorized by this Act to be served on a railway administration may be served..... .....in the case of a railway administered by a railway company on the Agent in India of the railway company ".

Held, that the words " may be served " do not mean " must be served "; the section merely provides a safe and unanswerable method for serving a claim upon the railway administration and enacts in effect that service upon the Agent is service upon the company.

Therefore, a notice contemplated by section 77 of the Act need not necessarily be served on the Agent but may be served on any person who is in fact authorized by the railway administration to receive notice of the claim.

A. Mahadeva Ayyar v. *The South Indian Railway Co.*(1), followed.

* Appeal from Original decree no. 69 of 1929, from a decision of Babu Suresh Chandra Sen, Subordinate Judge of Darbhanga, dated the 22nd January, 1929.

(1) (1921) I. L. R. 45 Mad. 185, F. B.

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Martin and Co. v. *Fakir Chand Sahu*(1) and *Nadiar Chandra Shaha* v. *Wood*(2), dissented from.

East Indian Railway Co. v. *Bhimraj Srilal*(3) and *East Indian Railway Co., Ltd.* v. *Sowa Lal Sawan Lal*(4), distinguished.

If the company by its course of business holds up any particular official as competent to deal with claims, service of notice of a claim upon such an official must be taken as against the company to be service upon the company.

The loss or injury referred to in Article 30 of the Limitation Act, 1908, is the loss or injury to the goods and not the loss or injury to the consignee. Where the defendant wishes to take advantage of Article 30 the onus is upon him to prove when the loss or injury to the goods actually occurred and that more than one year has elapsed from that date.

Where, however, the claim is for compensation for non-delivery of the goods, Article 31 applies and the period of limitation is to be counted from the time when the goods ought to have been delivered.

A suit under section 80 of the Railways Act for compensation for non-delivery may be brought either against the company with whom the contract for carriage was directly made or against the railway administration on whose railway the loss occurred. If the latter course is taken it does not follow that the suit is one founded in tort. The suit is founded on statutory liability which is attached to the contract though that contract be made with a railway other than the defendant in the suit.

If no particular date for delivery is specified in the contract it must be determined as a matter of what is reasonable having regard to the circumstances of the contract, and this criterion must be applied as much in favour of the plaintiff as in favour of the defendant.

Where the contract is a single contract in respect of a single consignment, the cause of action for a claim for compensation arises, not merely on non-delivery of a part of the goods consigned, but when the entire contract purports to have been fulfilled.

(1) (1910) 14 Cal. W. N. 888.
(2) (1907) I. L. R. 35 Cal. 194.
(3) (1926) I. L. R. 5 Pat. 488.
(4) (1928) 10 Pat. L. T. 24.

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Appeal by the defendant.

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

S. N. Bose, for the appellant.

S. M. Gupta and *K. P. Upadhya*, for the respondent.

COURTNEY TERRELL, C.J.—This suit was originally begun by the plaintiff on the 4th October, 1923, against the Agent of the Bengal and North Western Railway and also the Agent of the East Indian Railway for compensation for the loss by the plaintiff as the consignee of goods of which short delivery had been made. The case was heard by the Subordinate Judge and the plaintiff applied to amend his plaint by substituting the respective railway companies as defendants in place of their Agents. The Judge heard the evidence produced by the plaintiff and the defendants but without deciding on the merits dismissed the suit as against both Agents and refused leave to amend the plaint. On appeal by the plaintiff a Bench of this Court dismissed the appeal as regards the Agent of the East Indian Railway but remanded the case to the Subordinate Judge to allow an amendment of the plaint substituting the name of the Bengal and North Western Railway company as defendant for that of its Agent and for a decision of the suit on the merits as against that company. The East Indian Railway company and its Agent were accordingly eliminated from the proceedings. No application was made either by the plaintiff or by the Bengal and North Western Railway company to call fresh evidence and after considering the evidence already before him and allowing the amendment directed, the Subordinate Judge gave judgment for the plaintiff against the Bengal and North Western Railway company who now appeal from his decision.

The facts are simple. James Duke and Company of Calcutta despatched to the plaintiff on the 27th

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August, 1922, a consignment of 3,229 bundles of round steel rods weighing 851 maunds and also four wooden frames from Ramkristapur railway station on the East Indian Railway to Muktapur railway station on the Bengal and North Western Railway. Risk Note *A* was signed by the agent of the consignor, the contract was made with the East Indian Railway and the East Indian Railway acknowledged receipt of the goods. On three separate dates in September open wagons arrived at Mokameh Ghat station on the East Indian Railway company's line. Each of these contained a portion of the consignment of steel rods. It appears from the evidence called by the East Indian Railway company that in each case the goods were unloaded by the men of the East Indian Railway company from the trucks into the company's godown, and thence were taken over by the men of the Bengal and North Western Railway company and loaded into closed trucks on that company's line. An official of the Bengal and North Western Railway company in each case signed a register belonging to the East Indian Railway. In this register in the case of each portion of the consignment the station of origin (Ramkristapur) and the station of destination (Muktapur) are stated. The names of the consignor and consignee are indicated. Under the head of "description" the goods are variously stated to be "lot bundles round iron" or (5, 11, 4 as the case may be) bundles of rod. Then is stated "weight as per invoice." Then there is a column which is headed "Remarks as to condition, weight on reweighment, etc." There is no statement as to the weight on reweighment and indeed there is nothing before us to show whether the goods were or were not reweighed by the Bengal and North Western Railway company and the observations in the column merely refer to the condition and packing of the goods. In the column headed "weight as per invoice" the weight of the different lots which were received at Mokameh Ghat on the 8th, 19th and 20th September is set forth as totalling 851 maunds as stated in the invoice. It is

perfectly clear that the Bengal and North Western Railway company had an opportunity to reweigh the goods and they might, if such was the fact, have entered in the register of the East Indian Railway company the statement that the weight of the goods so reweighed did not correspond with the weight in the invoice. They had ample opportunity to prove before the Subordinate Judge (if such had been the case) that notwithstanding that they had acknowledged receipt of 851 maunds from the East Indian Railway company, in fact the amount received by them was something less. In the absence of evidence it cannot be assumed that they took from the East Indian Railway company anything less than the amount acknowledged by them when signing the register. The register makes no mention of the four wooden frames which were part of the consignment despatched by the consignor to the consignee. The three closed wagons into which the iron is said to have been loaded by the Bengal and North Western Railway company were delivered at Muktapur railway station on three different dates. The first delivery was on the 14th September, 1922, the second on the 20th and the third on the 21st. On the occasion of the first delivery the clerk in the employ of the plaintiff signed the entry in the register of the Bengal and North Western Railway company and acknowledged the receipt of the entire amount of iron rod mentioned in the invoice, that is to say, 851 maunds. The closed trucks were taken to the plaintiff's siding, unloaded, and the iron rod was weighed. This operation took two days and it was found that there was a shortage of 248 maunds. The wooden frames were delivered by road van on the 5th October.

One of the defences relied upon by the railway company has been the familiar, and in the circumstances, somewhat disingenuous contention that the plaintiff failed within six months from the date of delivery of the goods to prefer a claim in writing to the railway administration as provided by section 77

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of the Indian Railways Act, and it is necessary, therefore, to examine the correspondence which took place.

On the 23rd October, 1922, the plaintiff's manager wrote to the District Traffic Superintendent of the Bengal and North Western Railway at Samastipur submitting a claim for non-delivery and setting forth precise particulars and asking for an early settlement and also enclosed a copy of this letter to the Traffic Manager of the East Indian Railway company at Howrah.

On the 27th October, 1922, the District Traffic Superintendent of the Bengal and North Western Railway wrote acknowledging the receipt of this letter and stating

"The matter is receiving my attention."

On the 30th October the Acting Traffic Manager of the East Indian Railway company acknowledged the receipt of the copy of the letter sent to him and stated that it was receiving his attention.

Nothing further seems to have happened until the 19th February, 1923, when the plaintiff's manager again wrote to the District Traffic Superintendent of the Bengal and North Western Railway again setting forth particulars of the claim and stating that his letter had not been acknowledged and that unless an immediate settlement was reached the matter would be placed in the hands of lawyers.

On the 3rd April, 1923, the District Traffic Superintendent of the Bengal and North Western Railway appears to have paid a personal visit to the plaintiff's mill and made an inspection of the goods which had been delivered.

On the 14th May the plaintiff's manager again wrote to him referring to the visit and asking if he had anything to communicate in connection with the plaintiff's claim.

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On the 22nd May the District Traffic Superintendent replied that he had forwarded the plaintiff's letter dated the 22nd August, 1922, to the Traffic Manager at Gorakhpur for favour of disposal.

On the 23rd July the plaintiff's manager wrote direct to the Agent, Bengal and North Western Railway, at Gorakhpur, referring to the claim stating that his several letters addressed to the Traffic Department had received no attention and stating that the matter would have to be handed over to the plaintiff's solicitors.

On the 4th August, 1923, the Traffic Manager of the Bengal and North Western Railway at Gorakhpur wrote to the plaintiff's manager. After referring to the plaintiff's letter of the 27th August, 1922, he said

"The consignment was delivered to you as received from the East Indian Railway and I regret I can do nothing in this case."

The defendants in support of their contention refer to section 140 of the Indian Railways Act the material parts of which are as follows:—

"Any notice or other document required or authorized by this Act to be served on a railway administration may be served,..... in the case of a railway administered by a railway company on the Agent in India of the railway company."

They contend that the letters written by the plaintiff's manager to the District Traffic Superintendent at Samastipur do not comply with section 77 and that the words "may be served" in section 140 mean "must be served". It is interesting to note that no such point is taken in the final letter of the 4th August, 1923, from the Traffic Manager and no such point was made in answer to the letter of the 23rd July from the plaintiff's manager to the Agent of the railway. The company have persisted in a course of business by which they have allowed their District Traffic Superintendent to deal with claims for compensation. The Agent has at no time until the written statement in this case repudiated the action of his subordinate. A series of cases of the Calcutta High Court have been cited to us in which

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the opinion has been expressed that the word " may " in section 140 is to be construed as " must " such, for example, as *Martin and Co.* v. *Fakir Chand Sahu*(1) and *Nadiar Chanda Shaha* v. *Wood*(2). I am entirely unable to understand the reasoning which prompted these expressions of opinion and I decline to follow them. Section 140, in my opinion, merely provides a safe and unanswerable method for serving a claim upon the railway administration and enacts in effect that service upon the Agent is service upon the company, but section 77 enacts that the service must be upon the administration and inasmuch as a company must conduct its business through its authorised agents the only question to be decided is whether the District Traffic Superintendent is in fact in the circumstances of the case the duly authorised agent of the railway company. If the company by its course of business holds up any particular official as competent to deal with claims, then service of notice upon such an official must be taken as against the company to be service upon the company. I agree with the reasoning of Mr. Justice Kumaraswami Sastri in the Full Bench decision of the Madras High Court in *A. Mahadeva Ayyar* v. *The South Indian Railway Co.*(3). The learned Judge said " The question whether a particular officer is authorised by the Agent to receive such notices on his behalf is a question of fact to be determined in each case. Agency may be proved either by direct evidence of authority, or by a course of conduct which in the opinion of the Court would justify the inference that the subordinate official was authorised by the Agent to receive notices on his behalf."

The decision of this Court in *East Indian Railway Co.* v. *Bhimraj Srilal*(4) is a decision upon the facts of the particular case and it was held that

(1) (1910) 14 Cal. W. N. 888.
(2) (1907) I. L. R. 35 Cal. 194.
(3) (1921) I. L. R. 45 Mad. 135 (154, 155).
(4) (1926) I. L. R. 5 Pat. 488.

no such delegation of authority had in fact been proved. The point that the notice required by section 77 must under section 140 be served on the Agent did not directly arise and, in my opinion, the case is no authority for that proposition. Similar observations may be made on the case of *East Indian Railway Co., Ltd.* v. *Sowa Lal Sawan Lal*(1). In my opinion in this case not only is it unnecessary in order to prove service on a railway administration to establish that the notice was served upon the Agent but there is ample evidence in this case in the course of conduct of the railway company and the behaviour of the Agent in not raising the point in reply to the letter of the 23rd July to establish that the District Traffic Superintendent at Samastipur was in fact authorised by the railway administration to receive notice of the claim.

The second contention on behalf of the railway company is to my mind as unattractive as the first. They rely upon Articles 30 and 31 of the Limitation Act. It is contended that if the matter is to be considered as governed by Article 30 the suit has not been brought within one year of the loss incurred by the plaintiff. It is said that the last delivery of iron was made on the 21st September and it was then made clear that the whole of the iron which could be delivered had been delivered and the suit having been begun on the 4th October, 1923, a period of more than one year had elapsed. The answer to this contention is simple. The loss or injury referred to in Article 30 is the loss or injury to the goods and not the loss or injury to the consignee. If the defendants wish to take advantage of Article 30 the onus is upon them to prove when the loss or injury to the goods actually occurred and that more than one year has elapsed from that date. In this particular case the defendants have throughout taken up the position that no loss in fact occurred and that the goods were delivered as received by the defendants from the East

(1) (1928) 10 Pat. L. T. 24.

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Indian Railway company. The Article of the Limitation Act which is applicable to this case is Article 31, that is to say, the claim is for compensation for non-delivery of the goods and the period of limitation is to be counted from the time when the goods ought to have been delivered. The defendants contend that even under Article 31 the date to be considered is that on which the last delivery of the iron rods was in fact made, that is to say, the 21st September To this contention there are two answers. First, this is a suit under section 80 of the Act for compensation for loss. Such a suit may be brought either against the company with whom the contract for carriage was directly made or against the railway administration on whose railway the loss occurred. If the latter course be taken it does not follow that the suit is one founded in tort. The suit is founded on statutory liability which is attached to the contract though that contract be made with a railway other than the defendant to the suit. Reference may be had to the contract for carriage for the purpose of determining the date when the goods ought to have been delivered. If no particular date is specified it must be determined as a matter of what is reasonable having regard to the circumstances of the contract, and this criterion must be applied as much in favour of the plaintiff as in favour of the defendant. Now the contract referred not only to the delivery of iron but also to the delivery of the four wooden frames. It was a single contract in respect of a single consignment and the plaintiff might reasonably take the point of view that until the entire contract purported to have been fulfilled he was not in a position to complain of non-delivery of a part of the goods subject to the contract. As I have said, the wooden frames were delivered by road van on the 5th October and the suit was begun on the 4th October in the following year and is, therefore, in time. But there is another aspect of the case which is even more conclusive against the defendants' contention. The plaintiff on the 23rd October wrote to the defendants of the loss. He was justified in waiting to bring his

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suit until the defendants had made it clear that they had no intention of delivering the goods. Had the position been reverse the defendants would not have hesitated to contend that a suit was premature which did not give them a reasonable opportunity of fulfilling the terms of the contract. The defendants by a deliberate process of ignoring the plaintiff's repeated requests for attention to his claim misled him into delaying his suit and it is not open to them now to contend that the suit has been brought too late. In my opinion the attitude of the railway company has throughout been lacking in candour and their defence to this suit even in its most technical aspects has no merit. I would, therefore, dismiss this appeal with costs.

FAZL ALI, J.—I agree.

Appeal dismissed.

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March, 16.

Before Adami and Fazl Ali, JJ.

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Execution—mortgage decree laying down order in which mortgaged properties are to be sold—executing court, whether can change the order—High Court, privilege and prerogative of, to vacate erroneous order in the ends of justice when entire record is before the court—order without jurisdiction—whether such order can be validated by consent of parties.

While it is true that an executing court may, in certain exceptional cases where equities demand it, prescribe the order in which the mortgaged properties are to be sold, it has no

* Appeal from Original Order no. 163 of 1928, from an order of Babu Radha Krishna Prasad, Subordinate Judge of Additional Court, Patna, dated the 11th August 1928.

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such jurisdiction where the mortgage decree has definitely laid down the order in which the mortgaged properties are to be sold.

Rajkeshwar Prasad Narain Singh v. *Mohammad Khalilur Rahman*(1), *Rai Saheb Sarju Lal* v. *Baij Nath Prasad Singh*(2), and *Bhagwan Chandra Das* v. *Rai Saheb Dharam Narayan Das*(3), referred to.

It is the privilege and prerogative of the High Court, once a record is before it and it is found that the order passed is erroneous and so erroneous as manifestly to amount to an injustice, to exercise its power of superintendence to revise such order, or set it aside and direct such further proceedings to be taken as justice may require.

Brindaban Chandra Choubey v. *Gour Chandra Roy*(4), followed.

Appeal by one of the judgment-debtors.

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

[An application for review of the judgment was rejected.]

S. M. Mullick (with him *S. Dayal* and *Syed Ali Khan*), for the appellant.

Hasan Imam (with him *W. H. Akbari*, *B. N. Mitter*, *D. N. Das* and *A. H. Fakhruddin*), for the respondents.

FAZL ALI, J.:—This is an appeal by one of the judgment-debtors against an order passed by the Additional Subordinate Judge of Patna in the course of an execution proceeding. It appears that in 1917 one Saiyid Badsha Nawab of Patna City borrowed a sum of Rs. 1,25,000 by mortgaging certain immovable properties to the ancestor of the present decree-holder. He died on the 19th March, 1919, leaving two brothers

(1) (1924) 5 Pat. L. T. 223.
(2) (1922) 6 Pat. L. T. 390.
(3) (1924) 6 Pat. L. T. 392.
(4) (1919) 1 Pat. L. T. 467.

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and two sisters as his heirs. A portion of the mortgage debt had been paid off by the deceased mortgagor during his life-time and as the two sisters paid up their one-third share of the remaining mortgage debt, their share in the properties was released by the decree-holder. In 1926 the decree-holder brought a mortgage suit for the realisation of Rs. 63,000 odd which was alleged to be the amount due at the time and he impleaded in this suit the two brothers of the mortgagor who had not paid their share of the debt as defendants 1 and 2 and also certain other persons including the three daughters of defendant no. 1. The necessity of impleading these other persons arose because defendant no. 1 had transferred his share in some of the mortgaged properties in favour of his three daughters (defendants 4 to 6) under an instrument called tamliknama and had also transferred certain other mortgaged properties to defendants nos. 7 to 14 and 17. It may be mentioned here that under this tamliknama defendant no. 4, one of the daughters of defendant no. 1, was directed to pay a sum of Rs. 10,818 odd to the decree-holder and also certain sums of money were left with some of the other transferees so that they might be applied towards the liquidation of the share of defendant no. 1 in the mortgage debt. In the mortgage suit it was held that the mortgage had been split up and, therefore, the two brothers of the deceased were entitled to pay up their share of the mortgage debt separately. Further the Court having fully considered the equities arising in the case directed that the properties be sold in a particular order. The defendant no. 2 whose estate was under the management of the Court of Wards paid up his share of the debt and consequently execution was taken out by the decree-holder against those properties only which were in the possession of defendants 4 to 6 (the three daughters of defendant no. 1) and the other transferees. It appears that defendant no. 4 who is the appellant before us had not appeared in the mortgage suit and in the various petitions which

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have been filed on her behalf in the execution proceedings, it is stated that she being a pardahnashin lady and no summons having been served on her she could not properly represent her case before the original Court so as to secure a release of her properties by payment of her share of the debt. However that may be, it appears that throughout the execution proceedings she has expressed her willingness to pay her quota of the debt, that is to say, the amount mentioned in the tamliknama as payable by her. The first petition made by her was filed on the 10th December, 1927. By this petition she asked the Court in the first place to order the decree-holder to accept a certain sum of money which according to her was her quota of the debt and release the mortgaged properties which were in her possession. She also asked the Court in the alternative to direct that her properties be sold after the sale of the properties in possession of defendants nos. 3, 5, 14 and 17. This petition was resisted by the decree-holder as well as by some of the judgment-debtors and it is to be noted that the decree-holder in his petition of objection particularly laid stress upon the fact that the order of sale directed by the decree could not be changed by the executing Court. On the 21st April, 1928, the learned Subordinate Judge passed orders on the petition of judgment-debtor no. 4 and directed that on her depositing Rs. 15,500 in Court or paying it to the decree-holder the sale of her properties (which have been described in the execution proceedings as lots nos. 1 to 5) be postponed

> "unless the proceeds of the sale of other lots barring those of judgment-debtors 5 and 6 but including those belonging to judgment-debtors 10 and 11 offer an inadequate sum to satisfy the whole decretal amount."

The effect of this decision was that the order in which the properties had been directed to be sold in the mortgage decree was changed and a sum of Rs. 15,500 was actually paid by the appellant to the decree-holder. On the 28th July, 1928, the appellant filed another application to the learned Subordinate Judge in which

she drew his attention to certain circumstances particularly to the fact that in spite of her having paid the full amount of the mortgage debt proportionate to her share of the liability, her properties were in immediate danger of being sold. It may be mentioned here that according to the valuation of the Court the properties in possession of the appellant are worth only Rs. 8,302-8-0 whereas she had already paid a sum of Rs. 15,500 to the decree-holder. The appellant, therefore, asked in her petition that either the decree-holder be directed to restore Rs. 15,500 which had been paid by her to him or that the sale of her lot might be postponed till all the other mortgaged properties had been sold. This was in effect a petition asking the Subordinate Judge to re-consider his previous order. The learned Subordinate Judge while dealing with this petition characterised the payment of the sum of Rs. 15,500 to the decree-holder as a foolish act on the part of defendant no. 4 and further remarked that the petition had been filed after the appellant had felt the pinch of this foolish act. He also observed—

> "At this stage I am of opinion that she cannot ask the Court to revise the order in which the allotments of properties for sale have been arranged."

Now the position which has been created is manifestly a somewhat unfair one and one of great hardship to the appellant. She has paid Rs. 15,500 in cash to the decree-holder to save the properties which according to the valuation of the Court are worth only Rs. 8,302 and odd and yet the decree-holder wants to sell her properties as well as keep the money. It is also conceded that the original decree being a mortgage decree, there was no personal liability on the defendant no. 4 to pay any portion of the decree for the realisation of which the decree-holder was entitled only to sell the mortgaged properties. There is no doubt that the defendant no. 4 has gained very little by payment of Rs. 15,500 because even if the sale of her properties had not been postponed and her properties had been sold straightaway they could not in

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all probability have been sold for more than the amount paid by her to the decree-holder and she could have repurchased the properties herself. The decree-holder, on the other hand, has received a sum of money in cash which he might not perhaps have been able to realise if the properties of the defendant no. 4 had been sold at auction and has also in addition retained the right to sell the properties of defendant no. 4. This position, as the lower Court has observed, has been undoubtedly created by the appellant's own foolish act but unfortunately it was an act to which the Court below also lent countenance by its order, dated the 21st April, 1928, and the question, therefore, is whether the Court is entirely powerless to give relief to a party who has been placed in unfair position not only by reason of her own act but also by reason of an order passed by the Court.

The learned Advocate for the respondent vehemently contends that both the Court below as well as this Court are entirely powerless in the matter and lays particular stress on the fact that this is not an appeal against the order of the 21st April, 1928, in pursuance of which the sum of Rs. 15,500 was paid by the appellant to the decree-holder but an appeal against an order of a subsequent date by which the lower Court refused to revise its previous order. The learned Advocate for the respondent also refers to the principle of res judicata and estoppel in this connection and even goes so far as to say that the conduct of the appellant amounts to his entering into a contract with the decree-holder in pursuance of which a sum of Rs. 15,500 was paid to the latter. Now, although I have no doubt that this is neither a case of estoppel nor of res judicata, nor do I understand how the money which was obviously paid to the decree-holder in pursuance of a definite order of the Court, can be said to have been paid under a contract, yet I fully concede that this Court will not and should not interfere on the sole ground of hardship if it is found that the order passed by the lower Court is a legal and proper

order. Here, however, the point which has been argued on behalf of the appellant is that the order of the 21st April, 1928, was wholly without jurisdiction and it was, therefore, incumbent on the lower Court to put matters right and relieve the parties of any hardship that might have arisen in consequence of that order. It has also been pointed out that if the Court has no jurisdiction to pass an order, the order cannot be validated merely because some of the parties have consented to the order. Lastly it is urged that the decree-holder does not suffer in any way if he refunds the amount paid to him and the sale of the mortgaged properties proceeds as if no payment had been made by defendant no. 4. Now, it is well settled that a Court which passes a mortgage decree may also in certain circumstances and having regard to the equities of the case prescribe the order in which the mortgaged properties are to be sold—*see Rajeshwar Prasad Narain Singh* v. *Mohammad Khalilur Rahman*(1). It is also well established that an executing Court cannot go behind the decree which is sought to be executed. The question, therefore, which arises for consideration is whether the learned Subordinate Judge was competent to change the order in which the properties had been directed to be sold in the original mortgage decree, as he actually did, by his order of the 21st April, 1928. It is true that in some cases it has been held that an executing Court may, in certain exceptional cases where equities demand it, prescribe the order in which the mortgaged properties are to be sold. A different view, however, seems to have been taken in *Rai Saheb Sarju Lal* v. *Baij Nath Prasad Singh*(2) where it was observed by Das, J. that the holder of a mortgage decree has the conduct of the sale and is entitled to execute the decree against any of the mortgaged properties he pleases, and if any question of equity arises between the decree-holder and the persons to whom the equity

(1) (1924) 5 Pat. L. T. 223.
(2) (1922) 6 Pat. L. T. 390.

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of redemption in the mortgaged properties, or any of them, may have subsequently become vested, that equity can only be enforced by an independent suit for contribution and not in proceedings for execution. Nevertheless the same learned Judge again held in *Bhagwan Chandra Das* v. *Rai Saheb Dharam Narayan Das*(1) that the decree-holder is entitled to have all the mortgaged properties mortgaged to him advertised and put for sale, but when they become subject to sale, the Court can decide on just and equitable principles the order in which they should be sold. The learned Subordinate Judge has also cited certain cases in his order of the 21st April, 1928, in which the executing Court was allowed to prescribe the order in which the mortgaged properties were to be sold even though the original Court declined to go into the question. I do not, however, find any authority for the proposition that once the Court passing the mortgage decree had definitely laid down the order in which the mortgaged properties are to be sold, the executing Court can ignore the original decree and proceed to sell the properties in a different order in spite of the objections of decree-holder as well as some of the judgment-debtors. In my opinion, therefore, the order passed by the learned Subordinate Judge on the 21st April, 1928, by which he allowed the sale of the properties of the appellant to be postponed in consideration of her paying Rs. 15,500 to the decree-holder was without jurisdiction and, as I have already stated, this was pointed out by the decree-holder himself in the petition of objection filed by him on the 20th January, 1928. It is, however, urged that that order cannot be touched now because this appeal is not directed against it. I have, however, already stated that the application made by the appellant on 28th July, 1928, was virtually an application asking the Court to reconsider its previous order and in fact in this light the learned Subordinate Judge himself has taken this petition. The question, therefore, is if

(1) (1924) 6 Pat. L. T. 392.

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the learned Subordinate Judge refuses to vacate an order which is entirely without jurisdiction and his order is appealable, whether the appellate Court cannot vacate that order. I do not think that even giving full weight to the technical arguments advanced on behalf of the respondent it can be held that the appellate Court is not competent to do so. Mr. Shiveshwar Dayal appearing on behalf of the appellant drew our attention to the decision of this Court in *Brindaban Chandra Choubey* v. *Gour Chandra Ray*(1) where it was pointed out that it is the privilege and prerogative of the High Court once a record is before it and it is found that the order passed is erroneous and so erroneous as manifestly to amount to an injustice, to exercise its power of superintendence to revise such order, or set it aside and direct such further proceedings to be taken as justice may require. I do not think, however, that the present case need be placed on such a high ground, because apart from the powers of superintendence which this Court undoubtedly possesses and which it will not be slow to exercise in a proper case, I think it is open to this Court to give adequate relief to the appellant in this appeal. There is no doubt that the order of the learned Subordinate Judge passed on the 21st April, 1928, in pursuance of which the sum of Rs. 15,500 was deposited was without jurisdiction and the parties should be relegated to the former position as far as possible. In the present case all the properties excepting the properties belonging to the appellant and the judgment-debtors nos. 5 and 6 have been already sold and none of the parties affected by the sale objected to these sales excepting the appellant. The petition of the appellant was thrown out by the Court below on the ground that he was not competent to maintain an application under Order XXI, rule 90, and the appellant preferred an appeal against the order to this Court. Her appeal has been allowed and the case has been sent back to the Court below with

(1) (1919) 1 Pat. L. T. 467.

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a direction that it is to be heard and disposed of on its merits. The appellant, however, undertakes not to press that matter before the learned Subordinate Judge if this appeal is allowed and adequate relief is granted to her.

In these circumstances all that we need do is to place the appellant and the decree-holder respondent in the same position in which they were before the order of the 21st April, 1928, was passed. As the respondents nos. 5 and 6 and the other judgment-debtors took no steps within the time prescribed by law to have the sale of other properties set aside, the sale of those properties need not be disturbed. Thus I think that it will meet the ends of justice if we order and provide that the respondent decree-holder will be competent to sell the properties of the judgment-debtor no. 4 forthwith if he repays the amount of Rs. 15,500 to the appellant or deposits it to her credit in the Court below within three months from to-day. In case this money is not deposited the respondent decree-holder will still be entitled to sell the properties of the remaining judgment-debtors other than the appellant but not the property of the appellant. We have in passing this order taken into consideration the fact that as the mortgaged property in possession of the appellant (lots 1 to 5) has been valued by the Court below at Rs. 8,302-odd, the decree-holder respondents will not be in any way prejudiced if they elect not to sell these properties and keep the money, a course to which the appellant does not have any objection. The respondents nos. 5 and 6 also who are the only other parties interested in this appeal will not be prejudiced at all, because in any event their properties will be sold last of all as provided in the decree.

The order of the lower Court is, therefore, set aside and the appeal allowed on the terms already indicated. If the respondent decree-holder proposes to sell the properties of judgment-debtors nos. 5 and

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6 only they will sell them for the balance of the decretal amount due after giving cerdit for the sum of Rs. 15,500 paid to them by defendant no. 4. If, however, they return the money to the appellant within the time prescribed, the decretal amount will increase to that extent. Having regard to the circumstances of the case there will be no order as to costs.

ADAMI, J.—I agree.

FAZL ALI, J.

Appeal allowed.

CRIMINAL REFERENCE.

Before Macpherson and James, JJ.

NANDKESHWAR PRASAD SAHI

1932.

August, 30.

v.

SITA SARAN SAHI.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 145 *and* 146—*dispute concerning land, one party claiming joint possession while the other claiming exclusive possession —sections, whether applicable.*

A dispute between two parties one of whom claims joint possession while the other claims exclusive possession over the disputed land and contests the opposite party's right is within the contemplation of section 145 (and, therefore, of section 146), Code of Criminal Procedure, 1898.

Sham Lal Mahto v. *Rajendra Lal*(1), not followed.

Tarujan Bibi v. *Asamuddi Bepari*(2) and *Krista Alhadini Dasi* v. *Radha Syam Panday*(3), distinguished.

The only condition for a proceeding under section 145, terminating in a finding under sub-section (*4*) and an order under sub-section (*6*) or an order under section 146, is that

* Criminal Reference no. 42 of 1932, made by J. G. Shearer, Esq., I.C.S., Sessions Judge, Muzaffarpur, in his letter no. 1014, dated the 30th June/2nd July, 1932.

(1) (1920) 1 Pat. L. T. 594.
(2) (1900) 4 Cal. W. N. 426.
(3) (1902) 7 Cal. W. N. 118.

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the magistrate should be satisfied on information before him that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction. Thereupon he is to call for written statements from the parties concerned in the dispute " of their respective claims as respects the fact of actual possession of the subject of dispute ", and he is to determine whether any and, if so, which of the parties was at the date of the order initiating proceedings in such possession of the said subject. Because one set of persons claim exclusive possession over the major portion of the land while another set of persons claim to be in joint possession along with them of the entire land, the dispute may be difficult to decide, but it is in principle no less a question of disputed actual possession than if each party claimed exclusive possession of the entire area.

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

MACPHERSON AND JAMES, JJ.—This is a reference by the learned Sessions Judge of Muzaffarpur in respect of an order under section 146 of the Code of Criminal Procedure.

The dispute was between parties, one of which claimed exclusive possession over the major portion of the land in controversy and the other of which claimed to be entitled to joint possession along with the first party of the entire land.

The learned Sessions Judge has recommended that the order passed by the Magistrate under section 146 to this Court be set aside, relying upon the decision in *Sham Lal Mahto* v. *Rajendra Lal*(1) which is substantially in pari materia.

The matter first came before a single judge who referred it to a Division Bench so that the decision relied upon might be considered. It was the decision of a single judge and appears to be based upon a

(1) (1920) 1 Pat. L. T. 594.

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similar decision of another single judge who perhaps failed to appreciate that the decisions on which he relied, are not really to the purpose. The two decisions in question are based upon two cases decided by the Calcutta High Court: *Tarujan Bibi* v. *Asamuddi Bepari*(1) and *Krista Alhadini Dasi* v. *Radha Syam Panday*(2). *In Tarujan Bibi* v. *Asamuddi Bepari*(1) the magistrate had found that both parties were entitled to joint possession of the land in dispute; but he directed that one of them should hold actual possession until evicted by due course of law. The court pointed out that the order that only one of the parties should be maintained in possession was not based on any finding that he and he alone had actual possession when cognizance of the matter in dispute was taken under section 145. In his explanation to the Court the magistrate said that both parties were in joint possession, so that it was manifest that the order evicting one of them under section 145 in the absence of a finding that his joint possession had been obtained by the recent use of force, could not be maintained.

In *Krista Alhadini Dasi* v. *Radha Syam Panday*(2) the first party had purchased the property at a sale in execution and had obtained delivery of possession. The second party claimed that their share in the property was unaffected by the sale; and the magistrate attached the property under section 146 of the Code of Criminal Procedure. In his judgment he said that the second party's claim from the beginning was restricted to an undivided *share* in the land. It was pointed out by Stevens and Mitter, JJ. that the written statement of the second party asserted a claim not to an undivided share but to undivided possession; and the learned Judges remarked that if their claim was merely to an undivided *share* the order of the

(1) (1900) 4 Cal. W. N. 426.
(2) (1902) 7 Cal. W. N. 118.

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Deputy Magistrate was bad in view of the decision in the case of *Tarujan Bibi* v. *Asamuddi Bepari*(1), in which it was held that " section 145 of the Code of Criminal Procedure contemplates a dispute between two parties each of which asserts the right to hold actual possession of the property as against the other and not a dispute between parties claiming to hold joint possession and neither contesting such right ". The learned Judges did not say that section 145 did not contemplate a dispute between two parties one of whom claimed joint possession, while the other claimed exclusive possession and contested the opposite party's right; but they distinguished between a claim to an undivided share and a claim to undivided possession, and treated the magistrate's order as bad because he dealt with the claims to shares rather than with the claims to possession. They went on, however, to point out that even if there had been a claim on each side to exclusive possession, the order of the magistrate would have been wrong, because the first party had been put in possession of the property by the civil court; and it would be the duty of the criminal court to uphold the status of the first party as established by the civil court. If any person had been wrongfully dispossessed as the result of the execution proceedings, he would have an opportunity of making an application in the proper form to have the matter dealt with by the civil court. On the views expressed by the learned Judges, it would appear that the proper order for the learned magistrate would have been in that case to declare the first party entitled to possession; but they contended themselves with setting aside the order attaching the land under section 146 of the Code of Criminal Procedure. It does not appear that this decision affords any justification for the view that although the possession of a party who has been placed in possession by the civil court must

(1) (1900) 4 Cal. W. N. 426.

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be protected against an opposite party claiming exclusive possession, the criminal courts are to be powerless to make any order under section 145 if the opposite party should merely allow the claim of the first party to possession of an undivided share. Nor does it afford justification for the view that the provisions of section 145 do not apply to a case in which one party claims exclusive possession, and a breach of the peace is likely to ensue, from that party's attempting to exclude another party who has hitherto enjoyed joint possession, or to resist the attempt of the other party to disturb his possession by enforcing a claim to joint possession with himself.

All that was actually decided in *Krista Alhadini Dasi* v. *Radha Syam Panday*(1) was that the provisions of section 145 ought not to be applied to defeat the effect of delivery of possession by the Civil Court. For the rest, the learned Judges merely observed that where each of the parties admitted the right of the other to an undivided share, both being in joint possession, the provisions of section 145 would not apply; and the Magistrate ought not to attach the property because he could not determine the respective shares; (nor to determine the shares, because this is rather a question of title than of possession, in the sense of the term as used in the Code of Criminal Procedure). But when one party claims definite possession of certain land with definite exclusion of the other, the case is altogether different. The dispute is here regarding possession, in the strictest sense of the term.

In our opinion this reference must be discharged. We are unable to accept as correct the view of the law which found favour in the decisions of this Court which have been referred to. The only condition for

(1) (1902) 7 Cal. W. N. 118.

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a proceeding under section 145, terminating in a finding under sub-section (4) and an order under sub-section (6) or an order under section 146, is that the magistrate should be satisfied on information before him that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction. Thereupon he is to call for written statements from the parties concerned in the dispute 'of their respective claims as respects the fact of actual possession of the subject of dispute' and he is to determine whether any and which of the parties was at the date of the order initiating proceedings in such possession of the said subject. The jurisdiction of the Magistrate to initiate proceedings under section 145 is subject only to the limitations provided in the section itself. It is altogether wrong to graft limitations upon the enactment which the legislature has not placed there. In the present instance and in instances of a like kind there exists a dispute likely to cause a breach of the peace concerning the actual possession of land. Because one set of persons claim exclusive possession over the major portion of it while the other set of persons claim to be in joint possession with them of the entire land, the dispute may be difficult to decide (though it need not be if the Magistrate remembers what he has to decide and does not wander away into complicated or but dimly relevant questions of civil right), but it is in principle no less a question of disputed actual possession than if each party claimed exclusive possession of the entire area. In our judgment there is nothing in section 145 or elsewhere in the Code of Criminal Procedure which renders it inapplicable to the case referred and similar cases.

We, therefore, discharge the reference.

Reference discharged.

APPELLATE CIVIL.

Before Rowland and Agarwala, JJ.

1932.

September, 2, 6.

BADRI DAS

v.

PASUPATI BANARJI.*

Limitation Act, 1908 (*Act IX of* 1908), *section* 20—*mortgage by a single mortgagor—debt single and indivisible—decree on mortgage—payment towards interest by person inheriting part of mortgaged property—payment, whether effective against purchaser of equity of redemption in another part of mortgaged property—" person liable to pay ", meaning of.*

Where the mortgage is entered into by a single mortgagor and the debt is a single debt and the liability is one and indivisible, a payment towards interest, due under the mortgage decree, made before the expiry of the period prescribed for the execution of the decree, by a person who has inherited a part of the mortgaged property, is effective to give a fresh start to limitation under section 20 of the Limitation Act, 1908, not only against the successor of the mortgagor who made the payment but also against a person who, prior to the payment, has purchased the equity of redemption in another part of the property.

Raja Rajtilak Narayan Suri Roy v. *Mafizaddi Tapadar*(1), *Krishna Chandra Saha* v. *Bhairab Chandra Saha*(2), *Domu Lal Sahu* v. *Roshan Dobey*(3), *Roshan Lal* v. *Kanhaiya Lal*(4), *Lewin* v. *Wilson*(5), *Chinnery* v. *Evans*(6), *Askaram Sowkar* v. *Venkataswami Naidu*(7), *Sarada Charan Chakravarty* v. *Durgaram De Sinha*(8), *Velayudam Pillai* v. *Vaithyalingam*

* Circuit Court, Cuttack. Appeal from Appellate Order no. 12 of 1931, from an order of Mr. S. K. Das, I.C.S., Additional District Judge of Cuttack, dated the 7th April, 1931, reversing the decision of Babu Sachindranath Ganguli, Munsif, 2nd Court, Cuttack, dated the 8th May, 1930.

(1) (1926) 44 Cal. L. J. 475.
(2) (1905) I. L. R. 32 Cal. 1077.
(3) (1906) I. L. R. 33 Cal. 1278.
(4) (1918) I. L. R. 41 All. 111.
(5) (1886) 11 A. C. 639.
(6) (1864) 11 H. L. C. 115.
(7) (1920) I. L. R. 44 Mad. 544.
(8) (1910) I. L. R. 37 Cal. 461.

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Pillai(1), *Achola Sundari Debi* v. *Doman Sundari Debi*(2) *and Ibrahim* v. *Jagdish Prasad*(3), followed.

Ahsanullah v. *Dakhini Dai*(4) and *Arjun Ram Pal* v. *Rohima Banu*(5), dissented from.

Jogesh Chandra Saha v. *Monindra Narain Chakravarty*(6), *Sarab Narain Das* v. *Top Ojha*(7), *Gopal Daji Sathe* v. *Gopal*(8), *Brajendra Kishore Roy Chowdhury* v. *Hindustan Co-operative Insurance Society, Limited*(9), *Thayammal* v. *Muthukumaraswami*(10), *Muthu Chettiar* v. *Muhammad Hussain*(11) and *Chandra Kanta Dhar* v. *Ramdin Poddar*(12), distinguished.

Chasi Khan v. *Thakur Kishori Ramanji Maharaj*(13), referred to.

Per AGARWALA, J.—In the case of a debt secured by a mortgage the debt is one although the property pledged as security for its repayment may consist of more than one item and although the various items may belong to more than one person.

The liability for a mortgage debt is indivisible and no splitting up of the security avails to split up the liability, unless the mortgagee consents to it. A payment of interest by a mortgagor judgment-debtor, therefore, is a payment by a "person liable to pay the debt", within the meaning of section 20(1) of the Limitation Act.

Appeal by the judgment-debtor.

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

B. N. Dutta and *H. P. Bhagat*, for the appellant.

(1) (1912) 17 Ind. Cas. 619.
(2) (1925) 90 Ind. Cas. 774.
(3) (1926) 99 Ind. Cas. 424.
(4) (1905) I. L. R. 27 All. 575.
(5) (1912) 14 Ind. Cas. 128.
(6) (1932) A. I. R. (Cal.) 620.
(7) (1916) 43 Ind. Cas. 351.
(8) (1903) I. L. R. 28 Bom. 248.
(9) (1917) I. L. R. 44 Cal. 978.
(10) (1929) A. I. R. (Mad.) 881.
(11) (1919) 55 Ind. Cas. 763.
(12) (1912) 15 Cal. L. J. 251.
(13) (1929) A. I. R. (All.) 380.

S. P. Das Gupta and *S. C. Chattarji*, for the respondents.

ROWLAND, J.—The question for decision is whether an application for execution presented by the respondent was barred by limitation.

Balaram Bhagat on 1st October, 1913, mortgaged three properties to Pasupati Banarji respondent no. 1. Subsequently he sold one of the properties to Richha Ram, father of appellant Badri Das. Balaram Bhagat died and his property passed to his grandson Deb Narayan Bhagat, respondent no. 2. Pasupati sued on his mortgage impleading Deb Narayan Bhagat and Richha Ram as defendants and obtained preliminary decree on the 17th September, 1920, which was made final on the 2nd August, 1921. His first application to execute the decree was presented on 20th March, 1925, alleging that a payment of Rs. 100 towards interest had been made by Deb Narayan Bhagat on 9th May, 1924, and duly endorsed on the back of the copy of the mortgage decree and that he was entitled to execute his decree against both the judgment-debtors within three years of that payment. Notices were issued to the judgment-debtors but further steps were not taken and the execution was dismissed for default on 29th April, 1925. A second application was presented on 3rd December, 1925, which has led eventually to the present appeal. The execution proceeded to sale of all three properties on 17th March, 1926, they were purchased by the decree-holder Pasupati Banarji, the sale was confirmed on 20th April, 1926, and delivery of possession was taken on 8th September, 1926. Richha Ram on 29th September, 1926, presented two objections: one was under Order XXI, rule 90, for setting aside the sale of the property which was in his hands: that was numbered as Miscellaneous Case 94 of 1926: the other was under section 47, Code of Civil Procedure, and the contention was that the execution commenced on 20th

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March, 1925, was beyond time. That objection was numbered as Miscellaneous Case 93 of 1926 and has given rise to the present appeal. It was at first dismissed by the Munsif on the ground that Richha Ram not having taken an objection in the former execution case could not raise this point now, being barred by the principle of res judicata. The District Judge dismissed an appeal from that decision; but on second appeal the case was remanded for disposal according to law after coming to a finding on the facts. It has now been held that the payment of Rs. 100 was in fact made on 9th May, 1924, and the District Judge has held on the authority of *Raja Rajtilak Narayan Suri Roy* v. *Mafizaddi Tapadar*(1) that the payment was effective to give a fresh start to limitation not only against the successor of the mortgagor who made the payment but also against the purchaser of the equity of redemption in lot 1 of the property. During the above proceedings Richha Ram, the purchaser of the equity of redemption, died and is represented now by his son Badri Das, the appellant.

In appeal the contention is that the payment kept the debt alive only against the person making it and, therefore, the decree was only capable of execution against the property in the hands of Deb Narayan Bhagat. Reliance is placed on *Jogesh Chandra Saha* v. *Monindra Narain Chakravarty*(2) and on *Sarab Nath Das* v. *Top Ojha*(3). We do not understand those decisions as laying down any general proposition that a payment by one debtor can only keep alive the liability as against himself. So wide a proposition would be contrary to principles which are too well established to be now called in question. In *Krishna Chandra Saha* v. *Bhairab Chandra Saha*(4) where a payment had been made by the

(1) (1926) 44 Cal. L. J. 475.
(2) (1932) A. I. R. (Cal.) 620.
(3) (1916) 43 Ind. Cas. 351.
(4) (1905) I. L. R. 32 Cal. 1077.

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mortgagor and it was contended that this did not give a fresh start to limitation as against a subsequent transferee of the equity of redemption. Maclean, C.J. rejected that contention following the principle of *Chinnery* v. *Evans*(1) and observing " that a mortgagee cannot, by the act of the parties entitled only to the equity of redemption, be deprived of his right to resort to any estate comprised in his mortgage so long he has not released or given it up and so long as that mortgage is legally kept alive ". This decision was followed in *Domu Lal Sahu* v. *Roshan Dobay*(2) where Maclean, C.J. after quoting from section 20 of the Limitation Act observed that " the words of the section are general and plain, when the legislature intends that a fresh period of limitation is to operate as against certain persons only it says so in distinct terms: *see* section 18 of the Act. There is nothing in the section to indicate that the extension is only to operate against the person making the payment ". These two decisions were approved by a Division Bench of the Allahabad High Court in *Rosan Lal* v. *Kanhaiya Lal*(3) where it was held that the view taken was in agreement with the observations of Lord Hobhouse in *Lewin* v. *Wilson*(4) pointing out the distinction between acknowledgment and payment, " payment is certain to be made only by those who have some duty or interest to pay. As regards the recipient, so long as he is paid according to the intention of the contracting parties, he is in full enjoyment of his bargain and is not put upon any further assertion of his rights ". In the Madras High Court in *Askaram Sowkar* v. *Venkataswami Naidu*(5) Wallis, C.J. and Ramesam, J. dealt with the case of a payment made by the purchaser of the equity of redemption and held that such payment extended limitation not only against the person

(1) (1864) 11 H. L. C. 115.
(2) (1906) I. L. R. 33 Cal. 1278.
(3) (1918) I. L. R. 41 All. 111.
(4) (1886) 11 A. C. 639.
(5) (1920) I. L. R. 44 Mad. 544.

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making it but also against the original mortgagors, citing observations of Lord Westbury in *Chinnery* v. *Evans*(1). In *Sarada Charan Chakravarty* v. *Durgaram De Sinha*(2) which was a case turning on the question whether a mortgage debt incurred by the father of the defendants was kept alive by a payment made by one of them, it was said " the entire equity of redemption descended to the sons of the mortgagor: they were jointly liable for the debt, not as co-mortgagors, but as representing the sole mortgagor, their father. There is nothing in section 20 of the Limitation Act to warrant the belief that the extended period of limitation is intended to operate only against the persons making the payment ". In the Madras High Court, again, it was held in *Velayudam Pillai* v. *Vaithyalingam Pillai*(3) that " section 20 requires that the payer should be one liable to pay the debt and provides that the result of the payment would be to give to the creditor a fresh period of limitation from the date of the payment. It does not restrict the benefit accruing to the creditor with respect to his debt to his remedy against the payer alone. According to the language of the section the debt being kept alive, the result must be to make it enforceable against any one liable for it ". *Raja Rajtilak Narayan Suri Roy* v. *Mafizaddi Topdar*(4) follows the decisions in *Krishna Chandra Saha* v. *Bhairab Chandra Sah*(5) and *Domu Lal Sahu* v. *Roshan Dobay*(6): payment by a mortgagor keeps a mortgage debt alive against the purchaser of the equity of redemption. This decision was followed in *Achola Sundari Debi* v. *Doman Sundari Debi*(7). It was again asserted that " the person liable to pay " in section 20 of the Limitation Act does not mean the

(1) (1864) 11 H. L. C. 115.
(2) (1910) I. L. R. 37 Cal. 461.
(3) (1912) 17 Ind. Cas. 619.
(4) (1926) 44 Cal. L. J. 475.
(5) (1905) I. L. R. 32 Cal. 1077.
(6) (1906) I. L. R. 33 Cal. 1278.
(7) (1925) 90 Ind. Cas. 774.

entire body of persons liable to pay the debt but any individual who would be liable for the whole debt; and this decision was approved in the Allahabad High Court in *Ibrahim* v. *Jagdish Prasad*(1).

I now turn to consider the cases in which this principle has not been applied. In *Gopal Daji Sathe* v. *Gopal bin Sonu Bait*(2) Jenkins, C.J., dealing with the question whether payment of interest by a debtor would give a fresh start for limitation against his surety also, answered the question in the negative holding that the surety's debt was not the same debt as the debt of his principal and that the principal was not the person liable to pay the debt of the surety. The expressions used imply that had it been otherwise, payment would have been available to the decree-holder as an answer to a plea of limitation. In *Brajendra Kishore Roy Chowdhury* v. *Hindustan Co-operative Insurance Society, Limited*(3) Sanderson, C.J. and Mukharji, J. followed the above decision drawing the same distinction between the debt of the surety and the debt of the principal debtor. Reference was made to *Domu Lal Sahu* v. *Roshan Dobay*(4) which was distinguished on the ground that in that case " there had been only one debt in question, namely, the mortgage debt; and inasmuch as the mortgagor had made payments to the mortgagee, it was held that such payments affected not only the mortgagor but the respondent who was the purchaser of the equity of redemption and who of course claimed through the mortgagor ". In the case before him, there being two distinct debts, Sanderson, C.J. held that the fresh period of limitation created under section 20 by the payment of interest by the principal debtor could be only in respect of the debt upon which the interest was paid. *Jogesh Chandra Sahu* v. *Mohindra Narain Chakravarty*(5) was a decision

(1) (1926) 99 Ind. Cas. 424.
(2) (1903) I. L. R. 28 Bom. 248.
(3) (1917) I. L. R. 44 Cal. 978.
(4) (1906) I. L. R. 33 Cal. 1278.
(5) (1932) A. I. R. (Cal.) 620.

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regarding persons who had jointly borrowed money on a simple bond and came as joint contractors, within the terms of section 21(2) of the Limitation Act. It followed that payment by one of those persons did not give a new start for limitation as against the other. We have been referred to two Madras decisions—*Muthu Chettiar* v. *Muhammad Hussain*(1) and *Thayammal* v. *Muthukumaraswami*(2). Both these were cases of mortgages originally entered into by two or more persons and falling within the terms of section 21(2) of the Limitation Act, joint mortgagors being treated as co-contractors within the meaning of that sub-section. In none of these does the decision (apart from obiter dicta) involve a denial of the principle that payment by one debtor may affect limitation against others. In *Ahsan-ul-lah* v. *Dakhini Dei*(3) Blair and Banarji, JJ. said, " On general principles one debtor by acknowledging a debt or making a part payment otherwise than an agent of other debtors cannot keep alive the right of creditors against those debtors ". No authority was cited in support of this view. This decision was approved in the Calcutta High Court in *Chandra Kanta Dhar* v. *Ramdin Poddar*(4)—a case of acknowledgment and not of payment—in which it had been held by the lower Court that the acknowledgment was effectual against the person making it; and not against his co-mortgagor and execution had been allowed to proceed against the defendant who made the acknowledgment and not against others. The only question to be decided by the High Court was whether the debtor who had made the acknowledgment could repudiate liability; and it was held he could not. No question as to the liability of his co-debtors arose. The above Allahabad decision has not, as I have shown, been followed in more recent cases of the same Court, and, with great

(1) (1919) 55 Ind. Cas. 763.
(2) (1929) A. I. R. (Mad.) 881.
(3) (1905) I. L. R. 27 All. 575.
(4) (1912) 15 Cal. L. J. 251.

respect, I propose not to follow it. Another Calcutta case of *Arjun Ram Pal* v. *Rohima Banu*(1) was a decision by a single Judge as to the effect of a payment by one of the co-heirs of the original mortgagor. With great respect, I do not think the learned Judge took a correct view of the law in holding that limitation was only saved as against the person making the payment: *Sarada Charan Chakravarty* v. *Durgaram De Sinha*(2). There remains one decision of the Patna High Court in *Sarab Narain Das* v. *Top Ojha*(3) on which special reliance is placed by the appellant as being a decision of this Court. It is necessary therefore to state the facts of that case.

The mortgage in question had been created not by a single mortgagor but by two widows and at the time of the suit both widows were dead. There were five defendants who had succeeded as reversioners to the property on the death of the widows. One of the reversioners had made a payment on account of interest and the question was whether it saved limitation as against himself only or as against all the defendants. It was held that the payment or acknowledgment was binding only on the person who made it. *Sarada Charan Chakravarty* v. *Durgaram De Sinha*(2) was distinguished as being a case in which the debtors had inherited an indivisible liability on an indivisible debt whereas in the present case the five reversioners must be regarded as co-mortgagors inasmuch as they had succeeded to the interests of the original mortgagors and held separate and distinct shares in the property. The Patna case was followed in *Muthu Chettiar* v. *Muhammad Hussain*(4) above cited. But these decisions seem to be applicable only to cases in which the original contract was entered

(1) (1912) 14 Ind. Cas. 128.

(2) (1910) I. L. R. 37 Cal. 461.

(3) (1916) 43 Ind. Cas. 351.

(4) (1919) 55 Ind. Cas. 763.

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into by more than one mortgagor. Where the mortgage was entered into by a single mortgagor and subsequently the equity of redemption has passed to his successor, but other parties have acquired an interest in the equity of redemption that fact would not make it a case of co-mortgagors or co-contractors so as to give the parties other than those who made the payment the benefit of section 21(*2*) of the Limitation Act. In *Ibrahim* v. *Jagdish Prasad*(1) Dalal and Pullam, JJ. of the Allahabad High Court declined to follow the Patna decision, the case before them being of a mortgage originally created by a single executant. The distinction is not expressly drawn in the judgment and the headnote is misleading. There was not, I think, any question of co-mortgagors in that case. Be that as it may, the Allahabad High Court had no hesitation in re-affirming the principle that where several persons are interested in the equity of redemption payment by any one of them can keep alive the debt as against all " according to the language of the section the debt being kept alive the result must be to keep it enforceable against any one liable for it ". The cases of *Ghasi Khan* v. *Thakur Kishori Ramanji Moharaj*(2) and *Achola Sundari Debi* v. *Doman Sundari Debi*(3) went further and applied the same principle even where the original mortgage had been created by two persons. It is not necessary to express any opinion as to the correctness of those decisions which are in conflict with *Sarab Narain Das* v. *Top Ojha*(4); but it seems to emerge clearly from a general view of the authorities cited that though section 20 may not apply to one debtor by reason of a payment made by another debtor in cases where the debts or liabilities are distinct, as in *Gopal Daji Sathe* v. *Gopal bin Sonu Bait*(5) and *Brajendra Kishore Roy Chowdhury* v. *Hindustan Co-operative*

(1) (1926) 99 Ind. Cas. 424.
(2) (1929) A. I. R. (All.) 380.
(3) (1925) 90 Ind. Cas. 774.
(4) (1916) 43 Ind. Cas. 351.
(5) (1903) I. L. R. 28 Bom. 248.

Insurance Society, Ld.(1) and though section 21(2) may apply where a mortgage has been entered into by two or more persons as in *Muthu Chettiar* v. *Muhammad Hussain*(2), *Sarab Narain Das* v. *Top Ojha*(3) and *Thayammal* v. *Muthukamaraswami*(4) or where two persons jointly execute a simple money bond, *Jogesh Chandra Saha* v. *Manindra Narayan Chakravarty*(5) limitation is saved where the debt is a single debt and the liability is one and indivisible notwithstanding that a part of the property liable for the debt may be in hands other than those of the person making the payment. Such a case falls within section 20 and is not taken out of its operation by section 21(2) of the Act.

I would, therefore, dismiss the appeal with costs to the contesting respondent.

AGARWALA, J.—The question for decision is whether a payment towards interest, due under a mortgage decree, made before the expiry of the period prescribed for the execution of the decree, by a person who has inherited a part of the mortgaged property, is binding on a person who prior to the payment, has purchased another part of the mortgaged property in execution of a money decree, so as to extend the period of limitation for executing the mortgage decree and enabling the decree-holder to proceed against the portion of the property sold in execution of the money decree.

The contention of the decree-holder is that the payment of interest provides him with a fresh starting point for the execution of his decree by reason of the provisions of section 20(1) of the Limitation Act, 1908. The material words of that section are:

"Where interest on a debt is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt,

(1) (1917) I. L. R. 44 Cal. 978.
(2) (1919) 55 Ind. Cas. 763.
(3) (1916) 43 Ind. Cas. 351.
(4) (1929) A. I. R. (Mad.) 881.
(5) (1932) A. I. R. (Cal.) 620.

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or by his agent duly authorized in his behalf, a fresh period of limitation shall be computed from the time when the payment was made."

The first question, therefore, in the present case is: who is the person liable to pay the debt within the meaning of section 20(*1*)? In the case of a debt secured by a mortgage the debt is one although the property pledged as security for its repayment may consist of more than one item and although the various items may belong to more than one person. The liability for a mortgage debt is indivisible and no splitting up of the security avails to split up the liability, unless the mortgagee consents to it. A payment of interest by a mortgagor-judgment-debtor, therefore, is a payment by a person liable to pay the debt. That being so, the next question is: Against what property is the liability enforceable? And the answer to this question is that so long as the mortgage is alive the mortgagee is entitled to enforce it against all or any part of the mortgaged property—*Chinnery* v. *Evans*(1). To my mind the position, thus far, is perfectly clear. But it is contended that if the property against which it is sought to enforce the liability has passed into the hands of another, the latter is not bound by any payment that has been made by a person whom he has not authorized to make the payment, and reliance is placed on sub-section (*2*) of section 21 of the Limitation Act. Section 21 would be relevant if it were necessary for us to determine whether the payer was or was not the authorized agent of the objector within the meaning of section 19 or 20. That, in my opinion, is not the question required to be determined in cases of the present kind. The only enquiry we are concerned with is: Was the payer a person liable for payment of the debt and, if so, what is the effect of the payment? It is incontrovertible that the payer in this case was liable to pay the debt, and that the payment provided a fresh *terminus a quo* for its

(1) (1864) 11 H. L. C. 115.

realization. The debt, being alive, is enforceable against every item of the mortgaged property, and but for certain cases which have been cited before us I should have thought the contrary proposition to be unarguable. The first of these cases is *Arjun Ram Pal* v. *Rohima Banu*(1), where it was held that a payment of interest by one of the heirs of a deceased mortgagor did not extend the period of limitation against purchasers from the other heirs. That was a case decided by Coxe, J., sitting singly, in which the learned Judge did not consider himself bound by an observation made by a Division Bench of the same Court in *Sarada Charan Chakravarti* v. *Durga Ram De Sinha*(2) to the effect that "there is nothing in section 20 of the Limitation Act to warrant the belief that the extended period of limitation is intended to operate only against the person making the payment". The decision in *Arjun Ram's*(1) case was approved in *Jogesh Chandra Saha* v. *Manindra Narayan Chakravarti*(3), which, according to the report, was a case of a "simple money bond". The learned Judges who decided that case referred to the Division Bench decision of their own Court in *Achola Sundari Debi* v. *Doman Sundari Debi*(4) but remarked that in that case, "It is not said in so many words that the period of limitation is extended against co-mortgagors by a payment made by one of them". If the learned Judges in *Achola Sundari's*(4) case did not say this in "so many words" their decision nevertheless depended on this being their view. In fact they said that the proposition that a payment to be effective under section 20 must be made by all the co-mortgagors together was "a novel one". The appellant has also relied on the decision in *Chandra Kumar Dhar* v. *Ramdin Poddar*(5). That was a case in which the lower appellate Court had held

(1) (1912) 14 Ind. Cas. 128.
(2) (1910) I. L. R. 37 Cal. 461.
(3) (1932) A. I. R. (Cal.) 620.
(4) (1925) 90 Ind. Cas. 774.
(5) (1912) 15 Cal. L. J. 251.

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that an acknowledgment of a debt by one of several joint judgment-debtors saved limitation against the maker of the acknowledgment. The latter appealed to the High Court, and the only question before their Lordships was the effect of the acknowledgment as regards the maker and not its effect against the other judgment-debtors. In *Muthu Chettiar* v. *Muhammad Hussain*(1) the Madras High Court held that co-mortgagors are co-contractors within the meaning of section 21(*2*) and this decision was applied in *Thayammal* v. *A. T. Muthukumaraswami Chettiar*(2), a case relied on by the appellant. As I have already indicated, we are not concerned with section 21(*2*) in the present appeal, but with section 20. The last case on which the appellant relies is a decision of our own Court in *Sarab Narain Das* v. *Top Ojha*(3) in which two widows had mortgaged certain lands for legal necessity. The equity of redemption eventually passed to their husbands' reversioners who inherited separate and distinct shares in the property. Their Lordships held that a payment by one of these reversioners did not bind the others. That case is distinguishable from the present on the ground that it was a case in which the mortgage was by two persons and it may be that considerations may arise in such a case different from those which arise in one like the present where the mortgage was executed by one person only. I do not, as at present advised, consider that that would be the case, but for the purpose of the present appeal it is sufficient to observe that the mortgage in the present instance was by a sole mortgagor whose successor was liable for the payment of the debt.

I would, therefore, dismiss this appeal.

Appeal dismissed.

(1) (1919) 55 Ind. Cas. 763.
(2) (1929) A. I. R. (Mad.) 881.
(3) (1916) 43 Ind. Cas. 351.

APPELLATE CIVIL.

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

1932.

September, 15.

GANESH LAL SARAWGI

v.

SANEHI RAM.*

Provincial Insolvency Act, 1920 (Act V of 1920), sections 13 and 24—petition by debtor—requirements of law—court, duty of, to be satisfied as to the truth of the statements in the petition—creditors, whether entitled to adduce evidence to throw discredit on the statements of the debtor—petition, hearing of, not a formal matter—tendency of courts deprecated.

Section 13 of the Provincial Insolvency Act imposes upon the petitioning debtor the obligation to state the amount and particulars of all his property and of all his debts and he is to make a statement that he is unable to pay his debts.

Section 24 of the Act lays down :—

"(1) On the day fixed for the hearing of the petition, or on any subsequent day to which the hearing may be adjourned the Court shall require proof of the following matters, namely :—

(a) that the creditor or the debtor, as the case may be, is entitled to present the petition :

Provided that, where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are prima facie grounds for believing the same and the Court, if and when so satisfied, shall not be bound to hear any further evidence thereon;

.....

(2) The Court shall also examine the debtor, if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, and the creditors shall have the right to question the debtor thereon."

Held, that the court must treat the evidence produced by following the procedure prescribed in section 24 as

* Appeal from Original Order no. 239 of 1931, from an order of G. Monahan, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 4th August, 1931.

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material to its decision as to whether or not to allow the petition and in deciding whether such evidence has satisfied the Court that there are prima facie grounds for believing the statements in the petition.

The statements in the petition by themselves, if merely repeated formally in the evidence, are not sufficient prima facie grounds for believing such statements.

The creditors are equally entitled to adduce such evidence as they think fit to throw discredit upon the statements in the petition.

There is a wrong tendency for Courts administering the Insolvency Act to believe that the hearing of a petition is a more or less formal matter and that if the petition is, as it were, merely verified by the evidence of the debtor the Court is bound to accede to the petition. It is the duty of the Court to be satisfied prima facie and after following the necessary procedure and making the necessary investigation to come to a conclusion that the statements by the debtor are true.

The procedure of insolvency is for the protection of creditors quite as much as for the protection of debtors.

Appeal by the creditor.

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

Hasan Imam and *S. S. Rakshit*, for the appellant.

Raghosaran Lal, for the respondent.

COURTNEY TERRELL, C.J.—This miscellaneous appeal is against an order of the Judicial Commissioner of Chota Nagpur dealing with the petition of two persons, Sanehi Ram and Aliar Ram, who are said to have carried on business in partnership and who applied for adjudication of insolvency. The petition set forth a schedule of debts the principal creditor being the appellant in this case whose debt was said by the petitioners to amount to Rs. 2,835. The schedule set forth other debts which, we are told by the learned Advocate on behalf of the debtors, are

mainly, as in the case of the appellant, for goods supplied on credit. The younger of the two petitioners gave evidence before the Judicial Commissioner, the elder being his father, and it was stated that the elder was ill. The younger petitioner in his evidence states that the petitioning debtors carried on a business in lac in the district of Palamau and the debts which totalled Rs. 6,530 were for the greater part, as I have said, in respect of goods supplied on credit, the appellant creditor having supplied a very large quantity of cloth. The petition also scheduled a trifling quantity of moveable property and the only immoveable property scheduled was Rs. 1,000 in respect of the house upon which it was said that a mortgage was held and the amount of the mortgage debt was set down amongst the other debts which the petitioners owed. They described themselves as Banias carrying on business in lac and the evidence of the younger petitioning debtor given in chief was of the briefest possible character. He stated that the debts of the firm amounted to Rs. 6,530 and the assets were worth only Rs. 300 or Rs. 400. He was unable to pay his debts and had concealed none of his assets. He was willing to place all his assets at the disposal of the Court and he stated that he suffered the losses which had brought about his insolvency in connection with the lac business. He then stated in cross-examination that he kept no books of account and that whenever he was supplied with goods on credit he merely signed the creditor's books. This was an unimpressive statement and two witnesses were called on behalf of the creditor who stated that they knew the petitioning debtors and that in fact they did keep books of account.

The learned Judicial Commissioner apparently thought that the requirements of the law was that he must simply have the evidence of the petitioning debtors to, as it were, merely verify the statements in the petition. That, however, is not the case. Section 13 of the Provincial Insolvency Act imposes

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upon the petitioning debtor the obligation to state the amount and particulars of all his property and of all his debts and he is to make a statement that he is unable to pay his debts. The requirements of such a petition are set forth in section 13 of the Act. Section 24 of the Act imposes upon the Court the duty of requiring proof of the following matters :—

"(a) that the creditor or the debtor, as the case may be, is entitled to present the petition :

Provided that, where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are prima facie grounds for believing the same."

Under sub-section (*2*)

" The Court shall also examine the debtor, if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, and the creditors shall have the right to question the debtor thereon."

The Court in this case does not seem to have proceeded to carry out that obligation imposed upon it by sub-section (*2*). Moreover this procedure is to be adopted as a preliminary to the decision as to whether to grant the petition or not and, therefore, the matters disclosed by that procedure are material to be taken into consideration. Otherwise sub-section (*2*) would have to be considered superfluous.

By sub-section (*3*)

" The Court shall, if sufficient cause is shown, grant time to the debtor or to any creditor to produce any evidence which appears to it to be necessary for the proper disposal of the petition."

It is further incumbent upon the petitioning debtor under section 22 of the Act when his petition is admitted to produce all books of account. The debtor has stated here that he has no books of account but necessarily in order to consider the debtor's conduct of the business as directed by sub-section (*2*) of section 24 the Court should make an investigation as to whether the statement that he did not keep account books is to be believed or not. Indeed it is clear that

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the Court must treat the evidence produced by following the procedure prescribed in section 24 as material to its decision as to whether or not to allow the petition and in deciding whether such evidence has satisfied the Court that there are prima facie grounds for believing the statements in the petition. The statements in the petition by themselves, if merely repeated formally in the evidence, are not sufficient prima facie grounds for believing such statements.

There has been a tendency for courts administering the Insolvency Act to believe that the hearing of a petition is a more or less formal matter and that if the petition is, as it were, merely verified by the evidence of the debtor the Court is bound to accede to the petition. That is not the case. It is the duty of the Court to be satisfied prima facie and after following the necessary procedure and making the necessary investigation to come to a conclusion that the statements by the debtor are true. After all the procedure of insolvency is for the protection of creditors quite as much as for the protection of debtors. It is unfortunately more often used by debtors than by creditors with the consequence that the interest of the creditor has a tendency to be forgotten.

In this case we think that the proper course should be to remit the matter back to the learned Judicial Commissioner with a direction to follow the procedure prescribed by the Act and to come to a finding as to whether or not there are prima facie grounds for believing the statements in the petition and if he comes to the conclusion that there are such grounds then he may make the order for adjudication. The matter should be re-heard and the applicant will be in a position to adduce such evidence as he may be advised for the purpose of inducing the Judicial Commissioner, acting on the principles I have stated, to make the order in his favour. The creditors will be equally entitled to call such evidence

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as they think fit to throw discredit upon the statements in the petition. The present order of adjudication is vacated without prejudice to such order as the Judicial Commissioner may make. The costs of this hearing will abide the result.

FAZL ALI, J.—I agree.

Appeal allowed.

Case remanded.

APPELLATE CIVIL.

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Sept. 14, 15, 16.

Before Khaja Mohamad Noor and Dhavle, JJ.

SUCHIT CHAUDHURI

v.

HARNANDAN SINGH.*

11 P.C.R. 65.

Hindu Law—guardian of infant, whether can contract loans on behalf of the minor for the latter's necessities and benefit—guardian, whether can impose personal liability on the minor—minor's estate, whether is liable for the debt.

A guardian of a Hindu infant has power to contract loans on behalf of the minor for the latter's necessities and benefit and, although the guardian cannot impose any personal liability on the minor, the estate of the minor is liable for such a debt.

Padma Krishna Chettiar v. *Nagamani Ammal*,(1) followed.

Kashi Prasad Singh v. *Akleshwari Prasad Narain Singh*,(2) distinguished.

Jodhi Singh v. *Chhotu Mahto*(3), referred to.

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* Appeal from Appellate Decree no. 1552 of 1930, from a decision of M. Muhammad Shamsuddin, Additional Subordinate Judge of Shahabad, dated the 10th November, 1930, confirming a decision of Babu Nanda Kishore Chaudhuri, Munsif of Shahabad, dated the 26th September, 1929.

(1) (1915) 30 Ind. Cas. 574.
(2) (1920) 2 Pat. L. T. 35.
(3) (1926) 7 Pat. L. T. 732.

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Appeal by the defendant.

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

Mahabir Prasad and *D. N. Varma*, for the appellant.

K. P. Jayaswal and *Anand Prasad*, for the respondent.

KHAJA MOHAMAD NOOR AND DHAVLE, JJ.—This is an appeal by the second defendant in a suit brought for the recovery of two loans: one of Rs. 100 and the other of Rs. 342 contracted on his behalf by his mother who was defendant no. 1 in the suit and who is found to have been the guardian of the appellant at the time of the loans. Both the defendants denied the loans and this has been concurrently found against them by the lower Courts. The appellant also urged that he was not a minor at the time the loans are said by the plaintiff to have been advanced to the appellant's mother, but this also has been negatived by the two lower Courts. A hand-note was executed in connection with each loan by the appellant's mother who did not describe herself in it as guardian of the appellant, but such description is not always essential and it is a question of fact in each case whether the person was acting as guardian, and both the Courts below have found that the appellant's mother did in fact act as guardian on appellant's behalf in connection with these loans. The first hand-note stated that the money was wanted for the purchase of bullocks and the second hand-note merely spoke of khas expenses. The evidence, however, was that money was taken on the second occasion for purchasing bullocks and seed grains and for improving kasht lands by removing sand from them. The trial Court found that the moneys had been taken by the appellant's guardian for his "necessities and benefit". The lower appellate Court has substantially endorsed this finding by observing that

> "the loans in suit were borrowed by defendant no. 1 as guardian of her son defendant no. 2 for necessities benefitting him."

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The learned Advocate for the appellant relies on *Kashi Prasad Singh* v. *Akleshwari Prasad Narain Singh*(1), a decision that was cited below and in which it was held that a guardian cannot bind the estate of a minor by a personal covenant and that, therefore, a hand-note executed by the guardian of a minor cannot bind the minor's estate. I ought to have said that while the trial Court gave the plaintiff a decree against both the defendants without any qualification, the lower appellate Court modified that decree by directing that as far as the appellant was concerned the decree should be executed against his estate only, that is to say, not against his person also. The case of *Kashi Prasad*(1) does not, however, help the appellant, and the reason is this. In *Jodhi Singh* v. *Chhotu Mahto*(2) which has been referred to by the learned Subordinate Judge the case of *Kashi Prasad Singh*(1) was distinguished as not a suit for the price of necessaries. A more important distinction for the purposes of the present case is that the suit in *Kashi Prasad Singh* v. *Akleshwari Prasad Narain Singh*(1) was a suit on the hand-note, while the present is a suit not on the hand-notes but on the loans that are evidenced by the hand-notes found to have been executed by appellant's mother. The plaint speaks of defendant no. 1 acting for herself and as guardian of defendant no. 2 and karta of the joint family—allegations which would have been entirely unnecessary if it was intended to proceed on the hand-notes alone. That the suit was regarded in this light by both the lower Courts is clear from their discussion of the issue whether defendant no. 2 was liable for the loans. Learned Counsel has laid stress on the fact that the hand-notes did not purport to charge the estate of the minor, but the documents in question would not have been hand-notes if they had purported to do so. The real question in the

(1) (1920) 2 Pat. L. T. 35.
(2) (1926) 7 Pat. L. T. 732.

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case is whether a creditor has any remedy against the person or estate of a minor in respect of a loan advanced by him to the minor's guardian for the necessities and benefit, as the trial Court put it, of the minor. That the guardian of a Hindu infant has power to mortgage or even sell the estate of the minor for the necessities of the estate or for the benefit of the estate is of course unquestionable. If the guardian has this power, he must clearly have power also to contract loans on behalf of the minor. It may be that for such loans he is personally liable, but the question is whether the minor's estate will also not be liable, provided of course it is shown that the loans were taken for purposes binding on the minor's estate. It is also beyond question that the guardian cannot impose any personal liability upon the minor; and unless the creditor could in a proper case proceed against the estate of the minor, the position would be that as against a minor a creditor would be left without any remedy at all in respect of a loan advanced by him on the minor's account to the minor's guardian. That cannot and has never been held to be the law. All that was laid down in *Kashi Prasad Singh* v. *Akleshwari Prasad Narain Singh*(1) was that if the creditor chooses to sue on the guardian's hand-note as such, he cannot obtain a decree against the minor's estate.

Learned Counsel has next assailed the concurrent finding of the lower Courts that the loans were taken for the necessities and benefit of the appellant. He has in this connection relied on *Kandhia Lal* v. *Muna Bibi*(2) and contended that the finding about the necessities and benefit of the appellant is vitiated by reason of the failure of the plaintiff to prove that he had made proper enquiries as to the necessities of the minor before advancing the loans in question. But

(1) (1920) 2 Pat. L. T. 35.
(2) (1897) I. L. R. 20 All. 135.

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what are the circumstances? The plaintiff knew, and had dealings with, the family for a long time before the loans in suit. We are told that he claims to have known the fields of the appellant also, and this may be believed all the more readily as both the plaintiff and the appellant are from the mufassil and apparently live not very far from each other. The appellant is the only son of his parents. The family was in an impecunious condition, and the learned Subordinate Judge has referred to the facts that the father of the appellant had previously mortgaged some lands to the plaintiff and that appellant's mother had also had occasion to do so besides selling some of them after the institution of the suit. The evidence is that appellant's mother asked for the money for bullocks, seed grains and the improvement of kasht lands by removing sand from them. These are obviously not purposes of luxury to an agriculturist, and there is no indication that the mother was indulging in a speculative business—say, in bullocks. The circumstances were such that the creditor may well have believed the mother's representations, and it was open to the Courts to proceed on that footing unless it had been the case of the appellant that the mother was in fact raising money for her own purposes, though nominally on behalf of her only son. It is not contended that any such suggestion was made in the Courts below. It seems to us further that the lower Courts had ample material before them to come to the conclusion that the moneys were borrowed by the appellant's mother for necessary purposes. We do not see any error of law in that finding. The case does in fact seem to be indistinguishable from *Padma Krishna Chettiar* v. *Nagamani Ammal*(1) which has been referred to by the learned Subordinate Judge.

We, therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) (1915) 30 Ind. Cas. 574.

APPELLATE CIVIL.

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Sept. 20, 21, 22, 26.
Oct., 18, 19, 21.

Before Khaja Mohamad Noor and Dhavle, JJ.

GIRWAR NARAYAN MAHTON

v.

KAMLA PRASAD.*

Jurisdiction—inherent lack of jurisdiction and want of jurisdiction on grounds to be determined by the court itself, distinction between—Bengal Tenancy Act, 1885 *(Act VIII of* 1885*), section* 109*, bar of, whether affects the inherent jurisdiction of the Court—objection as to the bar of section* 109 *not raised by parties—decree on consent by court—decree, whether is a nullity—validity, whether can be challenged in collateral proceeding—section* 109*, bar of, whether applies when suit under section* 106 *withdrawn—bona fide dispute between landlords and tenants—tenancy disputed—suit by landlord for declaration of title—compromise effected—tenants accepting to pay increased rent—compromise, whether offends against section* 29*—non-compliance with section* 147A*, whether makes the decree a nullity—minors sued as majors—appearance through mother guardian—compromise by guardian with the sanction of the court—cause title of suit not amended—minors, whether properly represented—defect, whether a mere irregularity—authority to effect compromise and authority to file compromise petition, distinction between.*

There is a distinction between an inherent want of jurisdiction in a court and want of jurisdiction on grounds which have to be determined by the court itself. The first makes the decree a nullity which can be ignored and need not be set aside. The second does not make the decree a nullity but only voidable; such a decree can be set aside by adopting the proper procedure, but cannot be collaterally impeached.

A court, which is empowered by law to try a suit, has power to try it either rightly or wrongly; the validity of a decree does not depend on whether it embodies a correct decision. A judgment of a court having jurisdiction over the subject-matter

* Appeals from Appellate Decrees nos. 1458 and 1459 of 1931, from a decision of Babu Ananta Nath Banarji, Additional Subordinate Judge of Patna, dated the 5th October, 1931, modifying a decision of Babu Sachindra Nath Ganguli, Munsif of Bihar, dated the 20th January, 1931.

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and the parties of the suit and having territorial and pecuniary jurisdiction, however erroneous, cannot be a mere nullity and cannot be collaterally challenged.

If the question of jurisdiction is to be decided by the court itself with reference to the existence or otherwise of a particular fact in bar of the trial, there is no want of inherent jurisdiction, and the judgment pronounced may be erroneous but not void and cannot be collaterally impeached. The question of jurisdiction in such a case is like other questions of fact or law to be decided by the court itself which otherwise has jurisdiction to try the suit. Ordinarily if a party does not raise the question of jurisdiction during the trial he should not be allowed to do so after the proceedings were carried to completion, provided the question of jurisdiction depends upon the decision of some fact or point of law.

The bar created by section 109 of the Bengal Tenancy Act, 1885, does not affect the inherent jurisdiction of the court but depends on the existence of some extraneous facts which is a matter for the court itself to decide.

Where, therefore, no objection as to the bar of section 109 was raised in a previous suit and the court entertained the suit and passed a decree on consent.

Held, that the decree was not a nullity and could not be impeached in a collateral proceeding.

Pande Satdeo Narain v. *Ramayan Tewary*(1), *Dwarka Prasad Marwari* v. *Jai Barham*(2) and *Tika Ram* v. *Tula Ram*(3), followed.

Banke Bihari Lal v. *Ram Anugrah Chowdhury*(4), *Maharaja Sir Rameshwar Singh Bahadur* v. *Yunus Momin*(5), *Rajini Kanta Bag* v. *Rajabala Dasi*(6), *Manisha Eradi* v. *Siyali Koya*(7), *Jungli Lall* v. *Ladu Ram Marwari*(8), *Gora Chand Haldar* v. *Prafulla Kumar Roy*(9) and *Gopal Chunder Chatterjee* v. *Gunamoni Dasi* (10), distinguished.

(1) (1923) I. L. R. 2 Pat. 335.
(2) (1922) 67 Ind. Cas. 686.
(3) (1929) 11 Pat. L. T. 185.
(4) (1930) 12 Pat. L. T. 717.
(5) (1921) 6 Pat. L. J. 588.
(6) (1924) I. L. R. 52 Cal. 128.
(7) (1887) I. L. R. 11 Mad. 220.
(8) (1919) 4 Pat. L. J. 240.
(9) (1925) I. L. R. 53 Cal. 166, F. B.
(10) (1892) I. L. R. 20 Cal. 870.

The prohibition of section 109 of the Bengal Tenancy Act applies even if the suit under section 106 of the Act was withdrawn.

Purna Chandra Chatterjee v. *Narendra Nath Chowdhury*(1), *Raja Reshee Case Law* v. *Satis Chandra Pal*(2) and *Bibi Saleha* v. *Antu Ram*(3), followed.

Cheoddilti v. *Tulsi Singh*(4) and *Mahammad Aycjuddin* v. *Prodyat Kumar Tagore*(5), dissented from.

Where there was a bona fide dispute about the very existence of the tenancy between the landlords and tenants, the former denying the tenancy altogether and the latter claiming to hold the land as occupancy raiyats at Rs. 5 per bigha, and in a suit brought by the landlords for a declaration of their title the parties compromised, the landlords recognising the defendants' tenancy at a higher rent of Rs. 7-8-0 per bigha.

Held, that the compromise did not offend against section 29 of the Bengal Tenancy Act, 1885.

Askaran Baid v. *Deolal Singh*(6), *Sheogovind Singh* v. *Mahabir Misir*(7) and *Ferasat Ali Mallik* v. *Priamboda Devi*(8), followed.

Held, further, that non-compliance with the provision of section 147A of the Act does not make the decree a nullity.

Askaran Baid v. *Deolal Singh*(6), *Sheogovind Singh* v. *Mahabir Misira*(7), *Deolagan Singh* v. *Gulbansi Kuer* (9), *Loki Gope* v. *Ram Nandan Prasad Singh*(10) and *Ishan Chandra Banikya* v. *Moomraj Khan*(1), followed.

Where certain minors were sued as sui juris and the fact of their being under age having been brought to the notice of the court, the plaintiffs were directed to take necessary steps but

(1) (1925) I. L. R. 52 Cal. 894, F. B.
(2) (1929) 10 Pat. L. T. 871, P. C.
(3) (1918) 43 Ind. Cas. 973.
(4) (1912) I. L. R. 40 Cal. 428.
(5) (1920) I. L. R. 48 Cal. 359.
(6) (1929) I. L. R. 9 Pat. 527.
(7) (1922) 4 Pat. L. T. 301.
(8) (1922) 69 Ind. Cas. 414.
(9) (1922) 69 Ind. Cas. 616.
(10) (1928) I. L. R. 8 Pat. 372.
(11) (1926) 30 Cal. W. N. 940,

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before any step could be taken the minors appeared through the guardianship of their mother and filed a written statement and later on she compromised the suit, the other major defendants whose interest was similar to that of the minors also compromising on the same terms, and the court accepted the guardian by permitting her to compromise, but the cause title of the suit was not amended.

Held, (*i*) that in the absence of the father, the mother was the natural guardian of the minors and was entitled to compromise on their behalf;

Nirvanaya v. *Nirvanaya*(1) and *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*(2), distinguished.

(*ii*) that the minors were properly represented in the suit and the fact that the heading of the plaint was not amended or a formal order for the appointment of the guardian was not made by the court was a mere irregularity and did not vitiate the decree.

Mussammat Bibi Walian v. *Banke Behari Prasad Singh*(3), *Pande Satdeo Narain* v. *Ramayan Tewari*(4), *Seshagiri Rao* v. *Jagannadham*(5), *Radhakrishnaswami Naidu* v. *Annamalai Chettiar*(6), *Ramgulam Sahoo* v. *Sham Sahai Das*(7) and *Hitendro Narayan Singh* v. *Sukhdeo Prasad Jha*(8), followed.

Partab Singh v. *Bhabuti Singh*(9), distinguished.

There is a difference between an authority to effect a compromise and an authority to file a compromise petition. The latter may be covered by general authority to represent a client in court, while the former stands upon a different footing.

Thenal Ammal v. *Sokkammal*(10), followed.

(1) (1885) I. L. R. 9 Bom. 365.
(2) (1911) I. L. R. 39 Cal. 232, P. C.
(3) (1903) L. R. 30 I. A. 182.
(4) (1923) I. L. R. 2 Pat. 335.
(5) (1915) I. L. R. 39 Mad. 1031.
(6) (1922) 70 Ind. Cas. 365.
(7) (1920) 5 Pat. L. J. 379.
(8) (1929) I. L. R. 8 Pat. 558.
(9) (1913) I. L. R. 35 All. 487; L. R. 40 I. A. 182.
(10) (1917) I. L. R. 41 Mad. 233.

Sourendra Nath Mitra v. *Tarubala Dasi*(1), distinguished.

Once a decree is passed the party relying upon it need not prove facts anterior to the decree. It is for those who challenge it to show that it is not binding.

Appeal by the plaintiffs.

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

Khurshad Husnain (with him *Syed Ali Khan* and *Rajeshwari Prasad*), for the appellants.

Manohar Lal and *K. Dayal*, for the respondents.

KHAJA MOHAMAD NOOR AND DHAVLE, JJ.—These two second appeals are by the same plaintiffs and arise out of two rent suits against two different sets of defendants, which though decreed in full by the trial Court, the Munsif of Bihar, have been partly dismissed by the Additional Subordinate Judge of Patna. The plaintiffs are co-sharer landlords of the village where the rent-claimed lands are situated. The suits were for rents of 1333 to 1336 Fs. The plaintiffs' shares consisting partly of the proprietary and partly of a leasehold interest, amounted to 7 annas 11 dams in the year 1333 and 13 annas 18 dams in the years 1334 to 1336 Fs. The rent was claimed at the rate of Rs. 7-8-0 per bigha. The defences raised included the denial of the extent of the plaintiffs' share and of their right to collect their own share of rent separately, and a plea of payment, but the most important defence was the denial of the rate of rent, namely, Rs. 7-8-0 per bigha, it being asserted that it was only Rs. 5 per bigha. Both the Courts have overruled all other contentions of the defendants; as to the rate of rent the defence has been accepted by the lower appellate Court.

In order to appreciate the questions involved in the dispute about the rate of rent it is necessary to state a few facts.

(1) (1930) 34 Cal. W. N. 458.

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The defendants and one of the plaintiffs, namely, Sheonarain Mahton, and the fathers of two of the plaintiffs, namely of Ramadhin Mahton and Tulsi Mahton, and some other persons not before us, were formerly the ijaradars or zarpeshgidars (lessees) of the village under the former proprietors. In 1909 when the village came under survey and settlement operations, a large area of land was found in the possession of the lessees which they claimed as their occupancy holdings at an annual rent of Rs. 5 per bigha. The proprietors, on the other hand, asserted that they were the bakasht of the landlords and that the lessees were in possession of them in that capacity. Up to the settlement stage under section 103A of the Bengal Tenancy Act the contention of the proprietors prevailed, and the lands were entered as the bakasht of the landlords; but subsequently under a revisional order of the Assistant Settlement Officer in charge, raiyati khatians were prepared in favour of the defendants (among others), and the rent-claimed lands with a rent at Rs. 5 per bigha were entered as occupancy holdings, and it was with these entries that the record-of-rights was finally published. Being dissatisfied with this, the landlords instituted a suit under section 106 of the Bengal Tenancy Act. That suit was withdrawn with permission to bring a fresh one on the same cause of action. Later on, some of the proprietors instituted a suit in the Civil Court, which was numbered 233 of 1911. That suit was for a declaration that the defendants had no raiyati land in the village, that the lands in suit were the bakasht of the landlords and that the defendants were in possession thereof as ijaradars, and for a declaration of the plaintiffs' right over those lands, together with an injunction against the principal defendants not to cultivate the lands after the expiry of their ijara. The principal defendants in the two present rent suits were among the defendants in that title suit. That suit was compromised, the landlords agreeing to recognise the defendants as occupancy raiyats in respect of

the lands in question, and the latter agreeing to pay rent at the rate of Rs. 7-8-0 per bigha. A decree was passed in the terms of this compromise. Since then the present plaintiffs have become landlords of a portion of the village either by purchase or by taking leases. It is on the basis of the compromise decree in suit no. 233 of 1911 that the plaintiffs claim rent at the rate of Rs. 7-8-0 per bigha. The defence in respect of this part of the case is contained in paragraphs 6 and 9 of the written statements of the defendants, and is to the effect that the defendants had no knowledge and information of the compromise, that they did not effect any compromise against the entries made in the survey khatian, that the compromise alleged was illegal and contrary to law, and that they were not at all bound by it. While the trial Court decreed rent at the rate of Rs. 7-8-0 per bigha, the learned Subordinate Judge has allowed rent at the rate of Rs. 5 per bigha only as entered in the record-of-rights and has ignored the compromise decree, holding that it was void as the Court's jurisdiction to entertain the suit of 1911 was barred under section 109 of the Bengal Tenancy Act. He has also held that the compromise constituted an enhancement of rent which was void under section 29 of the Act and that the compromise decree is also void on account of non-compliance with the provisions of section 147A of the Bengal Tenancy Act. He has further held that as both the defendants in Second Appeal no. 1458 were minors at the time of the suit of 1911 and were not properly represented therein, the decree was void on this ground also. He has also held, reversing the finding of the trial Court, that the compromise was not given effect to. Unfortunately none of these grounds, except the last one, was specifically raised before the trial Court, or decided by it, and it seems that the appellants were prejudiced by the omission. They protested against these questions being raised in appeal, but the learned Subordinate Judge overruled the objection. The written statement was not

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clear enough to give the plaintiffs sufficient notice of the lines of attack which the defendants were going to adopt against the decree. Some of the facts necessary to support or resist these lines of attack did require evidence, as is shown by the comment of the learned Subordinate Judge that there was no evidence that the mother of the minor defendants actually compromised the suit or signed the petition or that the vakalatnamah authorized the pleader to file the compromise petition. As in our opinion the view of law taken by the learned Subordinate Judge is not correct, it is not necessary to pursue the matter further.

As to the decree being void for want of jurisdiction in the Court, we consider that the learned Subordinate Judge has failed to appreciate the distinction between an inherent want of jurisdiction and want of jurisdiction on grounds which have to be determined by the Court itself. The first makes the decree a nullity which can be ignored and need not be set aside. The second does not make the decree a nullity but only voidable; such a decree, can be set aside by adopting the proper procedure, but cannot be collaterally impeached. For instance, if a Munsif tries and decrees a suit of Rs. 5,000 in value, as alleged by the plaintiff and not disputed by the defendant, or found by the Court, there is an inherent want of jurisdiction, and the decree need not be set aside by any particular procedure—it is a nullity and can be ignored. On the other hand, if a Court proceeds to try a suit, which is barred, for instance, by the principle of res judicata, however erroneous the decree of the Court may be, it cannot be collaterally challenged. The distinction between void and voidable judgments has been repeatedly laid down in a number of cases. In the case of *Pande Satdeo Narain* v. *Ramayan Tewary*(1), Das, J. observed:

"A void judgment, on the other hand, is a judgment where there was a total lack of jurisdiction

(1) (1928) I. L. R. 2 Pat. 385.

in the Court to render it. Such a judgment is a mere nullity. It is not necessary to set it aside. It can be completely disregarded whenever it is pleaded either in support of a claim or in answer to a claim. In order then to establish that the judgment..... is a mere nullity, it must be established that there was a total lack of jurisdiction in the Court to render the judgment.....Where there does not exist any jurisdiction to try and determine the cause, the judgment is void and it can be impeached collaterally .....Now jurisdiction has been classified under different heads by different Judges; but I think we may take that it falls under four different heads: (1) territorial jurisdiction, (2) pecuniary jurisdiction, (3) jurisdiction of subject-matter and (4) jurisdiction of the person."

In the case before us there is no doubt that the Court before which the suit of 1911 was instituted had jurisdiction under all these four heads. It is contended that a bar was placed on its power on account of the prohibition contained in section 109 of the Bengal Tenancy Act; but that is not an inherent want of jurisdiction. Assuming that the plea that the suit was barred under the provisions of section 109 of the Bengal Tenancy Act had been specifically taken before the Munsif before whom the suit was pending, and assuming further, in view of the fact that the interpretation of that section had not been clearly laid down at that time, that he had held that that section was no bar on account of the suit under section 106 of the Bengal Tenancy Act having been withdrawn and on that ground or on the ground that the scope of the suit of 1911 was different, had decreed the suit, could the decree have been treated as a nullity? A Court, which is empowered by law to try a suit, has power to try it either rightly or wrongly; the validity of a decree does not depend on whether it embodies a correct decision. A judgment of a Court having jurisdiction over the subject-matter and the parties of the suit, however erroneous, cannot be a mere nullity and

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cannot be collaterally challenged. To hold otherwise will mean that there is no finality in litigation as any unsuccessful party would then be at liberty in subsequent proceedings collaterally to challenge the decree as erroneous and therefore void. The question whether the suit of 1911 was or was not barred under section 109 of the Bengal Tenancy Act was one within the competence of the Court to decide in the suit of 1911. Though that question was not raised and was, therefore, not expressly decided, the fact remains that the Court entertained the suit and passed a decree on consent. The bar of section 109 of the Bengal Tenancy Act is a matter that ought to have been raised prior to the decree and cannot now be raised, as it could not have been raised collaterally if it had been raised in the suit of 1911 and, let us assume, wrongly decided against the defendants.

In the case of *Dwarka Prasad Marwari* v. *Jai Barham*(1) a question was raised whether a previous decision of a Court not having jurisdiction was final and conclusive between the parties if the question of jurisdiction was not specifically decided. Though it was held in that case as a fact that the question of jurisdiction had been actually raised and decided, Das, J. observed :

" But if the question was not in fact raised, the plaintiffs are in no better position..... In my opinion, when there is no want of jurisdiction in the Court to try a suit, that is to say, when the want of jurisdiction is not apparent on the face of the proceedings, but the absence of jurisdiction depends on a fact in the knowledge of the party which he had an opportunity of bringing forward in the Court, then if he does not bring that fact forward but allows the Court to proceed with the judgment he ought not to be permitted to impeach the jurisdiction of the Court in any collateral proceedings ".

(1) (1922) 67 Ind. Cas. 686, 699.

Thus, if the question of jurisdiction is to be decided by the Court itself with reference to the existence or otherwise of a particular fact in bar of the trial, there is no want of inherent jurisdiction, and the judgment pronounced may be erroneous but not void and cannot be collaterally impeached. The question of jurisdiction in such a case is like other questions of fact or law to be decided by the Court itself which otherwise has jurisdiction to try the suit. Ordinarily if a party does not raise the question of jurisdiction during the trial, he should not be allowed to do so after the proceedings were carried to completion (Casperz on Estoppel, section 83), provided the question of jurisdiction depends upon the decision of some fact or point of law.

In this case, if the question of jurisdiction had been raised in 1911, it would have been for the Court to decide, firstly, whether section 109, Bengal Tenancy Act applied after the previous suit under section 106 of the Act was withdrawn, and secondly, whether the scope of the subsequent suit was the same as that of the previous suit.

No doubt, it is now settled law that the prohibition of section 109 of the Bengal Tenancy Act applies even if the suit under section 106 of the Act was withdrawn—*see* the decision of a Full Bench of the Calcutta High Court in the case of *Purna Chandra Chatterjee* v. *Narendra Nath Chowdhury*(1), and the Privy Council decision in the case of *Raja Reshee Case Law* v. *Satis Chandra Pal*(2); but the contrary view was previously taken in *Cheodditti* v. *Tulsi Singh*(3), and *Mahammad Ayejuddin* v. *Prodyat Kumar Tagore*(4), which were expressly overruled by the Full Bench of the Calcutta High Court—*see* also

(1) (1925) I. L. R. 52 Cal. 894, F. B.
(2) (1929) 10 Pat. L. T. 871, P. C.
(3) (1912) I. L. R. 40 Cal. 428.
(4) (1920) I. L. R. 48 Cal. 859.

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Bibi Saleha v. *Antu Ram*(1). It was, therefore, open to the Court to decide either way and whatever would have been the decision it would have been final beetween the parties. Apart from this, it was open to the Court to decide that the scope of the suit was different.

Mr. Manohar Lal on behalf of the respondents has, however, contended that the bar created by section 109 of the Bengal Tenancy Act affects the inherent jurisdiction of the Court, and, therefore, the decree is void. In our opinion it is not so. The criterion is that if the constitution of the Court gives it jurisdiction to entertain a suit, but the jurisdiction may be barred by the existence of some extraneous facts, or the bar depends on an interpretation of the law, there is no inherent want of jurisdiction as the existence of those facts, or the interpretation of the law, is a matter for the Court itself to decide. Reliance has been placed on the case of *Banke Bihari Lal* v. *Ram Anugrah Chowdhury*(2), and of *Maharaja Sir Rameshwar Singh Bahadur* v. *Yunus Momin* (3) on which the former decision was based. These two cases decided that a finding as to the amount of rent or of the bhaoli area in a rent suit after the question had been decided in a suit under section 106 of the Bengal Tenancy Act did not operate as res judicata in a rent suit for subsequent years. These cases are, we think, really against the contention of Mr. Manohar Lal. No doubt it was held that the previous decisions were not res judicata, but the decree for rent passed in contravention of the rent fixed in the cases under section 106 was held to be a valid decree. In the present case the decree (passed with consent, no doubt) is not a decree for rent but a declaratory decree fixing the amount of rent and is final between the parties and binding upon the defendants.

(1) (1918) 43 Ind. Cas. 973.
(2) (1930) 12 Pat. L. T. 717.
(3) (1921) 6 Pat. L. J. 588.

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Reliance has also been placed upon the case of *Rajini Kanta Bag* v. *Rajubala Dasi*(1). But there a case triable by a Subordinate Judge was tried by a Munsif. It was a case of inherent want of jurisdiction and the decree was attacked directly in revision and not collaterally. The same remark applies to the case of *Manisha Eradi* v. *Siyali Koya*(2). There the Small Cause Court had only a limited jurisdiction and the decree was attacked directly in revision.

It is settled law that the question of jurisdiction cannot be raised collaterally, except where there is a total lack of jurisdiction in the Court which passed the decree. Mr. Manohar Lal has drawn an analogy from the fact that a decree against a dead person has been held to be a nullity in spite of the fact that the question of the death of the man is to be extraneously proved, and though the Court had jurisdiction over the suit. He, therefore, contends that the Court before which a decree is used is entitled to go behind the decree in order to ascertain whether or not the Court which passed it had jurisdiction to do so. He has also relied upon the principles underlying the decisions in which it has been held that a decree against a minor, who was not properly represented in the suit, has been held to be a mere nullity. These are, however, a few exceptions in which the Court can go behind the decree itself, and can treat it as a nullity in spite of the fact that want of jurisdiction does not appear on the face of the decree itself. The principle underlying all these cases is that the decree is void on account of a total lack of jurisdiction, or, in other words, there is only a decree on paper, but not in fact. As was observed by Manuk, J. in the Full Bench decision of this Court in the case of *Jungli Lall* v. *Laddu Ram Marwari*(3), where the question for consideration was the effect of a decree against

(1) (1924) I. L. R. 52 Cal. 128.
(2) (1887) I. L. R. 11 Mad. 220.
(3) (1919) 4 Pat. L. J. 240 (264), F. B.

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a dead man; " In cases like the one before us, that which purports to be a decree, was really passed only against a name on the record, the person behind that name having passed beyond the jurisdiction of all courts" . The decree against a dead man is void on the ground that there was no person representing the name in existence against whom a decree could be passed. Though there is a decree on paper, there is none in fact. When a question was raised in the Calcutta High Court as to how far an executing Court can go into the question of the validity of the decree, in the Full Bench case of *Gora Chand Haldar* v. *Prafulla Kumar Roy*(1), Walmsley, J. said:

" We have to start by accepting the proposition that the Court that made the decree had no jurisdiction to make it, and by that expression is meant that the Court had not such territorial jurisdiction as would authorise it to make the decree, and not that having jurisdiction it exercised it erroneously. This distinction is of great importance, for, with all respect, I venture to think that the apparent conflict in reported cases is largely due to failure to keep this distinction clearly in view. It would be tedious to examine the numerous decisions in detail, and it would not lead to any useful result. I think it may be said that the correct view, and the view for which there is a strong current of authority, is that where the decree presented for execution was made by a Court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction. Within these narrow limits I think that the executing Court is authorized to question the validity of a decree ".

(1) (1925) I. L. R. 53 Cal. 166, F. B.

It will be seen, therefore, that in all these cases the underlying principle has been a total lack of jurisdiction in the Court which passed the decree. The same thing can be said in respect of a decree against a minor who is not properly represented in the suit. There also the decree is treated as a nullity, because the defendant being a minor the Court had no jurisdiction over him unless he is represented by a guardian. In the case of *Tika Ram* v. *Tula Ram*(1) where a lunatic was concerned, Kulwant Sahay, J. pointed out the distinction between a decree which is void and a nullity and a decree which is voidable, and then he said: "A decree can be said to be void where there was a total want of jurisdiction in the Court to pass it..... ..... The jurisdiction of a Court may be determined with reference to its territorial jurisdiction, its jurisdiction over the subject-matter of the suit, its pecuniary jurisdiction and its jurisdiction over persons impleaded in the suit". It was held in that case that if a man under disability was not properly represented, the Court had no jurisdiction over him. In the case before us, as has been pointed out before, the Court in which the suit of 1911 was instituted had jurisdiction under all the usual heads in the suit—territorial, pecuniary, etc., and whether the jurisdiction to determine the suit was taken away, under section 109 of the Bengal Tenancy Act, was a matter to be determined by the Court itself.

Mr. Manohar Lal has further drawn an analogy from the fact that absence of the notice prescribed under Order XXI, rule 22, of the Civil Procedure Code makes further proceedings in the case a mere nullity, and he points out that in spite of the fact that the Court has jurisdiction to execute the decree, still the want of notice makes the whole proceedings void. He has drawn our attention to the decision in the case of *Gopal Chunder Chatterjee* v. *Gunamoni*

(1) (1929) 11 Pat. L. T. 185.

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Dasi(1), where Beverley, J. observed that until notice was issued on the legal representative of the judgment-debtor, the Court had no jurisdiction to issue its warrant for the execution of the decree. The word " jurisdiction " was there used, clearly, in the general sense of power. The analogy has no application, as there a necessary step in the initiation of the proceeding was wanting. We are, therefore, of opinion that there was no want of inherent jurisdiction in the Munsit who passed the consent decree in the suit of 1911 and that decree cannot be collaterally impeached and is not a nullity.

Mr. Manohar Lal has argued that the record-of-rights being in his favour, the plaintiffs cannot realise more rent than is entered therein and that the statutory presumption has not been rebutted. It is enough to say that the consent decree obtained after the publication of the record-of-rights must prevail against the record-of-rights.

The next two grounds on which the learned Subordinate Judge has held the compromise decree to be void are equally untenable. There is no doubt that there was a bona fide dispute about the very existence of the tenancy between the then landlords and the principal defendants of the two rent suits before us, the former denying the tenancy altogether and the latter claiming a tenancy at the rate of Rs. 5 per bigha. If under the circumstances the parties compromised the suit, such a compromise does not offend against section 29 of the Bengal Tenancy Act. In the case of *Ferasat Ali Mullik* v. *Priamboda Devi*((2) Ghosh, J. held that where on the refusal by the landlord to recognize the purchase of a non-transferable occupancy holding the purchaser agrees to pay a certain rent and is thus recognized as a tenant, the case does not come within section 29 of the Bengal Tenancy Act. The same view was taken by a Special Bench of this Court in *Askaran Baid* v.

(1) (1892) I. L. R. 20 Cal. 370.
(2) (1922) 69 Ind. Cas. 414.

Deolal Singh(1), a case which will be referred to later and also in the case of *Sheogovind Singh* v. *Mahabir Misra*(2), another case which will also be referred to later and which has been referred to by the learned Subordinate Judge.

Regarding the defence of non-compliance with the provision of section 147A of the Bengal Tenancy Act, assuming that there was a non-compliance of its provision, it does not make the decree a nullity. This was also held in the case of *Askaran Baid* v. *Deolal Singh*(1), a decision to which one of us was a party. Das, J. observed that the Court which was in seizin of the case which resulted in a compromise decree, being properly in seizin of that case, its decision cannot be described as a nullity. The same view was taken in this Court in the case of *Sheogovind Singh* v. *Mahabir Misra*(2), and also in an earlier case, *Deolagan Singh* v. *Gulbansi Kuer*(3), and also in *Lok Gope* v. *Ram Nandan Prasad Singh*(4). The Calcutta High Court has also taken the same view in the case of *Ishan Chandra Banikya* v. *Moomraj Khan*(5) where it was laid down that a decree passed wthout complying with the provision of section 147A of the Bengal Tenancy Act was not a nullity, though it was liable to be set aside in a proper case. Apart from this, there is always a presumption that a Court has acted in accordance with law, and we have no reason to suppose that the Court did not comply with the requirements of law when it accepted the compromise between the parties. This is no ground for ignoring the decree in the present case, especially when the suit in which the compromise was effected was not between landlord and tenant as such.

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(1) (1929) I. L. R. 9 Pat. 527, F. B.
(2) (1922) 4 Pat. L. T. 301.
(3) (1922) 69 Ind. Cas. 616.
(4) (1928) I. L. R. 8 Pat. 372.
(5) (1926) 30 Cal. W. N. 940.

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The next question to be considered is whether the decree is binding upon Kamla Prasad and Thakur Prasad, the defendants in second appeal no. 1458 of 1931 corresponding to appeal no. 120 of 1931 before the lower appellate Court (the no. 119 of 1931 as given in the judgment of that Court is apparently a clerical error). These defendants were admittedly minors at the time of that suit, and were sued as sui juris. The fact of their being under age was brought to the notice of the Court, and it ordered the plaintiffs to take necessary steps. Before any step could be taken, the two minor defendants appeared through the guardianship of their mother, their natural guardian, and filed a written statement. Later on she compromised the suit. The learned Subordinate Judge has under the circumstances held that the minors were not properly represented and were not bound by the compromise decree. The learned Subordinate Judge has confused an agreement which has not ripened into a decree of a Court and a compromise decree which like other decrees of the Court, ,is binding unless it can be shewn to have been passed without jurisdiction and is thus a mere nullity, or is shown to have been otherwise set aside. Once a decree is passed, the party relying upon it need not prove facts anterior to the decree. It is for those who challenge it to show that it is not binding.

Now the simple question in this case is whether the defendants, who were admittedly minors, were properly represented in the suit. In our opinion they were. No doubt, as the cause title of the suit shows, they were sued as majors; but it is also clear that they did appear in the suit through their mother and filed the written statement. That the heading of the plaint was not amended or a formal order for the appointment of the guardian was not passed by the Court, was a mere irregularity, and does not vitiate the decree. The Court accepted the guardian by permitting her to compromise.

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In the case of *Musammat Bibi Walian* v. *Banke Behari Prasad Singh*(1), it was held that where it appeared that in a suit the minors' interest was effectively represented by their mother with the sanction of the Court the absence of a formal order appointing her and an immaterial defect of service of summonses on the minors and their guardian not shewn to have caused any prejudice to them, are mere irregularities and would not be a ground for reversing the judgment and the execution proceedings on appeal, or in a separate suit for that purpose. The learned Subordinate Judge has distinguished that case on the ground that there the minors were sued as such, and in the present case they were sued as majors. The distinction is, however, immaterial as long as the interest of the minors was properly represented through a guardian who was allowed by the Court to proceed with the defence.

Mr. Manohar Lal has referred us to the case of *Partab Singh* v. *Bhabhuti Singh*(2), where their Lordships of the Judicial Committee ignored the appointment of a guardian when the amendment of the plaint showing such an appointment was not signed by the Judge. The ratio decidendi of this case was that there was no bona fide application for the appointment of a guardian, and the leave of the Court was not obtained to enter into the compromise on behalf of the minors. In the case before us there is an order of the Court sanctioning the compromise. In *Partab Singh's*(2) case the chief ground for setting aside the decree was that the guardian, who had compromised the suit, had acted in collusion and against the interest of the minors. This is not the case here. *Partab Singh's*(2) case was referred to in this Court in the case of *Pande Satdeo Narain* v. *Ramayan Tewari*(3), a case which has already been referred to in connection with the

(1) (1903) L. R. 30 Ind. App. 182.
(2) (1913) I. L. R. 35 All. 487; L. R. 40 Ind. App. 182.
(3) (1923) I. L. R. 2 Pat. 335.

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jurisdiction of the Munsif to pass a decree. The distinction between *Partab Singh's*(1) case and the present case is this that in that case there was nothing on the record to show that the Judge accepted the guardian who compromised the suit, whereas in this case there is an order of the Court allowing the guardian to compromise the suit. In *Pande Stadeo Narain's*(2) case, already referred to, it has been held that if a minor is represented by a proper guardian, who is not disqualified to act, the jurisdiction of the Court to try and determine the case as against the minor is complete though the procedure prescribed by law was not strictly followed. Mr. Manohar Lal has laid great stress upon the cause title of the suit as giving or defining jurisdiction to the Court, and he points out that in this case the defendants continued to be shewn as sui juris on the record of the case. In our opinion, the critical thing to be looked into is whether or not the minors were really represented in the suit; non-observance of form is merely an irregularity. It was held in the case of *Seshagiri Rao* v. *Tanguturi Jagannadham alias Hanumantha Rao*(3) that the fact that the plaint showed a defendant who in fact was a major to be a minor did not make the decree a nullity. A similar view seems to have been taken in the case of *Radhakrishnaswami Naidu* v. *Annamalai Chettiar*(4). In our opinion non-amendment of the cause title was nothing more than an irregularity.

Last of all, it has been contended by Mr. Manohar Lal that the mother was not entitled to compromise on behalf of the minors. He has relied upon the case of *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowduri*(5). This decision has no application, as there the Judicial Committee refused to a minor the specific performance of a contract entered into on

(1) (1913) I. L. R. 35 All. 487; L. R. 40 Ind. App. 182.
(2) (1923) I. L. R. 2 Pat. 335.
(3) (1915) I. L. R. 39 Mad. 1031.
(4) (1922) 70 Ind. Cas. 365.
(5) (1911) I. L. R. 39 Cal. 232, P. C.

behalf of the manager of his estate on the ground that there was no mutuality as the defendant could not have enforced specific performance of contract against the minor. In this case the compromise was entered into by the mother who in the absence of the father was the natural guardian of the minors, and she was perfectly entitled to compromise: *see Nirvanaya* v. *Nirvanaya*(1). The compromise was neither fraudulent nor collusive. Not only these two minors but all other defendants whose interest was similar to that of the minors compromised the suit on the same terms. The Court expressly sanctioned the compromise on behalf of the minors. The attention of the lower appellate Court was drawn to the case of *Ram Ghulam Sahoo* v. *Sham Sahai Das*(2) where the same principle was applied. The fact that there the question arose in an execution proceeding makes no difference. It was laid down in the case of *Hitendro Narayan Singh* v. *Sukhdeo Prasad Jha*(3) that non-compliance with the provisions of law in the matter of the appointment of a guardian will not vitiate the proceedings unless it is shewn that the minors had actually suffered by it. Taking into consideration the fact that the other tenants of the village, who were well able to look after their own interest, compromised the suit on the same terms as the mother clearly shows that their interest was sufficiently protected, and the compromise decree cannot be questioned. The learned Subordinate Judge has commented upon the fact that the authority of the Advocate who compromised the suit has not been proved. There is, however, a difference between an authority to effect a compromise and an authority to file a compromise-petition. The latter may be covered by general authority to represent a client in Court, while the former stands upon a different footing. The distinction between these two has been

(1) (1885) I. L. R. 9 Bom. 365.
(2) (1920) 5 Pat. L. J. 379.
(3) (1929) I. L. R. 8 Pat. 558.

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pointed out in the case of *Thenal Ammal* v. *Sokkammal*(1). The learned Subordinate Judge has relied upon the case of *Sourendra Nath Mitra* v. *Tarubala Dasi*(2) which has, however, no application to the facts of this case. In this case, as it appears from the petition of compromise filed, the compromise was effected by the parties themselves, and not by the pleader. The pleader simply filed the petition. As to the proof of the fact that the mother did actually compromise the onus has wrongly been placed upon the plaintiffs. It was not necessary for them to go behind the decree. As has been pointed out before, once a decree is passed, it is for those who want to challenge it to prove the circumstances which would make the decree void.

In this view of the case it is not necessary to discuss whether the compromise was given effect to. A compromise decree has been passed and, if that decree is not void, the plaintiffs are entitled to realise rent at the rate mentioned in that decree. And here again, it is for those who allege that the decree was not given effect to, to prove that rents were being realised at the rates alleged by the defendants. There is no finding by the learned Subordinate Judge that this was the case. His findings are of a negative character to the effect that the plaintiffs had not been able to prove that the rents were realised according to the rate decreed, which to our minds is absolutely immaterial and misplaces the onus.

The result is that the appeals are allowed, the decrees of the learned Subordinate Judge are set aside and those of the Munsif restored with costs throughout.

Appeals allowed.

(1) (1917) I. L. R. 41 Mad. 233.
(2) (1930) 34 Cal. W. N. 453, P. C.

APPELLATE CIVIL.

Before Wort and Khaja Mohamad Noor, JJ.

1932.

Oct. 24, 25.

MRS. GERTRUDE OATES,

v.

MRS. MILLICENT D'SILVA.*

Res judicata—doctrine based on general principles of law and not dependent on section 11 of Code of Civil Procedure, 1908 (Act V of 1908)—two suits disposed of by one judgment—common issue tried—appeal from one decree only—unappealed decree, whether operates as res judicata in the other suit at appellate stage.

O brought a suit against *D* praying for an injunction restraining her from carrying on another hotel business contrary to the Articles of Partnership and the main issue in the case was whether the partnership had been dissolved. Later *D* brought a suit against *O* for rent for her portion of the partnership premises and one of the issues involved in this suit was the same, viz., whether the partnership had come to an end. Both the suits were decided by the Munsif and on appeal by the Judicial Commissioner by one judgment. The suit of *O* failed while *D's* action succeeded. *O* appealed to the High Court from the decree made in *D's* suit while no further appeal was preferred from the decree in the other suit.

Held, that the decision in *O's* suit, which had become final, operated as res judicata, as regards the common issue, in the suit of *D* at the appellate stage.

Dhani Singh v. *Sri Chandra Choor Deo*(1) and *Isup Ali* v. *Gour Chandra Deb*(2), followed.

Held, further, that the doctrine of res judicata is not dependent on the limited provisions of section 11 of the Code of Civil Procedure, 1908, but is based on the general principles of law that multiplicity of suits should be avoided.

Hook v. *Administrator-General of Bengal*(3), followed.

* Appeal from Appellate Decree no. 545 of 1930, from a decision of H. R. Meredith, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 10th February, 1930, confirming a decision of Babu Gopal Chandra De, Munsif of Ranchi, dated the 30th August, 1928.

(1) (1923) 75 Ind Cas. 570.

(2) (1922) 37 Cal. L. J. 184.

(3) (1924) L. R. 48, I. A. 187.

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Appeal by the defendant.

The facts of the case material to this report will appear from the judgment of Wort, J.

Sir Ali Imam (with him *S. K. Mitra* and *L. K. Chowdhry*), for the appellant.

B. C. De and *K. K. Bannerjie*, for the respondent.

WORT J.—On the 2nd September, 1925, Mrs. Gertrude Oates on the one part and Mrs. Millicent D'Silva of the other part entered into a partnership deed, and thereafter it appears carried on business as hotel proprietors at the Silver O'aks Hotel, Ranchi. On the 26th of October, 1927, there was an agreement on the part of Mrs. Oates to pay Mrs. D'Silva rent for her portion of the hotel premises. Out of those two facts arose two actions which first of all came before the learned Munsif and eventually on appeal before the learned Judicial Commissioner of Chota Nagpur. As regards the first action Mrs. Oates claimed against Mrs. D'Silva an injunction restraining her from carrying on another hotel business contrary to the Articles of Partnership, and the main issue in that case was whether on the 1st of April, 1926, the partnership had been dissolved or not. The learned Munsif in the trial Court and the learned Judicial Commissioner in the appellate Court came to the conclusion that it had. In those circumstances Mrs. Oates failed in her action, and, as I have stated, it was in October of 1927, after certain events, to which I shall presently briefly refer, that an undertaking was given by Mrs. Oates to pay Mrs. D'Silva rent for her portion of the premises. As appears from the judgment of the learned Munsif, as regards the buildings of the Silver O'aks hotel, the two ladies were proprietors each enjoying a moiety. At the same time as the action, to which I have already referred as the partnership action, was brought, Mrs. D'Silva brought an action against Mrs. Oates for rent, and it is that action out of which this appeal arises. To understand the points which have been

raised, it is necessary, perhaps, to state one or two other facts.

It was in March, 1926, about six months after the partnership had started, that these two ladies came to consider the question of selling their respective shares in the Silver O'aks hotel. The reason, as far as I know, was not stated, but they were minded, as I have said, to sell their shares, and while they were considering the matter, a Mr. Clayton came along and offered to rent the Silver O'aks hotel, as it would appear his lease at a competing hotel was coming to an end and the landlord of the premises was asking him to pay an enhanced rent which, in his view, was exorbitant. Negotiations then took place between Mr. Clayton and these two ladies, and ultimately on the 1st of April Mrs. D'Silva wrote to Mrs. Oates saying that she had allowed Mr. Clayton to go into possession, in the meantime, on the 26th of March, after some correspondence between Mrs. D'Silva and Mrs. Oates, Mrs. Oates having sent a telegram which was to the effect

" Accept Clayton's offer writing ".

Now, in the partnership action it was contended, and the contention succeeded, that it was this letting Mr. Clayton into possession of the hotel by mutual consent of both parties, that is to say, Mrs. D'Silva on the one hand and Mrs. Oates on the other, that had brought the partnership to an end. The learned Judges did not express themselves in this way, but it seems to have been in the minds of the Judges that what had happened was that these two partners, by allowing Mr. Clayton to go into possession, had put it beyond their power to continue the partnership, and, therefore, it must be deemed to have come to an end. That was certainly the view which Mrs. D'Silva took.

Now as regards this suit for rent which, as I have said, was instituted in October, 1927, Mrs. Oates had agreed to pay rent at the rate of Rs. 150 a month.

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Rent was paid for a month or two but later it fell into arrear and eventually there was a claim for Rs. 1,878-9-0. The contention before us in this appeal is that the partnership had not come to an end and that consequently what the plaintiff was claiming in the action could only be a share of the profits of the partnership and that in no circumstances could rent be said to have accrued. I should add that the plaintiff in the action claimed, by reason of a letter dated the 13th of May, 1926, to have raised the rent as from the 1st of June, 1927, but both the Courts, that is to say, the Court of the Munsif and the Court of the Judicial Commissioner rejected that claim made by the plaintiff on the ground that there was no consent by the defendant to pay this enhanced rent of Rs. 200 a month. Whether that decision was right or wrong we are not concerned, because there is no appeal in regard to that question in this action; but we are here concerned with the matter of whether, as contended by the defendant, the partnership is still subsisting. It seems to me that the answer to that question is very clear, and clear for several reasons. In the first place the question of whether the partnership had come to an end or not was clearly a question of fact and the two Courts, which had jurisdiction to determine it, have come to a clear finding. It is contended by Sir Ali Imam on behalf of the defendant that this is a question of law; it is a question of construction of letters which passed between the parties and, therefore, is a matter of law in that sense. But what the learned Judges had to determine was whether on all the facts and circumstances of the case, it could be held that by mutual consent the partnership had ceased. Although the learned Judicial Commissioner has referred to letters, he refers to them merely for the purpose of determining what the views of the partners themselves were on this matter. On that account alone I should have, in my judgment, to hold that this appeal fails. But a further point is raised and that is, so far as the question of dissolution of

partnership is concerned, that it is a matter which has been finally decided between the parties and, therefore, we are precluded from further investigating it: in other words, the principle of res judicata applies.

Sir Ali Imam contends that section 11 of the Code of Civil Procedure does not apply to the facts of this case. I should have stated, in mentioning this matter, that when these two actions came on they were tried together and they were the subject-matter of one judgment, although the Courts passed separate decrees.

The clause to which reference is made is *Explanation I* to section 11. The expression " former suit " denotes a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto. As I understand the contention it is this, that when the Judicial Commissioner came to decide this question he decided both questions involving the same point, namely, whether there had been a dissolution of partnership. On this point Sir Ali Imam admits that that matter has to be decided on the day on which we are hearing this appeal, and the question that we have got to ask ourselves is whether at this moment there has been a decision on the question of dissolution of the partnership. In my judgment the case of *Isup Ali* v. *Gour Chandra Deb*(1) disposes of this question. It is true that there have been differences of opinion in the matter, the Madras High Court in particular coming to a decision different from that which has been arrived in the case to which I have just made reference, but the facts of the case of *Isup Ali*(1) are almost identical with those which we have to deal with in this case. There were two cases there which I shall call, one the earlier case and the other the later case; they were the subject-matter of a common judgment but by reason of defects in the

(1) (1922) 37 Cal. L. J. 184.

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notices of appeal and other proceedings one appeal failed, that which related to the later case, and the earlier one came on for hearing. The same question, however, arose in both actions, and it was held in those circumstances that, although in point of time the question which had to be decided was finally decided in the appeal of the later of the two cases, the decision which was arrived at in that case was binding on the High Court when it came before it in appeal. But quite apart from the decision in that case, it seems to me that the decision of the question is concluded by general principles of law. My learned brother pointed out in the course of the argument that if we were to hold otherwise, it might result in the defendant on the one hand having a decision in her favour on that point and the plaintiff on the other, by reason of the judgment of the Judicial Commissioner, having a decision to the opposite effect. It is in the public interest that litigation should cease. That is a free translation of a very wellknown legal maxim. In this connection I should like to refer to a decision of the Judicial Committee in the case of *Hook* v. *Administrator-General of Bengal*(1). There, to quote the words of Lord Buckmaster, who delivered the opinion of the Judicial Committee, it was said—" The learned Judge held that this matter has already been definitely settled and in addition gave reasons why he adhered to his former opinion ". Lord Buckmaster pointed out that this was superfluous: "the question as to the perpetuity had been definitely and properly before him in the former case and was in fact decided without any reservation, as is made plain by the terms of the judgment itself which showed that the determination of the dispute as to the perpetuity was the foundation of the whole judgment". Lord Buckmaster went on to point out " that therefore the matter was finally settled ". Then he stated—" The appellate Court, however, took a different view, and regarding the question as still open decided it against the appellant.

(1) (1921) L. R. 48 Ind. App. 187.

but the error in their judgment is due to the fact that they regarded the question as completely governed by section 11 of the Code of Civil Procedure. That section prevents the retrial of issues that have been directly and substantially in issue in a former suit between the same parties, and this question obviously arises in the same and not in a former suit, but it does not appear that the learned Judge's attention was called to the decision of this Board in *Ram Kirpal Shukul* v. *Rup Kuari*(1) which clearly shows that the plea of res judicata still remains apart from the limited provisions of the Code, and it is that plea which the respondents have to meet in the present case ".

Sir Ali Imam, as I have already stated, endeavoured to confine us to the words of *Explanation I* to section 11 of the Code of Civil Procedure, but, as the Judicial Committee of the Privy Council pointed out, it is not dependent upon the mere words of section 11 of the Code itself. But the question whether it is res judicata or not has to be decided on general principles of law. In my judgment this matter was clearly concluded by the decision of the Judicial Commissioner in the action which was brought under the partnership deed. The other question which Sir Ali Imam puts forward is really a branch of the same point. He contends that what was let out to Mr. Clayton was not merely the building but also the partnership business in the sense that Mrs. Oates and Mrs. D'Silva remained in partnership and that partnership business continued, and further that Mr. Clayton, on taking over the lease of the premises, had in a sense undertaken to manage it for the partnership. All that need be said about this is that there was no suggestion of that in the Courts below and the only possible support that can be given to the contention is that if it was so raised it was raised through paragraph 5 of the written statement. But a perusal of that paragraph and the next paragraph of the written statement quite

(1) (1883) L. R. 11 Ind. App. 37.

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clearly shows that what was stated there was a matter entirely divorced from the point which I have stated is now taken by Sir Ali Imam. What clearly we shall have to ask, if the question came to be decided, is whether the letter written to Mr. Clayton offering him a lease of these premises entitled him to carry on the business of the partnership between the two ladies, or whether going into possession under the lease had anything to do with the partnership business in any way. This matter could have been disposed of had the defendant thought fit to produce the lease or the draft lease under which Mr. Clayton went into possession but this was not so produced.

In my judgment, for the reasons which I have already stated, it seems to me that this appeal must fail and must be dismissed with costs.

KHAJA MOHAMAD NOOR, J.—I agree. In my opinion the trial of the issue about the dissolution of the partnership is barred by res judicata. The decision in the case of *Isup Ali* v. *Gour Chandra Deb*(1) which has been referred to by my learned brother is a clear authority for this proposition. As has been pointed out by my learned brother, the doctrine of res judicata is not confined in the provisions of section 11 of the Civil Procedure Code. It is based upon the principle that multiplicity of suits should be avoided and there should be an end to litigations. In *Dhani Singh* v. *Sri Chandra Choor Deo*(2) Kulwant Sahay, J. held that if more than one suit were decided by a common judgment and if the decree in one of them became final by the party not appealing against it, the issue decided in it operated as res judicata in other suits even at the appeal stage. In my opinion, if I may say so, the law has been correctly laid down. Apart from res judicata, the question of dissolution of the partnership is concluded by the concurrent findings of fact arrived at by the courts below. The conclusion

(1) (1922) 37 Cal. L. J. 184.
(2) (1923) 75 Ind. Cas. 570.

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of the learned Judicial Commissioner is not based, as is contended, upon the construction of the various letters which have been produced in the case, the meaning of which is clear and there is no dispute about it. His conclusion is based upon the cumulative effect of the letters and upon what the parties themselves understood their position to be when the Silver O'aks Hotel was leased to Mr. Clayton.

The appeal should be dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before James and Agarwala, JJ.

THAKUR BAGHESHWARI CHARAN SINGH

v.

BINDHESHWARI CHARAN SINGH.*

1932.

July, 29.

Chota Nagpur Incumbered Estates Act (Beng. Act VI of 1876), sections 12-A and 23—Khorposh grant, whether is an "alienation." within the meaning of section 12-A—decree for maintenance—properties of disqualified proprietor transferred to decree-holder—validity of transfer—section 23, whether applies only to suits instituted during the period of management—res judicata, whether a decision on a question of law operates as—Khorposh grant void ab initio—decree in previous suit holding khorposh grant to be valid, whether operates as res judicata.

Section 12-A, Chota Nagpur Incumbered Estates Act, 1876, provides :—

"(1) When the possession and enjoyment of property is restored, under the circumstances mentioned in the first or the third clause of section 12, to the person who was the holder of such property when the application under section 2 was made, such person shall not be competent, without the previous sanction of the Commissioner,—

(*a*) to alienate such property, or any part thereof, in any way, or

(*b*) to create any charge thereon extending beyond his life-time."

* Appeal from Original Decree no. 159 of 1928, from a decision of Babu Saudagar Singh, Subordinate Judge of Hazaribagh, dated the 31st of March, 1928.

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Sub-section (*3*) provides that every alienation and charge made or attempted in contravention of sub-section (*1*) shall be void.

Held, that a khorposh grant is an " alienation " within the meaning of section 12-A and, therefore, that such a grant made without the previous sanction of the Commissioner is void under sub-section (*3*) of that section.

Although, in a proper case, a decision on a question of law attracts the operation of the doctrine of res judicata as effectively as a decision on a question of fact, there may be cases in which a decision on a question of law does not operate as res judicata.

Held, therefore, that where a khorposh grant is void *ab initio*, a decision in a previous suit holding it to be valid does not operate as res judicata in a subsequent suit.

Tarini Charan Bhattacharya v. *Kedar Nath Haldar*(1), *Manohar Lal* v. *Baldeo Singh*(2), *Rup Nath Mandal* v. *Jagannath Mandal* (3) and *Joy Chand Kumar* v. *Bhutnath Khan*(4), followed.

Section 23 of the Act, as amended by Act III of 1909, applies only to certain suits instituted during the period that an estate is under management under the Act.

Where a decree in a suit instituted, not under section 23 of the Act, but under section 9 of the Code of Civil Procedure, entitled the decree-holder to get as maintenance from a disqualified proprietor certain properties belonging to the latter, *held*, that by reason of the provisions of section 12-A the disqualified proprietor was incompetent to give effect to the decree without the sanction of the Commissioner.

Thakur Khitanarain Sahi v. *Surju Seth* (5) and *Rup Nath Mandal* v. *Jagannath Mandal*(3), followed.

Government Pleader (with him S. S. Bose), for the appellants.

S. M. Mallick, B. C. De, Janak Kishore and Bindeshwari Prasad, for the respondents.

Appeal by the plaintiff.

The facts of the case are set out in the judgment of Agarwala, J.

(1) (1928) I. L. R. 56 Cal. 723, F. B.
(2) (1927) I. L. R. 49 All. 918.
(3) (1927) I. L. R. 7 Pat. 178.
(4) (1929) 11 Pat. L. T. 207.
(5) (1931) I. L. R. 10 Pat. 582.

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AGARWALA, J.—The appellant, who was the plaintiff in the court below, is the present holder of the Dargguli estate in Chota Nagpur and is a grandson of Thakur Jadu Charan Singh, the previous holder of the estate. Jadu Charan had two sons by his first wife, namely, Ramdhan Charan Singh and Jibdhan Charan Singh; by his second wife, Thakurain Jagarnath Koeri, he had a third son, Bindheshwari Charan Singh. The plaintiff Bagheshwari Charan Singh is the son of Ramdhan Charan. In 1890 Jadu Charan gifted several villages to his second wife for the maintenance of herself and any children she might bear him. The income of these villages was stated to be about Rs. 800 per annum. In 1894 the management of the estate was taken over under the provisions of the Chota Nagpur Incumbered Estates Act of 1876. It was released to Jadu Charan on the 15th of May, 1909. Section 12-A of the Act, however, continued to apply to the estate. On the 16th of June, 1909, Jadu Charan executed another deed of gift of certain villages in favour of his second wife, and on the 17th of November of the same year he made a khorposh grant in favour of his youngest son Bindheshwari of villages and lands whose annual value was stated to be Rs. 1,300. These lands are described in schedule A to the plaint of the present suit. The sanction of the Commissioner under section 12-A was not obtained either in respect of the gift or the grant; but seven years later, on the 14th of March, 1916, Jadu Charan applied to the Commissioner to sanction them. At the same time two petitions for sanction were filed by the Thakurain, one on behalf of herself in respect of the gift to her of the 16th of June, 1909, and the other as guardian of Bindheshwari and in respect of the grant to him of the 17th of November, 1909. The Commissioner refused his sanction.

Bindheshwari attained his majority on the 21st of September, 1917, and on the 2nd of November, 1917, he instituted suit no. 117 of 1917 against Jadu

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Charan, his father, and Jibdhan Charan and Ramdhan Charan, his brothers. This was a suit for maintenance. Ramdhan filed a written statement in that suit but took no further steps in it. On the 12th of November, 1919, a decree was passed in that suit, under which Bindheshwari was to get a khorposh of properties yielding an income of Rs. 2,300 in cash and Rs. 400 in produce in addition to the lands covered by the grant of 1909. An application under Order IX, rule 13, Civil Procedure Code, was made by Ramdhan but was dismissed on the 3rd of January, 1920. Then, on the 21st of January, Jadu Charan, purporting to act in obedience to the decree, executed a khorposh grant in favour of Bindheshwari Charan in respect of certain properties yielding an income of Rs. 2,700 and including the right to the minerals. These properties are described in schedule B to the plaint. In addition to these schedule B properties the grant also purported to convey the schedule A properties which were covered by the deed of 1909. Ramdhan died on the 30th of January, 1920. The management of the estate was again taken over under the Chota Nagpur Incumbered Estates Act in 1921. On the 21st of February, 1924, Jadu Charan died intestate. The plaintiff Bagheshwari, son of Ramdhan, succeeded under the rule of lineal primogeniture. Some of the properties included in the grant of 1920 were subsequently usufructuarily mortgaged to defendant no. 2.

Bagheshwari instituted the present suit on the 14th of May, 1926, in the Court of the Subordinate Judge of Hazaribagh, through the Manager of the Dargguli Incumbered Estate, against Bindheshwari Charan and the usufructuary mortgagee. He prayed for a declaration that the grants of 1909 and 1920 were invalid and inoperative, for recovery of possession of the schedules A and B properties and for recovery of Rs. 9,500 as mesne profits for 1981 and 1982 Sambat and Rs. 200 as damages for timber and

wood removed during those years. He alleged that the decree in suit no. 117 of 1917 was collusive; that that suit had abated for non-substitution of parties on the death of Ramdhan; and that under a custom prevailing in the estate the proprietor could make khorposh grants only of property yielding an income of Rs. 100 per annum and khas jote land up to 12 bighas. He also contended that the grants were invalid for want of the Commissioner's sanction under section 12-A. The defendant no. 1, on the other hand, pleaded *inter alia* that the decree in the 1917 suit operated as res judicata with the result that the plaintiff could not now be heard to say that the holder's right to make khorposh grants was limited by custom, or that the grant of 1909 was invalid, or that he (the defendant) was entitled to less than a khorposh grant yielding Rs. 4,000 a year. His contention was that a decision on all these points is either expressed or implicit in the decision of the suit of 1917. The defendant also pleaded limitation with respect to the schedule A lands, claiming to be in adverse possession of them since 1909. It is not disputed that he has been in possession since then.

The Subordinate Judge dismissed the suit. He found that the custom averred by the plaintiff was not proved; that the decree in the suit of 1917 was not void on account of collusion and that the decree in that suit was a final and not a preliminary decree and, therefore, that the suit had not abated for non-substitution of the present plaintiff in place of his father. He also found that the grant of 1909 was void by reason of the want of the Commissioner's sanction under section 12-A of the Act, but came to the conclusion that the decision in the 1917 suit operated as res judicata on this point and, therefore, that the grant must be treated as valid. With regard to the grant of 1920 he held that section 12-A was controlled by section 23 which permits the bringing of a suit for maintenance, and that the grant being

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in pursuance of the decree obtained in such a suit was not rendered void by section 12-A except as to the mineral rights which were not mentioned in the decree. Having found that the grant of 1920 was valid, and that the grant of 1909 must be treated as valid, the Subordinate Judge held that the question of adverse possession did not arise, but expressed an opinion that if the grants were invalid recovery of the properties covered by the grant of 1909 was barred.

With regard to limitation, it is clear that if the grant of 1909 was valid, no question of adverse possession can arise; and that if that grant was invalid, the present claim to recover the land covered by the grant is time-barred, unless there has been such an acknowledgment as is contemplated by section 19 of the Limitation Act. Plaintiff contends that the application for sanction made on behalf of Bindheshwari Charan on the 4th of March, 1916, constitutes such an acknowledgment and he relies on the decision of the Privy Council in *Bagheshwari Charan Singh* v. *Jagarnath Kuari*(1). That was a suit instituted by the present plaintiff to recover from the mother of the present defendant no. 1 the properties of which she was in possession under the gift of the 16th of June, 1909, on the ground, *inter alia*, that the gift was void by reason of want of the Commissioner's sanction under section 12-A. The defendant in that suit pleaded adverse possession for more than twelve years. To this defence the plaintiff replied that the application for sanction made in 1916 was an admission which constituted an acknowledgment under section 19 of the Limitation Act. The High Court (Das and Adami, JJ.) negatived the contention. This decision was reversed by the Privy Council. The petitions filed by the Thakurain for sanction in 1916 on behalf of herself and on behalf of

(1) (1931) I. L. R. 11 Pat. 272, P. C.

Bindheshwari were in precisely the same terms. The material words of the petitions were

> "That in view of the petition filed by Thakur Jado Charan Singh your petitioner begs to file the original deed of grant and prays that your honour may be pleased to sanction the same or order fresh grant on the same terms to be executed."

The only difference between the Privy Council case and the present one, on the question of limitation, is that in the present case the admission was made not by defendant no. 1 himself who was then a minor, but by his mother on his behalf. She, however, had been appointed his guardian on the 14th of November, 1906, and it is, therefore, clear that in view of the provisions of section 21 of the Limitation Act the admission made by her binds him. Mr. Mullick for the respondent-defendant submitted that the decision of the Privy Council as to the correct construction of the petition of 1916 was not binding in the present case. As I have already said, the two petitions filed by the Thakurain were in precisely similar terms and I am, therefore, of opinion that we are bound by the construction placed by their Lordships of the Privy Council on the document which was before them. The matter is of no importance because I should have construed the documents in the same way myself.

The custom alleged by the plaintiff in the present suit was also pleaded in the written statement which he filed in the suit of 1917. In the absence of evidence in support of the plea the Subordinate Judge held in that suit that the alleged custom was not proved. The Subordinate Judge who has tried the present suit has heard such evidence as was produced before him with regard to the custom and has decided that it does not establish the custom. I agree with his finding. If it had been proved, it would have imposed an unusual restriction on the right of the proprietor of an impartible estate to make provision for the dependent members of his family by means of adequate khorposh grants. It has nothing to commend it and

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the evidence adduced in support of it is unconvincing. That evidence consists of certain khewats and the statements of two witnesses Lachmi Charan Singh and Mahabir Prasad. The khewats merely show that when the record-of-rights was prepared some eighteen years ago certain small khorposh grants existed. There is nothing to show the relationship in which the grantees stood to the grantors, and they do not negative the right of the proprietor of this impartible estate to make adequate khorposh grants to his son. Furthermore, the khewats merely show the extent of the grants at the time of the survey and not their extent at the time the grants were made. Lachmi Charan Singh claims to have heard of the custom from his uncle and another distant relative when he was a youth aged 15 to 18 years. His evidence regarding the occasion on which he heard of the custom inspires no confidence in his statement. Mahabir Prasad held an ancestral jagir in a village in the estate and was formerly in the service of Jadu Charan Singh. He claims to have heard of the custom from Jadu Charan in the course of a litigation some eighteen years ago. It is clear, however, that he did not hear of it up to 1912, for in that year he deposed in the course of a survey proceeding that the amount of khorposh was not regulated by custom.

The custom was set up by the present plaintiff in a suit for maintenance instituted by his uncle Jibdhan Charan in 1925. It was negatived and Rs. 65 a month was determined as maintenance. In 1912 Jadu Charan deposed that the amount of khorposh grant was not regulated by custom. This, however, is considerably discounted by the fact that he was deposing three years after he himself had made a grant inconsistent with any such custom. The karpardaz of defendant no. 2 in the present case has denied the existence of the custom, but his connection with the Dargguli estate dates only from 1965 Sambat. Lastly, there is the evidence of defendant

no. 2 himself and he also denies the custom. Although I am not prepared to place any great reliance on the negative evidence of the defence, I am equally unconvinced by the evidence adduced on this piont by the plaintiff on whom lay the onus of establishing the custom. I, therefore, hold that the custom has not been established.

I shall now consider the sections of the Chota Nagpur Incumbered Estates Act relevant to the present case. As has been already observed, the Dargguli estate was subjected to the provisions of the Act in 1894. Jadu Charan was then the proprietor of the estate and it was released to him on the 15th of May, 1909, subject to the operation of section 12-A. The first clause of that section runs as follows :—

"When the possession and enjoyment of properties is restored, under the circumstances mentioned in the first or third clause of section 12, to the person who was the holder of such property when the application under section 2 was made, such person shall not be competent, without the previous sanction of the Commissioner,

(*a*) to alienate such property, or any part thereof, in any way, or

(*b*) to create any charge thereon extending beyond his own lifetime."

An appeal lies to the Board of Revenue from the refusal of the Commissioner to sanction an alienation or charge. Clause (3) provides that every alienation or charge made or attempted in contravention of sub-section (*1*) shall be void.

The question that arises is whether the khorposh grant made by Jadu Charan in favour of Bindheshwari Charan (defendant no. 1) on the 17th November, 1909, was void for want of the sanction of the Commissioner under section 12-A. The plaintiff's contention is that the grant was void *ab initio*. The defence, however, is that a khorposh grant is not an alienation within the meaning of the section. According to the defence the sole object of the Act is to preserve the estate for the benefit of the members of the family and, therefore, a grant to a member of the

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family does not offend against the object of the statute. With this contention I am not in agreement. In my opinion, the objects of the statute is to preserve the estate for the heir, and any dealings with the property which might have the result of keeping the heir out of possession attracts the operation of section 12-A. A khorposh grant usually implies that the subject-matter of the grant will revert to the grantor or his heir only on failure of descendants of the grantee in the direct line. In the present instance the grant of 1909 purported to be a grant

> " in khorposh from 1966 Sambat to Babu Sri Bindheshwari Charan Singh, my youngest son, descendible to children, generation after generation."

Except, therefore, in the event of Bindheshwari Charan dying without issue in the lifetime of Jadu Charan the grantor and his heir were likely to be kept out of possession of the land covered by the grants for a very considerable period.

The validity of this grant, however, was directly in issue in the suit of 1917, and the contention of the defendant in the present suit is that the decision of that issue now operates as res judicata. In that suit the trial court said that the word " alienate " is used in section 12-A

> " in the sense of transfer by way of sale, gift or mortgage so as to pass the property away from the hands of the proprietor's family ";

and the Court was of opinion that this construction of the section was clear from a perusal of the Statement of Objects and Reasons prefixed to the Bill which resulted in section 12-A being added to the original Act. The Court obviously misread the Statement of Objects and Reasons for one of the objects of the Bill was stated to be to prevent disqualified proprietors from making extravagant khorposh grants.

In this appeal the defendant-respondent supports the Subordinate Judge's interpretation of section 12-A by a reference to the third sub-section of section 3. That sub-section renders the proprietor of the estate during the period of management under the Act incompetent " to mortgage, charge, lease or alienate " his immoveable property. From this it was argued that the Act itself distinguishes between alienation on the one hand and a mortgage, charge or lease, on the other, and, therefore, that the alienation prohibited by section 12-A (*1*) (*a*) is something different from a mortgage, charge, lease or a khorposh grant. Mr. Mullick's contention on behalf of the respondent was that if there be any interest in the property remaining in the grantor, there is no alienation within the meaning of the section; and that as the grantor has an interest in the reversion to a khorposh grant, it follows that such a grant is not an alienation. Following this line of reasoning he was prepared to go to the length of saying that an usufructuary mortgage of the whole estate would not offend against the provisions of section 12-A. If his contention were sound, the object of the section, namely, the preservation of the estate, could always be defeated by the execution of a mortgage or permanent rent free lease of the whole estate. I have no hesitation in holding that a khorposh grant attracts the operation of the section and requires for its validity the previous sanction of the Commissioner.

It remains, however, to consider the effect of the decision in the 1917 suit on this question. As has been already said, that was a suit between the present plaintiff Bindheshwari Charan, on the one side, and Jadu Charan, Ramdhan Charan and Jibdhan Charan, on the other. The validity of the grant of 1909 was directly in issue, and the decision was in favour of its validity. The respondents contend that this decision operates as res judicata, and that, therefore, the validity of the grant cannot now be questioned by the appellant whose father was

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a party to the suit of 1917. For the appellant it was urged that the suit was in effect a collusive suit between Jadu Charan and Bindheshwari; that Ramdhan Charan was only a *pro forma* defendant and that in any case the decision does not bind Bindheshwari Charan. With neither of the appellant's contention can I agree. Succession to the estate is governed by the rule of lineal primogeniture. Ramdhan was, at the time of the suit, the next heir and vitally interested in contesting the validity of the grant; he did in fact contest it in the written statement which he filed. I do not understand on what principle it is arguable that Bagheshwari Charan, who now holds the estate, is not bound by the decision obtained against his father at a time when his father was the next heir, merely on the ground that he himself was not a party to the suit. The application of the doctrine of res judicata is, however, also resisted on another ground with which I shall deal later.

With respect to the alleged collusion, the appellant urges that the suit of 1917 was merely an attempt by Jadu Charan and Bindheshwari to obtain a recognition of a grant to which the Commissioner's sanction had not been accorded. In his written statement in that suit Ramdhan alleged that the suit had been instituted by Bindheshwari Charan in collusion with Jadu Charan who was defendant no. 1 and Jibdhan Charan who was defendant no. 3. The Subordinate Judge found that no collusion had been proved. When the facts are examined it will be clear that there was no such collusion as to entitle the present appellant to say that the decision is not binding on him. The custom alleged by the appellant not having been proved, there would have been no bar to Jadu Charan's making a substantial khorposh grant to his youngest son had his estate not been subjected to the Chota Nagpur Incumbered Estates Act. The present appellant could not have challenged such a grant. If Jadu Charan had, with the sanction of the Commissioner, made such a grant to

Bindheshwari after section 12-A became operative in his estate, Bagheshwari could not have impeached the grant. How then can Bagheshwari claim to be aggrieved merely because Jadu Charan and Bindheshwari attempted to achieve by a suit what could have been effected without a suit? I am of opinion that the alleged collusion was not such as to afford Bagheshwari an effective cause for grievance.

Reverting to the question of the operation of the doctrine of res judicata on the grant of 1909, the point for determination is whether the decision in the 1917 suit can render valid a transaction which sub-section (3) to section 12-A declares to be void. It is true that, in a proper case, a decision on a question of law attracts the operation of the doctrine of res judicata as effectively as a decision on a question of fact. That there may be cases, however, in which a decision on a question of law does not operate as res judicata was suggested by Rankin, C. J. in *Tarini Charan Bhattacharya* v. *Kedar Nath Haldar*(1), and there is a decision of a Division Bench of the Allahabad High Court in *Manohar Lal* v. *Baldeo Singh*(2) which is not without bearing on the point. That was a decision under the Agra Tenancy Act of 1901. Section 194 of that Act precludes a suit for rent by one cosharer except in two instances which are not material to the present decision. The plaintiff sued for the whole rent due from the tenant-defendants in respect of the holding although admittedly there were other persons besides himself who were cosharers in the holding as proprietors. It appears that there had previously been two similar suits by the plaintiff against the defendants and that the defendants had not pleaded section 194 in bar. In the third suit they did plead the section, but the plaintiff contended that they were debarred by the rule of res judicata from doing so. Ashworth, J., in overruling the plaintiff's contention, said: " In my opinion where the law forbids a certain thing

(1) (1928) I. L. R. 56 Cal. 723, F. B.
(2) (1927) I. L. R. 49 All. 918.

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being done in a suit no amount of failure by the defendant in the previous suit to plead the positive bar created by the legislature will prevent its being taken up in a subsequent suit ". Walsh, J., who was the other member of the Bench, contented himself with the observation that he was satisfied that there was no res judicata. A somewhat similar question has been decided in this Court with reference to section 47 of the Chota Nagpur Tenancy Act, 1908. In *Rup Nath Mandal* v. *Jagannath Mandal*(1) an attempt was made to sell a raiyati holding in execution of a mortgage decree in spite of the prohibition contained in section 47. Objection to the sale was taken in, and allowed by the Court executing the decree, but was overruled in appeal. The decision of the appellate Court was reversed by the High Court (Kulwant Sahay and Macpherson, JJ). Kulwant Sahay, J. said " The second part of section 47 expressly forbids the sale of the right of a raiyat in his holding in execution of any decree, and the fact that the decree under execution is a mortgage decree directing the sale of the land in question does not in any way affect the provisions of section 47 of the Act ". Macpherson, J. observed " it is altogether illegal to sell a raiyati right in land even in execution of a decree or order directing such a sale ". Then, in another case, *Joy Chand Kumar* v. *Bhutnath Khan*(2), section 47 was pleaded in the trial Court and overruled. The objection was again raised in the execution proceedings and overruled by the lower courts on the ground that the question was res judicata. This decision was reversed by the High Court (Kulwant Sahay and Dhavle, JJ.) who held that the judgment-debtor was not concluded by the rule of res judicata from raising the question in the execution proceedings. Now the third sub-section of section 12-A declares that an alienation or charge made without the previous sanction of the Commissioner is void, that is to say, it is void *ab initio*.

(1) (1927) I. L. R. 7 Pat. 178.
(2) (1929) 11 Pat. L. T. 207.

The grant of 1909 was in my opinion still-born and the decision in the suit of 1917 could not impregnate it with life. I, therefore, hold that we are not bound to treat the grant of 1909 as valid merely by reason of the conclusion as to its validity arrived at by the learned Subordinate Judge in the 1917 suit.

With respect to the grant of schedule B lands, that is to say, the lands covered by the grant of 1920 other than the schedule A lands, the respondent's contention is as follows. He says that section 23 empowers the Courts in Chota Nagpur to entertain suits relating to claims of maintenance from any immoveable property brought under the operation of the Act; that the suit of 1917 was a suit contemplated by section 23; that the suit resulted in Bindheshwari obtaining a decree declaring him to be entitled to get as maintenance from Jadu Charan properties yielding an income of Rs. 4,000 a year; that for the purpose of assuring this income to Bindheshwari the decree directed Jadu Charan to convey to him lands of the annual value of Rs. 2,700 in addition to the lands covered by the grant of 1909, the annual value of which is Rs. 1,300. The respondent says that the decree created a charge on the estate and that the grant of 1920 was merely a carrying out of the directions given in the decree; and that the sanction of the Commissioner was not required to validate the grant. The argument is based on the assumption that the suit of 1917 was a suit to which the provisions of section 23 applied. This, however, is a fallacy as will be apparent from an examination of this section and section 21-B. As originally enacted section 23 is as follows:

> "Nothing in this Act precludes the courts in Chota Nagpur having jurisdiction in suits relating to succession to, or claims of maintenance from, any immoveable property brought under the operation of this Act, from entertaining and disposing of such suits, but to all such suits the Manager of such property shall be made a party."

In 1909 section 21-B was introduced into the Act. That section provides that

> "During the period of management"

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the Manager shall be made a party to all suits and appeals by or against the holder of the estate. By the same Amending Act the words

"Subject to the provisions of section 21-B"

were prefixed to section 23. This rendered superfluous the last fifteen words of section 23 (namely, "but to all such suits the Manager of such property shall be made a party"), and they were repealed by the same Act. From the above it is clear that section 23 applies only to certain suits instituted during the period that an estate is under management under the Act. The suit of 1917 was instituted after the estate had been released to Jadu Charan and before it was again taken under management. The suit of 1917, therefore, was not brought under section 23 of the Act but under section 9 of the Code of Civil Procedure. The only effect of the decree in that suit was to declare Bindheshwari to be entitled to obtain from Jadu Charan properties yielding an annual income of Rs. 4,000. But Jadu Charan was incompetent to give effect to the decree unless the Commissioner sanctioned a transfer or charge under section 12-A. The Commissioner has not done so, and there is no evidence that subsequent to the decree he has been asked to do so. On this part of the case the appellant referred to *Thakur Khitanarain Sahi* v. *Surju Seth*(1) in which it was held that section 12-A is a bar to the execution sale of land belonging to a disqualified proprietor unless the Commissioner sanctions the sale. The decision in *Rup Nath Mandal's*(2) case cited above is also in point; for in that case it was held that a decree directing the sale of a raiyati holding cannot override the prohibition contained in section 47 of the Chota Nagpur Tenancy Act, 1908, forbidding the sale of such a holding in execution of a decree.

(1) (1931) I. L. R. 10 Pat. 582.
(2) (1927) I. L. R. 7 Pat. 178.

The conclusion at which I have arrived is, therefore, that the appeal must be allowed, the decision of the Subordinate Judge set aside and the suits decreed with costs.

JAMES, J.—I agree.

Appeal allowed.

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APPELLATE CIVIL.

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

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Provincial Insolvency Act, 1920 (*Act V of* 1920), *section* 37, *significance of*— "*as the court may, by order in writing, declare*", *meaning of*—*words, whether govern the vesting of the property in the debtor only*—*vesting order, whether must be passed simultaneously with the order of annulment.*

Section 37 of the Provincial Insolvency Act, 1920, lays down :—

" (*1*) Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the court or receiver shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the court may, by order in writing, declare..... "

Held, (*i*) that the words " as the Court may, by order in writing, declare " govern the vesting of the property in the debtor only and they mean that the vesting of the property in him, in the absence of any other person being appointed by the Court, shall be subject to any condition which the Court may declare and that in the absence of any declaration of condition it will vest in the debtor unconditionally;

(*ii*) that, therefore, in the absence of appointment of any person by the Court, the property of the debtor would, on the annulment of the insolvency, revert to him;

* Miscellaneous Appeals nos. 210 and 217 of 1930, from the orders of H. R. Meredith, Esq., I.C.S., District Judge of Manbhum-Sambalpur, dated the 9th August,1930, and 15th August, 1930, respectively.

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Bailey v. *Johnson*(1), *Flower* v. *Lyme Regis Corporation*(2) and *Maung Hme* v. *U Po Seik*(3), followed.

(*iii*) that an order directing the debtor's property to vest in someone need not, however, be passed simultaneously with the order of annulment.

Venugopalachariar v. *K. Chinulal Sowcar*(4), distinguished.

Jethaji Peraji Firm v. *Krishnayya*(5) and *Roop Narain* v. *King King & Co.*(6), referred to.

Where, therefore, the Court annulled the adjudication on the 14th June, 1928, and by a subsequent order, dated 1st August, 1928, directed the debtor's property to vest in the receiver appointed by the Court, *held*, that after the order of annulment the Court did not cease to have jurisdiction in the matter and that his vesting order was valid and operative.

Appeals by the creditors.

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

P. R. Das (with him *S. M. Mullick* and *S. C. Mazumdar*), for the appellants.

Sir Sultan Ahmad and *N. N. Ray*, for the respondents.

KHAJA MOHAMAD NOOR, J.—These two appeals arise out of the same insolvency proceedings. The appellant in appeal no. 210, Chouthmal Bhagirath, applied on the 24th February, 1926, that one Gurdut Singh be adjudged an insolvent. That application was refused on the 20th February, 1927. On appeal this Court made an order of adjudication on the 8th November, 1927. After the presentation of the application before the District Judge; an *ad interim*

(1) (1872) 7 Exch. 263.
(2) (1921) 1 K. B. 488.
(3) (1925) A. I. R. (Rang.) 801.
(4) (1926) A. I. R. (Mad.) 942.
(5) (1929) I. L. R. 52 Mad. 648.
(6) (1926) 94 Ind. Cas. 234.

receiver was appointed on 13th March, 1926, and a similar order for an *ad interim* receiver was passed by this Court when an appeal was preferred against the order refusing adjudication and an *ad interim* receiver was appointed on 25th May, 1927. In the meantime, i.e. between the date of the refusal of the application by the District Judge and that of adjudication by this Court, two creditors of the insolvent, Khemkaran Das Jokhi Ram and Gouridut Ganesh Lal (creditors nos. 2 and 3), who held two decrees against him, proceeded with their execution in the Court of the Deputy Commissioner-Subordinate Judge of Singhbhum and brought to sale an unliquidated debt which has since then been found to be Rs. 6,095/15/- payable to the insolvent by the Bengal Nagpur Railway Company. That debt was purchased by Jokhi Ram Suraj Mal, the principal respondent in the two appeals. The order of adjudication was annulled on 14th June, 1928, on account of the insolvent not applying for his discharge within the time fixed by the Court and later on 1st August, 1928, an order presumably under section 37 of the Insolvency Act was passed directing the properties realized to vest in the receiver on behalf of the creditors. After this a question arose whether the auction-purchaser of the debt due from the Bengal Nagpur Railway could take advantage of the sale as it was alleged that he was the benamidar of the two decree-holders who were debarred from getting any benefit of the execution by virtue of section 51 of the Insolvency Act. The learned District Judge by his order, dated the 17th January, 1929, decided against the respondents Jokhi Ram Suraj Mal, holding that they were really the benamidars of the two creditors above-mentioned, and therefore the debt due from the Bengal Nagpur Railway was still an asset of the insolvent and was liable to be distributed amongst all the creditors.

The auction-purchasers Jokhi Ram Suraj Mal preferred an appeal to this Court which was heard

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by Wort and Adami, JJ. who, without deciding the question of the benami nature of the purchase, on the ground of law held that the sale to the then appellant (now respondent no. 1) was perfectly valid and that he was entitled to Rs. 6,095/- realised from the Bengal Nagpur Railway. The effective part of the order so far as it concerns us in the present appeal runs thus:

> "It is therefore directed that the Rs. 6,095-15-0 be paid over to the appellants (Jokhi Ram Suraj Mal)."

During the pendency of that appeal in the High Court Chouthmal Bhagirath, one of the creditors, who is appellant in appeal no. 210, withdrew Rs. 2,312/8/9 out of Rs. 6,095/15/-, after giving security and an undertaking to refund the amount if the order of the District Judge, dated the 7th January, should be reversed on appeal. After disposal of the appeal he was called upon to pay up this amount in Court. He objected on the ground that the auction-purchasers Jokhi Ram Suraj Mal were the benamidars of creditors nos. 2 and 3 aforesaid and as such these two creditors were liable to refund Rs. 5,750/- the sale proceeds of the debt which they have taken away in satisfaction of their decrees against the provisions of section 51 of the Provincial Insolvency Act. This contention was overruled.

It is against this order that Chouthmal Bhagirath has come up in appeal and it is the subject-matter of appeal no. 210 of 1930. The questions whether creditors nos. 2 and 3 are liable to refund the sale proceeds, or, whether Jokhiram Suraj Mal is their benamidar, are irrelevant at present. The appellant having taken away the money on the express undertaking that he would refund it if the order of the District Judge was set aside can raise no objection against the refund. In fact we are informed that the money has already been deposited in Court. So far as this appeal is concerned, in my opinion, it

should be dismissed with costs. Hearing fee two gold mohurs. The order directing Jokhiram Suraj Mal to furnish security before withdrawing the money deposited will be discharged.

Appeal no. 217 is on behalf of Tejmal Marwari who was one of the creditors (creditor no. 4) and who had proved his debt. He was a party to the proceeding when the order of the 17th January, 1929, to which I have already referred, was passed. Unfortunately he was not impleaded in the appeal which was preferred to this Court against that order. After the appeal was allowed, he appeared and filed an application before this Court for modifying or vacating that order. This was rejected on the 8th May, 1930, in Miscellaneous Judicial Case no. 69 of 1930. The order ran thus:

"This application is misconceived. It is open to the petitioner to approach the Receiver for distribution of the assets from the sale of the debt."

Since then he applied before the learned District Judge to take steps for the realisation of the Rs. 5,750, the sale proceeds of the debt which had been taken away by the creditors nos. 1 and 2. This has been rejected on the ground that no proceeding was pending and that the receiver had become functus officio. It has been contended before us that as after the annulment of the order of adjudication on the 14th June, 1928, there was an order on the 1st August, 1928, vesting the properties realized in the receiver for the benefit of the creditors, the proceedings continue, and the receiver could realize the assets of the insolvent. Sir Sultan Ahmad, who appears on behalf of the respondents, has, however, contended that the order of the 1st August, 1928, was ultra vires. His argument is this: The effect of the order of the 14th June was that whatever assets of the creditor remained undisbursed reverted ipso facto to the debtor. Any subsequent vesting order in favour of the receiver could not divest the properties which had already become vested in him.

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He contends that the order of vesting the properties in the receiver ought to have been simultaneous with the order of annulment. The appellant, however, points out that there is nothing in section 37 of the Insolvency Act (which is referred to in section 43 of the Act under which the order of annulment was passed) to make it imperative upon the Court to give the direction contemplated in that section simultaneously with the order of annulment. It is argued on his behalf that in spite of the annulment the properties cannot be vested in the debtor unless there is an order of the Court to that effect.

Section 37 of the Provincial Insolvency Act runs thus:

> "Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts heretofore done, by the court or receiver, shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the court may, by order in writing, declare."

The appellant contends that the last few words "as the Court may, by order in writing, declare" govern both the previous clauses, namely, the vesting in such person as the Court may appoint and also the vesting in the debtor. I cannot accept that the property does not vest in either unless the condition is declared. In my opinion, those words govern the vesting of the property in the debtor only, and it means that the vesting of the property in him, in the absence of any other person being appointed by the Court, shall be subject to any condition which the Court may declare. Declaring a condition is not necessary (if any). In the absence of any declaration of condition it will vest in the debtor unconditionally. This is the view which seems to have been taken of section 81 of the old Bankruptcy Act of 1869 and section 29 of the present Bankruptcy Act of 1914, and for the present purpose section 37 of our Act is similar to the two above-mentioned sections of the two Bankruptcy Acts. It was held under the

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English Acts that in the absence of appointment of any person the properties of the debtor will, on the annulment of the bankruptcy, revert to him : see *Bailey* v. *Johnson*(1) and *Flower* v. *Lyme Regis Corporation*(2). A similar view has been taken under our Act in *Maung Hme* v. *U Po Seik*(3). This does not, however, end the matter. In this particular case an order vesting the property in the receiver was passed on the 1st of August, 1928, about six weeks after the order of annulment. The question is—is this order valid and operative? If so, the insolvency proceeding has not come to an end, though the protection afforded to the debtor has been taken away from him. Sir Sultan Ahmad has contended, as I have said, that the order contemplated in the last clause of section 37 must be passed simultaneously with the order of annulment, and, if it is not done, the Court is deprived of its powers and no subsequent vesting order can be of any avail. I cannot accept it, and see no reason why the order cannot be passed later on. To hold otherwise will lead to serious injustice, as it would have done in this case, and this the legislature could never have contemplated. It is to be noted that in the case before us the order of adjudication was made on appeal by this Court at the instance of one of the creditors (appellant in Miscellaneous Appeal no. 210 of 1930), and the annulment was made on account of the default of the insolvent behind the back of the creditors, who were vitally interested in the administration of the insolvent's estate. The order of annulment, on failure to apply for discharge, is intended to punish the insolvent by withdrawing from him the protection which he gets by the order of adjudication and if, while passing the order of annulment the Court, by some oversight or other, fails to pass orders for the protection of the creditors, there is no reason why the Court cannot do so when the mistake is pointed out to it. There is nothing in the

(1) (1872) 7 Exch. 269.
(2) (1921) 1 K. B. 488.
(3) (1925) A. I. R. (Rang.) 301.

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Insolvency Act to prevent it. It is not correct to say that after the order of annulment the insolvency proceeding comes to an end ipso facto. This very section 37 provides that all the previous acts of sale or disposition of property, etc., will hold good. Cases may arise in which the direction and orders of the Court may be necessary for the purpose of doing acts to complete the titles of the transferee, etc. or for protecting their interest and there is no reason to hold that the Court after the order of annulment ceases to have jurisdiction in the insolvent's estate. The cases which I have referred to above and on which reliance has been placed on behalf of the respondents are of no help to us. In none of these cases was any order vesting the property in any other person passed by the Bankruptcy Court, even on a subsequent date, and therefore the legal consequences followed and the property was held to be vested in the insolvent. None of these cases can be an authority for the proposition that the order contemplated in the last clause of section 37 cannot be passed some time after the order of annulment. Reliance has, however, been placed upon the case of *Venugopalachariar* v. *K. Chinnulal Sowcar*(1) where it was held that the order of annulment cannot be reviewed. In this case the order of the 1st of August is not a review of the order of annulment, but is supplementary to it. Section 5(*1*) of the Provincial Insolvency Act says that subject to the provisions of the Act the Court in regard to proceedings under it shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction. Section 141 of the Civil Procedure Code provides that provision of the Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction. Section 151 of the Code reserves to the Court its inherent powers to make necessary orders for the ends of justice to prevent abuse of the process of the

(1) (1926) A. I. R. (Mad.) 942.

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Court. The order of annulment without making provision for the protection of the creditors was obviously an order which would have defeated the ends of justice and led to an abuse of the process of the Court, and the Court was, in my opinion, perfectly entitled to exercise its inherent powers by making supplementary order on the 1st of August. In this case, however, there is much stronger reason to hold that the order of the 1st August, 1928, stands and the insolvency proceeding is not at an end. All the parties acquiesced in the order of that date, and no step was taken by any person to have it set aside, and it was in pursuance of that order that the Court by the order, dated the 17th January, 1929, withheld the payment to the respondent of the dues of the insolvent from he Bengal Nagpur Railway. No doubt, the respondent appealed to this Court against that order and collaterally challenged the validity of the order of 1st of August, but the debtor or other creditors who were affected by that order did not appeal against it. I may refer to two cases in which the order of vesting the property in the receiver was passed by the High Court in revision though the Insolvency Court at the time of the passing of the order of annulment omitted to do so. They are *Jethaji Peraji Firm* v. *Krishnayya*(1) and *Roop Narain* v. *King King & Co.*(2).

No doubt, different considerations may arise if subsequent to the order of annulment and before the order vesting the property in some other person than the insolvent, the latter has made transfers of properties to a bona fide purchaser. Such a purchaser perhaps may not be affected. But the insolvent and all those persons who were party to the insolvency proceeding are bound by the order.

Therefore, in my opinion, in spite of the annulment of adjudication the insolvency proceeding continues and it is still open to the receiver to proceed

(1) (1929) I. L. R. 52 Mad. 648.
(2) (1926) 94 Ind. Cas. 284.

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to realise the assets vested in him. I would, therefore, set aside the order of the learned District Judge and direct him to proceed with the application of the appellant and dispose of it according to law. It will be open to him to take steps to realise the assets of Gurdat Singh vested in the receiver wherever they may be found and may be lawfully realisable and to take such legal steps for their realisation as the parties may ask him to take. The appeal no. 217 of 1930 is allowed with costs. Hearing fee two gold mohurs.

COURTNEY TERRELL, C.J.—I agree.

Appeal no. 210 *dismissed.*

Appeal no. 217 *allowed.*

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

JNANENDRA PRASAD BOSE

v.

GOPAL PRASAD SEN.*

1932.

November, 10.

Ref. 55 CW N 331.

Contempt of Courts Act, 1926 (*Act XII of* 1926), *section* 2, *sub-section* (3), *scope and meaning of—High Court, cognisance by, barred only when contempt of court is punishable as such under Penal Code,* 1860 (*Act XLV of* 1860)—*section* 228 *of the Code, whether is the only section dealing with contempts of court.*

The Contempt of Courts Act, 1926, enables the High Court to punish contempt of the inferior courts notwithstanding that such contempt as is complained of is not an offence (as contempt) against any of the sections of the Penal Code; only those contempts which are punishable by the Code as contempts of court are excluded from the jurisdiction of the High Court by the Act.

Kaulashia v. *King-Emperor*(1), followed.

Sections 175 to 179 of the Penal Code define as offences various acts and those acts are offences not against the court

* Civil Revision no. 554 of 1932, against an order of Babu A. N. Singh, Subordinate Judge of Cuttack, dated the 26th August, 1932.

(1) (1932) I. L. R. 12 Pat. 1.

itself because they are applicable whether or not in many cases a court is concerned at all.

The only section of the Penal Code which deals with contempts committed against a Judicial Officer, that is to say, a court, is section 228.

Per Khaja Mohamad Noor, J.—It is of the utmost importance for the administration of justice that citizens should submit to the orders and authority of courts.

By obstructing the execution of a process of law the offender commits two offences: one is the alleged obstruction and the other is the contempt of court, the offender being deemed to have undermined the authority of that court. The first offence is covered by the Penal Code, while the second one is not.

Sub-section (3) of section 2 of the Contempt of Courts Act obviously excepts those cases of contempt which are punishable under the Penal Code as contempt and not if they are punishable independently of that contempt.

Application in revision by the decree-holders.

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

Sir Sultan Ahmad (with him *G. P. Das* and *P. Misra*), for the petitioners.

S. C. Bose, for the opposite party.

COURTNEY TERRELL, C.J.—These are two civil revisions arising out of certain matters before the Subordinate Judge of Cuttack in which a somewhat extraordinary course has been followed. There was litigation between the plaintiff and the defendant which ultimately reached the Privy Council and under the decree of the Privy Council the defendant was ordered among other things to deliver to the plaintiff possession of a certain house. The decree of the Privy Council was sent down to the lower court for execution by order of this Court. There were a number of intermediate proceedings which it is unnecessary to recount but the

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Subordinate Judge sent his naib nazir to the house in question with instructions to deliver it up to the plaintiff. On arriving at the place an individual named Satyabadi Das was found in possession of the house taking up a defensive attitude with the encouragement and support of a number of his local friends. The naib nazir appears to have been overawed by this display and furthermore, to have been affected in some way by a statement on behalf of Satyabadi Das that he was entitled to remain in possession. He thereupon sent from the spot a message to the Subordinate Judge and asked what he was to do. The Subordinate Judge wrote back on the message that the naib nazir was to execute the writ of delivery of possession according to law. But the naib nazir was apparently too alarmed to do this and, notwithstanding that he had the assistance of an officer of police and two constables, the threatening attitude of Satyabadi Das appears to have entirely overcome his resolution and he made a further report to the Subordinate Judge in which he said that he had had to come back without executing the writs. This incident took place on the 19th August, 1932.

As a result of this on the 22nd August, 1932, the decree-holder's advocate appeared before the Subordinate Judge who directed a re-issue of the writ and directed that the writ in this particular case was to be executed by the other naib nazir in his service. The second naib nazir went to the spot and again found Satyabadi Das and considered that he was not entitled in law to execute the writ being convinced by the legal arguments which were apparently put forward by Satyabadi Das before him, so that notwithstanding the order of the Subordinate Judge the writ was not executed.

On the 25th August, 1932, the matter came before the Subordinate Judge again on the report of the second naib nazir that he had not executed the orders of the Subordinate Judge and the Subordinate Judge

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appointed a day apparently for the hearing of the parties on the matter. It is hardly necessary to say that what he should have done was immediately to have directed the naib nazir to arrest the resisting Satyabadi Das and bring him before him promptly to be dealt with. But apparently being fonder of a lengthy legal proceeding, on the 27th August, 1932, he heard an objection which was actually filed by the decree-holder and directed that it should be registered as a miscellaneous case and fixed the 24th of the following September for hearing that case and at the same time issued notice to Satyabadi Das returnable by the date fixed and directed the decree-holder to pay the process fee and file a written notice by the 29th August. Then on the 29th August the execution case was directed to be put down to be heard with the miscellaneous case.

In these circumstances the matter was brought to the notice of this court and this court on the 23rd September, 1932, directed the issue of notice to Satyabadi Das to shew cause why he should not be committed to prison for contempt. Under the Contempt of Courts Act a defect in the old procedure has been remedied. Under the law before that Act this court could not protect the lower courts when contempt of their orders was manifested by anybody but under the Contempt of Courts Act this court is empowered and will use that power to protect the dignity of the courts which are subordinate to it. In so far as the civil revisions are concerned, in my opinion, the proper order to make is that the Subordinate Judge be directed forthwith to give directions to the naib nazir supported by any police force which may be necessary to deliver possession of the house to the plaintiff and furthermore to attach the moveables in execution of the decree for costs. That disposes of the two civil revision cases.

In so far as the notice issued by this court is concerned Satyabadi Das has not appeared in person before us but he is represented by Mr. Bose who has done his best with the materials at his disposal but

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it is perfectly obvious that a gross contempt of the order of the Subordinate Judge was committed. It is absolutely necessary that the courts should be fearless in enforcing the orders that they give in civil cases and acting under the powers given to us by the Contempt of Courts Act we direct that a warrant issue for the arrest of Satyabadi Das and a second warrant to the Superintendent of the jail at Cuttack to keep him in custody in simple imprisonment for a period of six months as provided in the Act. He may purge his contempt by making a proper apology and also by paying the costs of these proceedings as also the proceedings in the lower court. Hearing fee in this court five gold mohurs.

It is necessary to deal with a point of law that was raised by Mr. Bose at the very last moment. He contended that under sub-section (*3*) of section 2 of the Contempt of Courts Act this court was not empowered to punish his client. That sub-section runs as follows:—

"No High Court shall take cognisance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code."

Mr. Bose argued that since there is already a provision under the Indian Penal Code for the punishment of resistance to a public servant notably under section 186 of that Code, the offence comes within the character of one which is punishable under the Indian Penal Code and, therefore, this Court is excluded from taking cognisance of it as a contempt of Court. But it was pointed out by this Court in the case of *Kaulashia* v. *King-Emperor*(1) that the meaning of the sub-section is not that if the act complained of is not only a contempt of court but is also punishable under the Indian Penal Code the offence is not also punishable as a contempt of court, but that the real meaning of the sub-section is that if the act constitutes an offence against the Penal Code it may well be punishable under the Penal Code and if it

(1) (1932) I. L. R. 12 Pat. 1.

also constitutes a contempt of court and if as a contempt of court it is not of the character set forth in section 228 of the Indian Penal Code then it is punishable by this Court. As I take it the broad history of the law may be stated thus:—Courts of record have inherent power to punish contempts of their authority whether committed in the face of the Court or whether committed vicariously upon the persons of their officers. It was, however, not thought fit to give power of that character to subordinate courts. The express provisions of section 228 set forth the contempts of inferior courts which are punishable under the Code and it was subsequently held that contempts, which would be certainly contempts of a court of record, if they do not come within the provisions of section 228 or any other section, cannot be punished as offences of the character of contempt of court. And it was further held that the High Courts of record cannot punish contempts of the inferior courts. Subsequently the Contempt of Courts Act was passed which enabled the superior courts to punish contempts of the inferior courts notwithstanding that such contempt as is complained of is not an offence (as contempt) against any of the sections of the Indian Penal Code and the object is that as to contempts considered as contempts of the court which are punishable by the Indian Penal Code they shall not be taken cognisance of by the High Court. Now sections 175 to 179 of the Indian Penal Code define as offences various acts and those acts are offences not against the court itself because they are applicable whether or not in many cases a court is concerned at all. The offence of striking or resisting a public servant is an offence whether that public servant is the public servant of a court or whatever his capacity be provided he be a public servant. The only section of the Indian Penal Code which deals with contempts committed against a judicial officer, that is to say, a court, is section 228. The offence in this case is not punishable under section 228. Therefore, this Court has power to take cognisance of it.

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This point was raised during the actual course of the judgment very courageously by Mr. Bose but in my opinion it is unsound.

KHAJA MOHAMAD NOOR, J.—I agree. At one time I was inclined to hold that the objection of Mr. Bose should prevail; but on further consideration I have come to the conclusion that the view taken by my Lord the Chief Justice is, if I may say so, correct. It has been contended that the obstruction offered to the naib nazir is an offence under section 186 of the Indian Penal Code and, therefore, under sub-section (*3*) of section 2 of the Contempt of Courts Act of 1926 we are precluded from taking cognizance of that offence. This contention, though plausible, has no substance. Obstruction offered to a public servant in the discharge of his public function is an offence by itself though the public servant may not be acting under the orders of a Court of Justice as long as he was performing a legal public function. But if that public servant is carrying out an order of a court the offender commits another offence, namely, the offence of contempt of the court whose order the public servant is carrying out. Section 186 of the Penal Code takes no notice of this second offence. It is of the utmost importance for the administration of justice that citizens should submit to the orders and authority of courts. By obstructing the execution of a process of law the offender undermines the authority of this Court and this is not punishable under the Penal Code as such. Sub-section (*3*) of section 2, in my opinion, obviously excepts those cases of contempt which are punishable under the Penal Code as contempt and not if they are punishable independent of that contempt. In this particular case the offender has been guilty of two offences; one is obstruction to the naib nazir and another is contempt of the Court of the Subordinate Judge; while the first one is covered by the Penal Code, the second one is not.

On these grounds I agree with the order passed by my Lord the Chief Justice.

Order accordingly.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

1932.

November, 11.

RAJA PRAMATHA NATH MALIA

v.

MR. I. S. MACKEY.*

Res Judicata—application for amendment of decree dismissed for default—subsequent application, hearing of, whether barred—Code of Civil Procedure, 1908 *(Act V of* 1908), *Order IX, rule* 4, *principle underlying applicable.*

Where an application for the amendment of a decree was dismissed for default, the petitioner having failed to file the process forms, and an application for review of that order was also dismissed, and a second application for amendment was subsequently made.

Held, that the previous application having been rejected without adjudication on merits, the dismissal of that application did not operate as a bar, on the principle of res judicata, to the hearing of the subsequent application.

Langat Singh v. *Janki Kuar*(1), followed.

Application by defendant no. 3 for amendment of the decree.

The facts of the case are set out in the judgment of Kulwant Sahay, J.

P. B. Ganguli, for the petitioner.

Government Pleader, for the opposite party.

KULWANT SAHAY, J.—This is an application for amendment of a decree made by this Court. The application is on behalf of defendant no. 3. The decision of this Court, so far as this defendant is concerned, is that the appeal be dismissed as against him with costs. There was another defendant,

* Miscellaneous Judicial Case no. 20 of 1932.

(1) (1911) I. L. R. 39 Cal. 265.

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namely, defendant no. 14, whose Advocate asked for costs also, and it was ordered that the appeal be dismissed as against the said defendant no. 14 and that he be entitled to his costs in this Court—hearing fee ten gold mohurs.

The decree was prepared in this Court awarding costs jointly to the defendants nos. 3 and 14 and it awarded ten gold mohurs as hearing fee to both of them. The petitioner contends that under the terms of the judgment he was entitled to separate costs and to the full hearing fee according to the ordinary scale and that the ten gold mohurs as hearing fee was the fee allowed to defendant no. 14 separately. In my opinion the contention is sound and the decree must, therefore, be amended by awarding separate costs to the defendant no. 3 and defendant no. 14. The defendant no. 3 is entitled to his costs and to the full hearing fee according to the ordinary scale and the defendant no. 14 is entitled to his costs and ten gold mohurs as his hearing fee, according to the terms of the judgment. A point has been taken on behalf of the learned Government Pleader to the effect that the present application is not maintainable because a previous application to the same effect had been rejected by this Court. It appears that upon the previous application a notice was ordered to issue, but the petitioner failed to file the process forms although he had deposited the talbana and copies, and, therefore, the previous application was dismissed for default. He made an application for review of that order and that application was also dismissed. It is contended that the rejection of the previous application operates as a bar, on the principle of res judicata, to the hearing of the present application. In my opinion, the objection cannot be entertained. The previous application was not heard and decided on merits. Notice was ordered to issue; but notices were not issued on account of default on the part of the petitioner. The case of the petitioner may not be worse than the case of a plaintiff whose suit has been

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dismissed for non-service of summonses upon the defendants. Under Order IX, rule 4, such a plaintiff has the right to institute a fresh suit subject, of course, to the law of limitation. Similarly the dismissal of the previous application in the present case cannot operate as an estoppel and does not debar him from making the present application inasmuch as the previous application had been rejected without adjudication on merits. The point was considered by the Calcutta High Court in *Langat Singh* v. *Janki Kuar*(1) and the cases cited there support the view which I am inclined to take on the point.

This application is, therefore, allowed as indicated above. There will be no order for costs in this application.

MACPHERSON, J.—I agree.

Application allowed.

APPELLATE CIVIL.

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

CHHATERBIJAI SINGH

v.

DAMODAR DAS.*

1932.

November, 16.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 90—*sale held in lots—irregularity extending to all the lots—inadequacy of price in respect of some only of the lots—sale, whether should be set aside in respect of all the lots.*

In a proceeding under Order XXI, rule 90, Code of Civil Procedure, 1908, where both the irregularity and the injury to the objector can be satisfactorily allotted to one part only of the sale, the court may be justified in setting aside the sale of that part only, but in cases where the irregularity extends

* Miscellaneous Appeals nos. 81 and 85 of 1931, from an order of Babu Debi Prasad, Subordinate Judge of Shahabad, dated the 21st March, 1931.

(1) (1911) I. L. R. 39 Cal. 265.

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to the whole property and to all the lots, it is not justifiable to retain the efficacy of the sale with respect to some of the plots only in which the sale price obtained cannot be shewn to be inadequate.

Appeal by the judgment-debtors.

The facts of the case material to this report will appear from the judgment of Courtney Terrell, C.J.

C. P. Sinha, for the appellants.

Government Pleader and *D. N. Varma*, for the respondents.

COURTNEY TERRELL, C.J.—Appeal no. 85 of 1931 is from a decision of the Subordinate Judge of Shahabad, the appellants being the judgment-debtors. The plaintiffs in the suit had obtained a decree against the judgment-debtors for a considerable sum of money and proceeded to sell certain properties belonging to the judgment-debtors as joint family property. The property was located in several distinct villages and it was advertised for sale in separate lots and ultimately sold. Certain of the judgment-debtors being share-holders in the defendants' family asked that the sale should be set aside under Order XXI, rule 90, of the Civil Procedure Code on the ground that there were irregularities in the conduct of the sale and that they had suffered loss or damage on account of such irregularities. The learned Subordinate Judge found as a fact, after considering the evidence, that there had been serious irregularities in the conduct of the sale inasmuch as the sale proclamation had not been served on the spot and that the irregularity extended to all the lots which were ultimately sold. But in considering the application to set aside the sale of each and every lot he proceeded to divide the lots into two classes. Notwithstanding that the irregularity extended to the whole of the property sold, he pointed out that as to three of them, on his view of the evidence, no loss could be shewn to

have been sustained in respect of those lots inasmuch as the sale price obtained was within measurable distance of the advertised value.

In support of the learned Subordinate Judge's decision it has been argued that the Court was perfectly entitled; having regard to the proviso to Order XXI, rule 90, to divide the sale into separate plots and to set aside the sale in respect of some only of the lots and I can well understand that as a broad proposition that may well be true but the circumstances under which that can be done are limited only to cases, in my opinion, in which both the irregularity and the injury to the objector can be satisfactorily allotted to one part only of the sale in which case that part of the sale may properly be set aside. There may conceivably be other circumstances but in cases such as I have described the Court may well be justified in setting aside the sale. But here where the irregularity extends to the whole property and to all the lots it is not justifiable to retain the efficacy of the sale with respect to some of the plots only in which the sale price obtained cannot be shewn to be inadequate in view of the advertised sale value. On this point the judgment-debtors who have objected are, in my opinion, justified in their objection to the order of the learned Subordinate Judge and a fresh sale proclamation should be issued and the entire property put up for sale.

As to the appeal no. 81 of 1931 that objection was dismissed. It was an objection by one of the shareholders in the defendants' joint family property. The objection was dismissed for reasons into which it is unnecessary to go. The objection of the shareholders in appeal no. 85 of 1931 having been efficacious and the sale having been set aside it is not necessary to consider whether or not the objection in appeal no. 81 of 1931 was justified and accordingly I would allow appeal no. 85 of 1931 with costs and as to appeal no. 81 of 1931 I would dismiss that appeal but

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without costs. Appeal no. 81 of 1931 was not pressed and we are not in a position to say anything as to its merits.

KHAJA MOHAMAD NOOR, J.—I agree.

Appeal no. 81 *dismissed.*

Appeal no. 85 *allowed.*

APPELLATE CRIMINAL.

1932.

November, 8, 17.

Before Courtney Terrell, C.J.

(On difference of opinion between Scroope and Agarwala, JJ.)

KING-EMPEROR

v.

RAM CHANDRA SAHU.*

Penal Code, 1860 (*Act XLV of* 1860), *section* 21, *clauses* (4) *and* (9)—"*apprentice*" *peon serving process without remuneration, whether is a* "*public servant*"—*clause* (9)—*unpaid peon authorized by Munsif to serve process, whether is* "*specially authorized*" *within the meaning of clause* (4).

Section 21 of the Penal Code, 1860, provides :—

"The words 'public servant' denote a person falling under any of the description hereinafter following, namely.....

Fourth.—Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court; and every person specially authorized by a Court of Justice to perform any of such duties.....

Ninth..... and every officer in the service or pay of Government or remunerated by fees or commission for the performance of any public duty....."

Held, per Courtney Terrell, C.J. and Agarwala, J. (Scroope, J. *dissentiente*)—(*i*) When a person who has no

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* Government Appeal no. 4 of 1932, from a judgment of Mr. S. N. Patnaik, Sub-Deuty Magistrate, 2nd Class, Bargarh, dated the 23rd of April, 1932.

general power to execute a judicial process is authorized by a court to execute such a process, he is " specially authorized " within the meaning of section 21(*4*).

(*ii*) where a person is enrolled as a candidate or apprentice peon getting no pay or remuneration by fees or commission for the performance of any public duty, but accepts the duties and responsibilities of executing a warrant entrusted to him and the court recognises him as filling the position of a process-server, he falls within the description of " public servant " as defined in the ninth clause of section 21.

Queen-Empress v. *Parmeshar Dat*(1) and *Queen* v. *Ramkristo Doss*(2), followed.

Per SCROOPE, J.—(*i*) The mere fact that the Munsif himself has made over a process to an " apprentice " peon for service, does not bring that peon within the words " specially authorized by a Court of Justice " of the fourth clause of section 21. That expression has reference to an ad hoc appointment, as for example, that of a commissioner in a civil case who receives a writ of commission from the Civil Court and thereby becomes a public servant for the purpose of the particular duty assigned to him;

(*ii*) a " candidate " or " apprentice " peon who serves processes without any remuneration whatsoever is not a " public servant " within the meaning of the ninth clause of section 21, as he cannot be called " an officer in the service of Government ".

The facts of the case are set out in the following judgment of Agarwala, J.

AGARWALA, J.—The question for decision in this appeal is, whether the complainant Pankdhar Meher was, on the 25th of February, 1932, a " public servant " within the meaning of section 21 of the Indian Penal Code. The complainant had for some time been enrolled as a candidate peon in accordance with rule 30 of the High Court General Rules and Circular Orders. He gets no pay or remuneration, but by being on the list of candidate peons he has the chance of being appointed as a civil court process server when a vacancy occurs. The facts out of which this appeal has arisen were these. The complainant was entrusted with the service of a warrant of attachment of moveable properties which had been issued in execution of a decree by the Munsif of Bargarh. On the 25th of February he went to the house

(1) (1886) I. L. R. 8 All. 201.
(2) (1871) 16 W. R. 27 (Cr.).

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AGARWALA, J.

of the judgment-debtor for the purpose of executing the warrant and attached some of his moveable property. Ram Chandra, the son of the judgment-debtor then assaulted him and took away the property. Ram Chandra was put on his trial on charges of theft, of resisting the taking of property by the lawful authority of a public servant and of assaulting a public servant. The Deputy Magistrate who tried the case came to the conclusion that the complainant was not a public servant. In these circumstances he held that it was useless to enter into a discussion of the merits of the case and he acquitted the accused. The Government have appealed under section 417 of the Code of Criminal Procedure, and the question for decision now is, whether the complainant was a public servant at the time he was resisted and assaulted.

The material portions of section 21 of the Indian Penal Code are the fourth and ninth clauses. The material words of the fourth clause are as follows:

"Every officer of a Court of Justice.....and every person specially authorized by a Court of Justice to perform any of "

the duties of an officer of a Court of Justice. This clause clearly distinguishes between a person who is an "officer of a Court of Justice", and a person who is not such an officer; the latter is not a "public servant" within the meaning of the section unless he is "specially authorized" by a Court of Justice to perform the duties of an officer of a Court of Justice. Now, in this case the Munsif of Bargarh deposed that owing to dissatisfaction among the peons of the civil courts of Bargarh with the distribution of processes by the nazir he himself distributes the processes and that he gave the warrant of attachment in this case to the complainant for execution. It is contended by the learned Government Advocate that this amounts to special authorization within the meaning of section 21, clause 4 of the Code. I have no doubt that the complainant in this case was authorized by the Munsif to execute the warrant and to my mind the only question that arises is whether he was "specially" authorized; and it seems to me that when a person who has no general power to execute a judicial process is authorized by a court to execute such a process, he is "specially authorized" within the meaning of the section.

It has also been argued by the learned Government Advocate that the complainant is a public servant within the meaning of the ninth clause of the section. Under this clause

"every officer in the service or pay of Government or remunerated by fees or commission for the performance of any public duty "

is a public servant. It is argued that although the complainant is not in the pay of Government and is not remunerated by fees or commission for the performance of any public duty, he is nevertheless in the service of Government; and reliance was placed on the decision of Straight, J., in *Queen Empress* v. *Parmeshar Dat*(1) where his Lordship said: "I am of opinion that any person, whether receiving pay or not, who chooses to take upon himself duties and responsibilities belonging to the position of a public servant, and performs those duties,

(1) (1886) I. L. R. 8 All. 201.

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AGARWALA, J.

and accepts those responsibilities, and is recognized as filling the position of a public servant, must be regarded as one". It is true that that was a case in which the person alleged to be a public servant was interested in denying that he was such public servant, but I respectfully agree with the test suggested by Straight, J. In this case, as has been already observed, the complainant was enrolled as a candidate or apprentice peon; he accepted the duties and responsibilities of executing the warrant entrusted to him; the Munsif recognized him as filling the position of a process-server; and I am, therefore, of opinion that he was a person who fell within the description of 'public servant' as defined in the ninth clause of section 21. The case is not dissimilar from that of *The Queen* v. *Ramkristo Doss*(1). There a supernumerary collectorate peon, whose sole remuneration was the amount received as fees on such occasions as he was entrusted with the service of processes, was deputed, on the 21st of June, 1871, to keep order in the Special Sub-Registrar's office, for which duty he was to get no remuneration at all. It was held by Ainslie and Paul, JJ. that the peon was a public servant while keeping order in the Special Sub-Registrar's office.

I would, therefore, set aside the acquittal and send the case back to the learned Magistrate to be tried according to law.

SCROOPE, J.—The additional evidence ordered by a Bench of this Court has now been taken and it transpires that the peon got no remuneration at all for serving this process and this peculiar system which seems to prevail in Sambalpur alone of all the civil courts in the province according to which "candidate" or "apprentice" peons serve processes without any remuneration whatsoever has led to the difficulty in this case, the Sub-Deputy Magistrate of Bargarh having held that such a peon is not a public servant and I am not prepared to say that he is wrong. There is authority in support of either view. The learned Magistrate has relied on *Mahendra Prosad* v. *Emperor*(2) and in support of the appeal *Queen-Empress* v. *Parmeshar Dat*(3) and *Queen* v. *Ramkristo Doss*(1) have been cited. The learned Government Advocate has sought to bring this kind of peon under the words "specially authorized by a Court of Justice" because the Munsif himself made over the processes to the peon: but it was not because he was an unpaid peon that the Munsif did this. It appears that the Munsif distributes the processes amongst the peons in Bargarh as there had been some dissatisfaction amongst the peons when the Nazir distributes; and in my opinion, the mere fact of distribution by the Munsif does not amount to "specially authorized" within the meaning of the fourth clause of section 21 of the Indian Penal Code. The expression, in my opinion, has reference to an ad hoc appointment, say, that of a commissioner in a civil case who receives a writ of commission from the civil court and thereby becomes a public servant for the purpose of the particular duty assigned to him. Nor do I consider that the complainant is a public servant within the meaning of the ninth clause as he cannot be called "an officer in the service of

(1) (1871) 16 W. R. 27 (Cr.).
(2) (1910) 9 Ind. Cas. 698.
(3) (1886) I. L. R. 8 All. 201.

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Government ". The High Court Rules do not, as I read them, contemplate a peon serving processes without remuneration of any kind: obviously no proper system of process serving could, as it simply means that this irregular forces of peons is to gain its remuneration from the litigant public. I would, therefore, hold that the so called peon in this case was not a public servant and was not acting in that capacity and I would dismiss the appeal.

ORDER.

SCROOPE, J.

SCROOPE AND AGARWALA, JJ.—As we have disagreed in this case let the appeal be placed before the Hon'ble the Chief Justice for necessary orders.

On this reference

Sir Sultan Ahmed, Government Advocate, for the appellant.

H. Singh, for the respondent.

COURTNEY TERRELL, C.J.—I need only say that I entirely agree with the judgment of Mr. Justice Agarwala and have nothing to add to it.

Appeal allowed.

Case remanded.

REFERENCE UNDER THE COURT-FEES ACT, 1870.

1932.

November, 18.

Before James, J.

DHANUKDHARI PRASAD PANDEY

v.

RAMADHIKARI MISSIR.*

Court-fees Act, 1870 (*Act VII of* 1870), *section* 11 *and Schedule* 1, *Article* 1—*final decree determining amount of mesne profits, appeal from—ad valorem court-fee payable on amount of decree—liability of defendants joint—value of appeal, what should be—ad valorem court-fee paid on the appeal from preliminary decree, whether allowance should be made for—Taxing Judge, whether can make reference to Division Bench.*

* Reference under section 5 of the Court-fees Act.

7-A-67/33

Where the amount of mesne profits is definitely ascertained and embodied in a final decree, and an appeal is presented against that decree, the appellant must pay on the memorandum of appeal ad valorem court-fee calculated on the amount of the decree which is the subject-matter of the appeal and not merely on the value of the mesne profits claimed in the plaint.

Kedar Nath Goenka v. *Maharaja Chandra Mauleshwar Prasad Singh Bahadur*(1), followed.

Sheodhin Singh v. *Norangi Lal Ram Marwari*(2), not *followed.*

Ram Gulam Sahu v. *Chintaman Singh*(3), referred to.

The second part of section 11, Court-fees Act, 1870, applies only to a claim for mesne profits accruing subsequently to the date of suit of which the plaintiff is unable to calculate the approximate value and to a case in which the mesne profits calculated in execution exceed the original claim. It does not apply to mesne profits accruing before suit on which a definite valuation has been placed in the plaint.

Where the liability of the defendants under a decree for mesne profits was joint and some only of them preferred an appeal from the decree adopting a valuation calculated on the proportion which the area held by them bore to the total area of which the plaintiff had been dispossessed, *held*, that the value of the appeal must be the value of the whole decree, and that the ad valorem court-fee payable was to be calculated on that amount.

Held, further, that in calculating this court-fee allowance should be made for the ad valorem court-fee already paid on the appeal from the preliminary decree, since the appellant was not required to pay ad valorem court-fee twice.

Kanchan Mandar v. *Kamla Prasad Chowdhury*(4), followed.

A Taxing Judge must himself decide the point referred to him for his decision and he cannot make a reference to a Division Bench.

(1) (1932) I. L. R. 11 Pat. 532.
(2) (1926) 11 Pat. L. T. 703.
(3) (1925) I. L. R. 5 Pat. 361, F. B.
(4) (1912) 16 Cal. L. J. 564.

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Kachera v. *Kharag Singh*(1), followed.

Reference to the Taxing Judge under section 5 of the Court-fees Act.

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

B. N. Mitter, for the appellants.

Government Pleader, for the Crown.

JAMES, J.—This appeal arises out of a suit for recovery of mesne profits. The suit was decreed against all the defendants with the direction that a commissioner should be appointed to take an account in order to ascertain the actual value of the profits to be awarded. The suit was valued at thirteen thousand rupees; but the commissioner has found that the plaintiff is entitled to mesne profits of Rs. 16,011. This decision has been adopted by the Subordinate Judge who has by his final decree definitely directed, without any ambiguity, that the liability of all the defendants will be joint. The appellants preferred an appeal from the preliminary decree adopting a valuation calculated on the proportion which the area held by them bore to the total area of which the plaintiff has been dispossessed. They have now preferred an appeal from the final decree valuing their appeal in the same way and paying ad valorem court-fee on the difference between this value and that of the appeal against the preliminary decree. The Taxing Officer has made a reference under the Court-fees Act on two grounds; first, of whether ad valorem court-fee is payable on an appeal of this kind; and secondly, of whether the value of the appeal for the purposes of court-fee is that of the entire decree.

On the question of whether the appeal should be valued at the value of the entire decree, or only at that which would have been its proportionate value if the learned Subordinate Judge had decided otherwise than he did, it appears to be clear, since by the

(1) (1910) I. L. R. 33 All. 20.

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decree these defendants are liable to pay mesne profits of Rs. 16,011, and not any smaller sum calculated on what might have been their liability if the decision had been otherwise, that the value of the appeal is the value of the whole decree. It has been definitely found that these defendants with the other defendants who were jointly liable entered into a conspiracy to dispossess the plaintiff, and that the liability of the defendants cannot be split up and apportioned. The value of this appeal is, therefore, Rs. 16,011-5-0; and if ad valorem court-fee is payable it must be calculated on that amount.

On the second point the reference has been made on account of a decision of a Division Bench of this Court, differing from the decision of the Taxing Judge which has hitherto prescribed the rule for determining the court-fee payable on such appeals. Jwala Prosad, J. in *Sheodhin Singh* v. *Norangi Lal Ram Marwari*(1) held that where the applicant for ascertainment of mesne profits in a proceeding under Order XX, rule 12, of the Code of Civil Procedure was not satisfied with the amount awarded by the court enquiring into the matter, and preferred an appeal claiming a higher amount, he was not liable to pay ad valorem court-fee on the amount which he claimed on appeal, because no court-fee calculated ad valorem could be demanded from the appellant until the amount of mesne profits actually due to him had been ascertained in the appeal, when the provisions of the second part of section 11 of the Court-fees Act would become applicable. A Full Bench of this Court, in *Ram Gulam Sahu* v. *Chintaman Singh*(2), had laid down the rule that where the decree directs mesne profits to be ascertained in execution, court-fee calculated ad valorem cannot be levied on the successful plaintiff when he prefers his claim in execution; it is not payable until, after the enquiry has been held and the amount of the mesne profits

(1) (1926) 11 Pat. L. T. 703.
(2) (1925) I. L. R. 5 Pat. 361.

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ascertained, he proceeds to execute his decree against the judgment-debtor. Following the principle laid down in that decision, Jwala Prosad, J. in *Sheodhin Singh's*(1) case held that no court-fee calculated ad valorem could be levied from the successful plaintiff at any stage of the proceedings until the provisions of the second part of section 11 of the Court-fees Act became applicable, on his proceeding to execute his final decree, and that, therefore, ad valorem court-fee could not be levied on an appeal by the successful plaintiff, in which he claimed a higher amount than the lower court had awarded him in the preliminary execution proceedings. The matter came before a Division Bench of this Court in *Kedar Nath Goenka* v. *Maharaja Chandra Mauleshwar Prosad Singh Bahadur*(2) wherein the learned Judges, acting under section 28 of the Court-fees Act, decided that court-fee calculated ad valorem was payable on a memorandum of appeal presented against a decree made on an application for ascertainment of mesne profits. The learned Judges differed from the view taken by the Taxing Judge in *Sheodhin Singh's*(1) case, pointing out that the document which they had to consider was not a petition for ascertainment of mesne profits but a memorandum of appeal. They observed that section 4 of the Court-fees Act required that no document of any of the kinds specified in the first schedule of the Act could be received by the High Court unless in respect of that document there had been paid a fee or an amount not less than that indicated by the said schedule as the proper fee for such a document. They then proceed to point out that the first article of Schedule I of the Court-fees Act prescribes that a memorandum of appeal is to bear a court-fee stamp calculated on the value of the subject-matter in dispute in the appeal. It is argued that the learned Judges of the Division Bench had no power to reopen under section 28 of the Court-fees

(1) (1926) 11 Pat. L. T. 703.
(2) (1932) I. L. R. 11 Pat. 532.

Act a matter which had already been finally decided by the fact that the Stamp Reporter had accepted the memorandum of appeal as sufficiently stamped at the time when the appeal was preferred. The matter came before the Division Bench because the officer whose duty it was to prepare the decree of the Court found difficulty, owing to the fact that in his opinion the memorandum of appeal had been insufficiently stamped. I do not consider that it is necessary for me to decide whether a Division Bench has power under section 28 of the Court-fees Act to enquire into the question of whether a memorandum of appeal which is before them has been sufficiently stamped or not. Even if the argument be accepted that the remarks of the learned Judges are to be treated as no more than obiter dicta, the fact remains that the obiter dictum of a Division Bench must be treated with respect; and the Taxing Officer in the present case acted rightly in making his reference.

In view of the fact that the liability of all the defendants has been found to be joint so that the present appellants were by the original decree liable to pay the whole of the mesne profits which might ultimately be found to be payable, there can be no question in the present case regarding the correctness of the Stamp Reporter's view that ad valorem court-fee is payable on the value of the decree up to the extent of thirteen thousand rupees which was the valuation in the plaint. The second part of section 11 of the Court-fees Act has no application until the amount of mesne profits payable comes to be determined in execution. Where a definite value is placed in the plaint on the mesne profits claimed, and the suit is decreed, the defendant appealing from the decree must pay court-fee calculated ad valorem on the value of the mesne profits claimed in the plaint, whether the suit is only for mesne profits, or whether the claim for recovery of mesne profits accompanies a claim for recovery of land: *Kanchan Mandar* v. *Kamla Prashad Chowdhury*(1). The second part of

(1) (1912) 16 Cal. L. J. 564.

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section 11 of the Court-fees Act, whether it applies to appeals or not, applies only to a claim for mesne profits accruing subsequently to the date of suit, of which the plaintiff is unable to calculate the approximate value, because he cannot say for how long a period he is likely to be kept out of possession, and to a case like this, in which the mesne profits calculated in execution exceed the original claim. The rule applies to the present case only to this extent, that the plaintiff must pay additional court-fee before he can execute his decree; but it does not apply to mesne profits accruing before suit on which a definite valuation has been placed in the plaint. The question, therefore, to be considered in the present case is that of whether ad valorem court-fee is payable on the whole amount for which the appellants seek to avoid liability, or only on that portion of it which was included in the value of the plaint. The amount to which the second part of section 11 applies is thus the sum of three thousand rupees or so by which the mesne profits ascertained in execution exceed the amount definitely claimed in the plaint. According to the decision of the Taxing Judge in *Sheodhin Singh's*(1) case ad valorem court-fee is not payable on this amount; while according to the decision of the Division Bench in *Kedar Nath Goenka's*(2) case ad valorem court-fee is payable. As this question has been referred to me for decision as Taxing Judge, I am obliged to decide it, since I cannot make a reference to a Division Bench: *Kachera* v. *Kharag Singh*(3). It appears to me that the reasons given by the Division Bench for their decision in *Kedar Nath Goenka's*(2) case should prevail, that an appeal differs from a mere application for ascertainment of mesne profits, and that a memorandum of appeal of this kind is liable to ad valorem court-fee under Article 1 of Schedule 1 of the Court-fees Act. When mesne profits have once

(1) (1926) 11 Pat. L. T. 703.
(2) (1932) I. L. R. 11 Pat. 532.
(3) (1910) I. L. R. 33 All. 20.

1932.

DHANUK-DHARI PRASAD PANDEY. v. RAJADHIKARI MISSIR.

JAMES, J.

been definitely ascertained in execution, the plaintiff is certainly capable of ascertaining the exact amount which he claims, and the defendant knows definitely the amount of the liability which he is seeking to escape. I would, therefore, hold that the value of the present appeal is Rs. 16,011-5-0 and that ad valorem court-fee is payable on that amount. In calculating this court-fee allowance should be made for the amount of the ad valorem court-fee already paid on the appeal from the preliminary decree, since the appellant is not required to pay ad valorem court-fee twice: *Kanchan Mandar* v. *Kamla Prasad Choudhury*(1); but the attention of the Stamp Reporter should be drawn to the fact that unless ad valorem court-fee is paid on this appeal, the memorandum in First Appeal 117 of 1930 will be insufficiently stamped.

Order accordingly.

PRIVY COUNCIL.

RAJA KIRTYANAND SINGH

v.

RAJA PRITHI CHAND LAL CHAUDHURY.

J.C.* 1932.

November, 22.

Limitation—Execution of Decree—Subsequent Order directing Payment—Order in different Suit—Order staying Execution—Debtor and Surety—Limitation Act (IX of 1908) s. 15—Code of Civil Procedure (V of 1908), s. 48(1)(b); s. 145.

Under section 48(1)(*b*) of the Code of Civil Procedure, 1908, a subsequent order directing payment does not postpone the commencement of the period limited for making a fresh application for execution of a decree unless the order is made in the suit in which the decree was made and directs payment by the debtor or surety of money due under the decree; the provision does not apply, therefore, where a receiver having been appointed in a different suit he is directed to make payments in discharge of the decree sought to be executed. Further, a statement in an order in that

* PRESENT: Lord Tomlin, Lord Thankerton and Sir Lancelot Sanderson.

(1) (1912) 16 Cal. L. J. 564.

1932.

RAJA KIRTYANAND SINGH v. RAJA PRITHI CHAND LAL CHAUDHURY.

different suit that the holders of the decree sought to be executed must wait for payment is not an injunction or order staying execution of the decree within section 15 of the Limitation Act, 1908.

Semble if a person in his capacity as surety consents to a decree against the principal debtor the effect of section 145 of the Code of Civil Procedure, 1908, is that the decree can be executed against him as though he were a party to the suit and the principal debtor.

Decree of the High Court affirmed.

Appeal (no. 126 of 1930) from a decree of the High Court (July 10, 1929) affirming an order of the Subordinate Judge of Monghyr.

The question arising upon the appeal was whether an application by the present appellants on July 13, 1927, to execute a decree dated April 1, 1914, was barred by limitation. The respondent against whom it was sought to execute the decree was a surety for payment of the rent for which the decree was recovered, and assented to the decree which was a compromise of the claim in the suit. The material facts, and enactments appear from the judgment of the Judicial Committee.

The High Court (Kulwant Sahay and Macpherson, JJ.) held, affirming the order appealed from, that the application was barred under s. 48 of the Code of Civil Procedure, 1908.

1932. Nov. 21, 22. *Sir Dawson Millar, K. C.* and *Hyam*, for the appellants.

Dunne, K. C. and *Wallach*, for the respondent.

The argument for the appellant is stated in the judgment; the respondent's counsel was not called upon.

The judgment of their Lordships was delivered by

LORD TOMLIN—This is an appeal from a decree of the High Court at Patna, which affirmed an Order dated 19th September, 1927, of the Court of the Subordinate Judge of Monghyr.

The question arises in this way. On the 1st April, 1914, a decree was made in certain rent suits

by which by consent the present appellants, or their predecessors, obtained a decree for Rs. 1,84,521, besides further interest thereon at 8 annas per cent. per month. It was provided by the decree that the plaintiff should not take out execution of the decree until March, 1915, so that there was a year's suspension.

The present respondent was a consenting party to the decree in his capacity as surety. The result of that apparently is that the decree can under section 145 of the Civil Procedure Code be executed against him as though he were a party to the suit and the principal debtor.

Having obtained that decree, the plaintiffs made a number of applications for execution.

The first was made on the 23rd June, 1915, and apparently was struck off on the 24th June, 1916, without there being any satisfaction of the decree. A second application was made on the 10th September, 1918, and that again was struck off on the 25th March, 1919, without any satisfaction of the decree. A third application was made on the 10th April, 1919; but in the meantime the defendants in the rent suits who apparently were, or claimed to be, interested in the Srinagar Raj, as one of their principal assets, had a suit commenced against them by a lady of the family, the nature of which does not very clearly appear but which was evidently a suit for the protection of the property in the interests of the family.

In the course of that suit apparently in January, 1920, a receiver was appointed, and on the 31st January an application was made in that suit by the appellants in the absence of the judgment-debtors and of the surety, which resulted in an Order in that suit for payment of Rs. 9,000 half-yearly by the receiver in that suit to the appellants in respect of their judgment debt in the rent suits. In fact, the receiver paid nothing.

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On the 24th February, 1920, the third application for execution in the rent suits which was up till that moment pending, was struck out. About this time it appears that at the instance of the receiver in the Raj suit the proceedings in the rent suits were transferred from Monghyr, where they had theretofore been conducted, to Bhagalpur where the Raj suit was proceeding; and presently an application was made by the appellants in the Raj suit asking in effect that either the receiver might pay their debt, or that they might levy execution on the property of the Raj in the hands of the receiver.

That application seems to have come before the Subordinate Judge on many occasions, and on each occasion he saw fit to postpone decision and ultimately, according to the order-sheet, on the 16th September, 1922, he made an order that the appellants were to wait for some time for payment of the larger decree, and he directed an account of the smaller decree. That only means that the compromise decree was made up of two separate sums, a bigger sum and a smaller sum; so that the result of that was that they were left with nothing in the main to satisfy their debt. At that moment when that order was made, it is to be observed that there were in fact no execution proceedings pending at all. The appellants appealed against the last-mentioned order and on the 16th April, 1923, that is, seven months afterwards, the order was set aside.

On the 15th May, 1923, that is a month after the order was set aside, the appellants made their fourth application for execution in the rent suits. That was struck off on the 8th June, 1923, and there is no information as to why it was so struck off although it appears that in the meantime some sum had been paid to the appellants by the receiver in the Raj suit.

On the 11th June, 1923, that is, three days after the fourth application was struck off, the appellants

made a fifth application for execution and that was struck off on the 30th March, 1926. But in the meantime, in some way or another, they had succeeded in getting an order for the sale of the Raj property, presumably in the Raj suit, and the Raj property was in fact sold and something over a lakh of rupees was realised and paid to them in satisfaction *pro tanto* of their judgment debt. But there remained a substantial sum still owing to them.

On the 15th June, 1925, they made a sixth application for execution in the rent suits. Their Lordships have no particulars of that application, or what happened to it, it probably suffered the fate of its prdecessors and was struck off without any particular result.

On the 13th July, 1927, there followed a seventh application for execution in the rent suits. It is to be observed that the six applications which have been mentioned up to this point were all applications against the judgment-debtors. The seventh application was, however, an application against the surety. This application founds the present appeal before their Lordships' Board, because objection was taken to it that it was out of time. That objection was upheld in both Courts below, and it is against that conclusion that the present appellants have appealed to His Majesty in Council.

Now two points are made by the appellants. The first is that though under section 48 of the Code of Civil Procedure it is *prima facie* barred, because a period of twelve years has run, it is saved by the order of the 31st January, 1920, by which the receiver was ordered to make half-yearly payments to the appellants, on the ground that that order is within the meaning of section 48 (1) (*b*) a subsequent order directing payment of money.

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The section is as follows:

"Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from: (*a*) the date of the decree sought to be executed, or (*b*) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree."

Their Lordships are of opinion that on the true construction of the section the subsequent order must be an order in the suit in which the decree is made, and an order which directs payment by the debtor or the surety of money in respect of the judgment debt. The order of the 31st January, 1920, satisfies none of these conditions. It is an order made at a time when some of the property which was believed to be the property of the debtors was the subject of some suit in the nature of an administration suit, in which a receiver had been appointed. The application for the order made in that suit, was made in the absence of the judgment-debtors and in the absence of the surety, and the order for payment was an order on the receiver in that suit. That, in their Lordships' opinion, is not such an order as is contemplated by section 48(1) (*b*) at all, and that point, therefore, fails.

The second point depends upon section 15 of the Indian Limitation Act, 1908, which is in these terms:

"(1) In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded."

The point made by the appellants is this. They say that on the 16th September, 1922, the judge in the Raj suit ordered, according to the note in the order paper—their Lordships have not the order before them—that the decree-holders were to wait for some time for payment. That order was set aside on the

16th April, 1923. Therefore, there was an interval of seven months during which the order of the 16th September, 1922, was in operation. The appellants say that was a stay, and those seven months saved the situation for them, because if those seven months are not counted the present application was in time.

Now the first thing to be observed is that at the time when that order was made, there was in fact no application for execution pending at all. It was an order, again, made in the Raj suit and not in the rent suits; it was an order made on an application by the decree-holders seeking leave to proceed against property in the hands of the receiver, in the Raj suit. It was an order which did not stay execution at all, but simply said that so far as that application in that suit was concerned the appellants were to wait. That seems to their Lordships not to be, in any sense within the meaning of the section, a stay of the execution by injunction or order. This point also fails.

A number of other points were discussed in the courts below, including the relation between section 48 of the Code of Civil Procedure and section 15 of the Indian Limitation Act, 1908; also the relation between section 48 of the Code of Civil Procedure and article 182 of the Limitation Act. Having regard to the view which their Lordships take of the two points that have been raised, those matters do not fall to be considered at all. The result must be that their Lordships will humbly advise His Majesty that this appeal should be dismissed and the appellants must pay the costs.

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

Solicitors for respondent: *H. S. Polak and Co.*

LETTERS PATENT.

1932.

November, 28, 29.

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

LALA BANWARI LAL

v.

SHEIKH SHUKRULLAH*

Letters Patent of the Patna High Court—clause 10—*order refusing to exercise jurisdiction under section* 151 *of the Code of Civil Procedure,* 1908 (*Act V of* 1908), *whether is appealable.*

A decision of a single judge refusing to exercise jurisdiction under section 151, Code of Civil Procedure, 1908, and to recall his order is not appealable under clause 10 of the Letters Patent.

Brajagopal Ray Burman v. *Amar Chandra Bhattacharjee*(1) and *Kailash Chandra Samadar* v. *Rebati Mohan Ray Chowdhry*(2), followed.

Per KHAJA MOHAMAD NOOR, J.—Where a judge, rightly or wrongly, after hearing all the parties and taking into consideration all that can be said one way or the other, adopts a particular course and passes a particular order and later on one of the parties comes and asks that judge to recall the order either under his power of review or under his inherent power and that judge merely refuses to take any steps in the matter, such an order is not a "judgment" within the meaning of clause 10 of the Letters Patent.

The word "judgment" as used in clause 10 of the Letters Patent is incapable of any exhaustive definition to cover all cases which may come up before the court of appeal; but in each case the court has to make up its mind whether the particular order in question is a "judgment" or not, having regard to the nature of the order.

Budhu Lal v. *Chattu Gope*(3), referred to.

Appeal by the defendants.

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* Letters Patent Appeal no. 43 of 1932, from a decision of the Hon'ble Mr. Justice A. W. E. Wort, dated the 24th February, 1932.

(1) (1928) I. L. R. 56 Cal. 135.

(2) (1917) 21 Cal. W. N. 652.

(3) (1916) I. L. R. 44 Cal. 804.

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

P. R. Das and *A. K. Mitra*, for the appellants.

Sir Sultan Ahmad (with him *K. Husnain*, *S. A. Khan* and *H. R. Kazimi*), for the respondents.

COURTNEY TERRELL, C. J.—This is an appeal from a decision of Mr. Justice Wort in Miscellaneous Judicial Case no. 144 of 1931 which arose from somewhat unusual circumstances. The plaintiffs sued the defendants for dissolution of partnership. The partnership was formed for the purpose of carrying on a sugar factory. They also joined with their claim for dissolution of partnership a claim for damages for breach of the fundamental terms of the contract of partnership, the fundamental term, of which it was said there was a breach, being to carry on the factory concerned in a particular way. The merits of that claim we are not concerned with. The learned Subordinate Judge before whom the suit was tried passed a partnership decree decreeing partnership accounts and dissolution of the partnership and also decreed damages against the defendants for the tort or breach of contract, as the matter may be considered, alleged by the plaintiffs. He then proceeded to take evidence concerning the damages which the plaintiffs had suffered and he inquired into the allegation of damage as suffered up to the date of the suit and drew up his accounts upon that basis and for the period up to the date of the suit in so far as the question of damages was concerned. A little later the plaintiffs applied to the Subordinate Judge for a further decree against the defendants in the matter of damages or it may be that they asked for the continuation of the account as to damages from the date of the suit up to the date of the dissolution of partnership. I do not propose to offer any opinion as to which was the proper way to look at that claim. The Subordinate Judge proceeded, however, to deal with the damages alleged to have been suffered by the plaintiffs

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from the date of the suit continuing for a further period of about a year so as to carry the account of the damages up to the date of the dissolution of the partnership and he came to the conclusion that the plaintiffs in respect of that further period had suffered damages to the extent of Rs. 42,000 and odd.

The defendants objected to this course and they said that the learned Subordinate Judge having originally given a decree for damages was now functus officio and, as they said, had no power to carry the order further and make what they said was a supplementary decree for further damages incurred beyond the date of the suit. The Subordinate Judge heard the objection and decided against the contention of the defendants who thereupon came to the High Court in revision and the learned Judge of this Court dismissed that application summarily. Therefore, on the 1st October, 1931, the learned Subordinate Judge delivered judgment in the matter before him of this further inquiry and he awarded damages to the extent of the amount I have stated together with costs of that further inquiry amounting to about Rs. 2,000 and he directed that the further sum of Rs. 42,000 by way of damages was to be shown on the credit side of the account.

The next material stage in the matter was that on an application to this Court for a transfer of the case it directed that the matter should be called up to this court and continued as an original suit and it came before Mr. Justice Wort. The defendants then applied to this Court in revision of the order of the learned Subordinate Judge and that matter of the application for revision was ultimately placed by my order before Mr. Justice Wort for the reason that he was already seised of the case as called up from the lower court and it would be more convenient that he should deal with the matter. He heard the application in revision and rejected it and held nevertheless that in his opinion the Subordinate Judge had no jurisdiction to pass a supplementary judgment but he held

that having regard to the original decision of the Subordinate Judge it had been open to the defendants to get that decision altered by way of appeal and he had no right to deal with it by way of revision.

A little later the defendants then took a somewhat curious course which has given rise to this appeal. They applied to Mr. Justice Wort on the 23rd February, 1932, that is to say, about four months or so after the original decision of the Subordinate Judge, to recall the order of the Subordinate Judge under section 151 of the Civil Procedure Code and they put their case in this way:—They said that inasmuch as the case had been transferred to Mr. Justice Wort and inasmuch as it was transferred as a pending case, Mr. Justice Wort was in the same position as the learned Subordinate Judge himself and represented him in all his capacities and powers and, therefore, they asked him in fact to re-hear the matter on the ground that the original decision of the Subordinate Judge had been, according to their contention, come to without jurisdiction and that he had no business to have passed the order which he passed for what they called a supplementary decree for damages. Mr. Justice Wort in dealing with this application repeated that in his opinion the Subordinate Judge who was his predecessor in office, as one might call him, had no jurisdiction to have passed the supplementary decree but the learned judge nevertheless declined to exercise his discretion under section 151 and recall the order.

It is unnecessary for the purposes of this decision to examine the question as to whether the learned judge was right on the merits of the case. The only point for our decision is whether any appeal lies under the Letters Patent against the decision of Mr. Justice Wort refusing to exercise jurisdiction under section 151 of the Civil Procedure Code. A few observations may be made as to some of the jurisdictions used by this Court in which it is clear that no appeal lies. First, a judge of this Court exercising revisional power is clearly not subject to revision by a Bench of this

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Court. Secondly. an application for review, if resulting in the grant of the order for review, may be made the subject of an appeal but it is very clear, and nobody disputes it and it arises from the Code itself, that a decision by a judge of this Court refusing to review his own order is not appealable. In both the case of a revision and in the case of a review the right to a revision or the right to a review depends upon the possibility on the part of the applicant of bringing to the notice of the Court some error in law in the case of a revision or, in the case of a review, the discovery of some new facts or any other new circumstance. But in the case of this particular application under section 151 of the Code it was not suggested on behalf of the applicants that the learned Judge should do more than consider the very matters which had been before him, or, rather to be strictly accurate, before the Subordinate Judge whom he then represented, and decide those matters over again. A fortiori one would have thought that if refusal to exercise the discretion to review was not appealable the refusal to exercise powers under section 151 would not be appealable. But the matter is put by Mr. Das on behalf of the appellants in this way:—He says that we are not concerned with the rights of appeal under the Code, that we are not embarrassed by the provisions relating to revisions and reviews; he claims to be entitled to fall back upon section 10 of the Letters Patent and to say that this decision of Mr. Justice Wort refusing to exercise his discretion under section 151 is a judgment within the meaning of the Letters Patent and further affects his rights as a litigant and, therefore, is properly the subject-matter of appeal. He has not been able, as he frankly conceded, to point to any case in which the Court had interfered with a refusal to exercise powers under section 151. He agrees that it the original order had in fact been passed by the learned Subordinate Judge whom Mr. Justice Wort subsequently represented there would have been no appeal because the Civil Procedure Code which would

have governed the matter in those circumstances provides no appeal and, as I say, he falls back entirely upon the word " judgment " in the Letters Patent. In my opinion, that argument is not sound and the proper analogy between the decision of Mr. Justice Wort and his predecessor, the Subordinate Judge, is illustrated by the decision in the case of *Kailash Chandra Samadar* v. *Rebati Mohan Ray*(1) where it was held that a decision by a single Judge who had originally been a member of a Bench, the other member of whom had ceased to be a Judge, represented the two Judges when an application was made to him for review of the decision of those two Judges. It was also held that under section 15 of the Letters Patent of the Calcutta High Court (corresponding to section 10 of the Letters Patent of this Court) no appeal lay under the Letters Patent from the decision of that Judge notwithstanding that he was physically a single Judge. The meaning of the term " judgment " has been exhaustively dealt with by Rankin, C. J. in the case of *Brajagopal Ray Burman* v. *Amar Chandra Bhattacharjee*(2). At page 144 he makes the matter perfectly clear notwithstanding the correct technical use of the word " judgment " as used in England and as defined by the Privy Council and with that decision I agree. The mere fact that a question of right is decided is not in itself conclusive. This was an exercise of a discretion by the learned Judge and whatever the merits of his decision the discretion exercised cannot be attacked by way of appeal and that is abundantly clear from the fact that he was merely asked to set aside an order which had been made for precisely the same reasons as were considered and rejected when the original order was made. To allow an appeal in a matter of this sort would be highly dangerous. It would allow any litigant who had a decision against him to go to the court and ask for a recall of the

(1) (1917) 21 Cal. W. N. 652.
(2) (1928) I. L. R. 56 Cal. 135.

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judgment and, if the decision were against him on that application, to carry the matter by way of Letters Patent to an appeal or indeed to raise any other appeal which he might consider allowable in the circumstances. In my opinion, this appeal is not admissible and fails in limine and I would dismiss it with costs. Hearing fee ten gold mohurs.

KHAJA MOHAMAD NOOR J.—I entirely agree. In my opinion the word "judgment" as used in clause 10 of the Letters Patent of this High Court is incapable of any exhaustive definition, a definition to cover all cases which may come up before the Court of appeal. In the words of Sanderson, C. J. in the case of *Budhu Lal* v. *Chattu Gope*(1),whenever this point is taken the Court has to make up its mind whether the particular order in question is a judgment within the meaning of clause 15 of the Letters Patent of the Calcutta High Court (corresponding to clause 10 of our Letters Patent) having regard to the nature of the order. I am clearly of opinion that taking into consideration the circumstances under which it was passed the particular order passed by Mr. Justice Wort is not appealable. The appellants cannot be in a better position than if they had asked Mr. Justice Wort to recall an order passed by himself. A Judge has rightly or wrongly after hearing all the parties and taking into consideration all that can be said one way or the other adopted a particular course and passed a particular order. Whether that order itself is or is not appealable and if appealable at what stage are quite different matters. But if later on one of the parties comes and asks that Judge to recall the order either under his power of review or under his inherent power and that Judge merely refuses to take any step in the matter, such an order is not a " judgment " within clause 10 of the Letters Patent. In this particular case the appellants are in a somewhat worse position. The order of Mr. Justice Wort refusing to take action under section 151 was in effect based upon his judgment

(1) (1916) I. L. R. 44 Cal. 804.

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in exercise of the revisional powers of the court passed a few days earlier. In effect the appellants' inviting us to hear an appeal against the order of Mr. Justice Wort or, to be more correct, against his refusal to pass any order under section 151 is an invitation to hear an appeal against his order passed in revision. That in my opinion is not tenable. I agree with my Lord the Chief Justice that the appeal should be dismissed with costs.

Appeal dismissed in limine.

APPELLATE CIVIL.

1932.

Nov., 28.
Dec., 8.

Before Fazl Ali and James, JJ.

KALI PRASAD SINGH

v.

MUKUTDHARI PRASAD SINGH.*

Local Self-Government Act, 1885 (*Beng. Act III of* 1885), *as amended by Bihar and Orissa Act* 1 *of* 1923—*District Board Electoral Rules framed under the Act—rules* 29 *and* 68—*Returning Officer, summary rejection of nomination paper by—suit for a declaration that the order was illegal —Civil Court, jurisdiction of, whether ousted—Specific Relief Act*, 1877 (*Act I of* 1877), *section* 42—*District Magistrate, how far empowered to hear election petitions.*

Rule 68 of the District Board Electoral Rules framed by the Local Government under the Local Self-Government Act, 1885, as amended by Bihar and Orissa Act 1 of 1923, provides :—

" All disputes arising under these rules in regard to any matter other than a matter the decision of which by any other authority is declared by these rules to be final, shall be decided by the District Magistrate whose decision shall be final."

Held, (*i*) that the provision in rule 68 is only a precautionary measure to see that some authority is provided by the

* Second Appeal no. 1366 of 1931, from a decision of Rai Bahadur A. N. Chattarji, District Judge of Gaya, dated the 26th July, 1931, confirming a decision of Babu B. K. Sarkar, Munsif of Aurangabad, dated the 3rd February, 1931.

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rules for the decision of disputes, necessary when rules are being framed, since it is difficult to make provision for possible grounds of dispute over the observance of every rule.

(*ii*) that the District Magistrate is not empowered to hear election petitions which are based on anything more than some irregularity in the election rules; in other words, the rules do not empower him to hear applications which are based on the grounds of improper rejection or acceptance of nomination papers, bribery or corruption, intimidation or personation discovered after the election.

Sibesh Chandra Pakrashi v. *Bidhu Bhusan Roy*,(1) distinguished.

M was nominated as a candidate for election in a particular circle of the Aurangabad subdivision, being eligible by the fact that his name was borne on the electoral roll of Aurangabad. At the time of election the Returning Officer, without examining the electoral roll of the subdivision, rejected the candidate on the ground that his name was not found on the electoral roll of the circle and no certified copy of any other electoral roll had been filed by him. The candidate was, however, correctly described in the nomination paper as on the roll of the subdivision and his number in that roll was specified.

M instituted a suit in the Civil Court praying for a declaration that the order of the Reutrning Officer rejecting his nomination was invalid.

Held, (*i*) that the order of the Returning Officer was without jurisdiction and that, in the absence of any express provision excluding the jurisdiction of the Civil Court, it had jurisdiction to entertain the suit and to grant the declaration sought for under section 42 of the Specific Relief Act, 1877.

(*ii*) that rule 29(2) did not imply that absence of a certified copy could be treated as if it afforded proof that the candidate's name was not on the electoral roll.

Appeal by the defendant.

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

N. K. Prosad II and *Sarjoo Prosad*, for the appellant.

A. N. Lal, for the respondents.

(1) (1928) I. L. R. 56 Cal. 52.

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JAMES, J.—The rules framed by the Local Government under the Bihar and Orissa Local Self-Government Act require that the name of a candidate for election to the District Board shall be recorded on the roll of some electoral circle within the subdivision in which he is a candidate. Mukutdhari Prosad Sinha was nominated as a candidate for election in the Kutumba-Nabinagar Circle within the Aurangabad subdivision, being eligible by the fact that his name was borne on the electoral roll of Aurangabad. At the time of nomination, the Returning Officer rejected the candidate on the ground that his name was not found on the electoral roll of the Kutumba-Nabinagar Circle and no certified copy of any other electoral roll had been filed by him. The rejected candidate instituted a suit in the court of the Munsif of Aurangabad praying for a declaration under section 42 of the Specific Relief Act, to the effect that the order of the Returning Officer rejecting his nomination was invalid in which he was successful. An appeal from the Munsif's decision was dismissed by the District Judge of Gaya; and the contesting defendant now comes in second appeal from that decision.

Mr. Nawal Kishor Prosad on behalf of the appellant argues in the first place that civil courts have no jurisdiction to entertain a suit of this nature. Under rule 29 of the electoral rules framed by the Local Government, the Returning Officer is required to decide summarily regarding the qualification of candidates; and his decision is to be final. Rule 68 provides that all disputes arising under these rules, other than those in which the decision of the appointed officer is declared to be final, shall be decided by the District Magistrate, and his decision shall be final. Mr. Nawal Kishor Prosad argues that rule 68 makes the District Magistrate the tribunal for the decision of election petitions; and the fact that his decision is to be final necessarily excludes the jurisdiction of the civil courts. It may be remarked that since the decision of the Returning Officer under section 29 of

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the Act is final, it would follow that if Mr. Nawal Kishor Prosad's contention were correct, no election could ever be set aside on the ground that a nomination had been improperly rejected by the Returning Officer. The learned Advocate cites authority for his proposition that the Local Government has power to create special tribunals for the hearing of election petitions, or for the decision of disputes that may arise in the course of elections and that when such a special tribunal is created by rules framed under the Act, the ordinary jurisdiction of the civil courts under the Specific Relief Act is excluded. On that point generally speaking there need be no doubt; but the question is whether by the rules framed under the Act in Bihar and Orissa, the Local Government has actually set up such a tribunal to the exclusion of the civil courts; that is to say, whether the provisions of rule 68 do make the District Magistrate the final tribunal for the determination of such questions in general, and particularly when what has to be decided is what practically amounts to an election petition. Mr. Nawal Kishor Prosad points out that similar rules framed by the Government of Bengal were interpreted in this way by a Division Bench of the Calcutta High Court in *Sibesh Chandra Pakrashi* v. *Bidhu Bhusan Roy*(1). That suit was similar in its nature to the suit with which we are here concerned; but the presiding officer had in that case rejected the nomination on the ground that the proposer and seconder were not qualified voters. The learned Judges apparently accepted the argument put forward by Dr. Radha Binode Pal, that the ordinary tribunal for the decision of election petitions would be the District Magistrate whose decision would be final. Rule 1A of the Bengal Electoral Rules, to which reference is made in that decision, corresponds practically to rule 68 of the Bihar and Orissa Rules. Rule 15 of the Bengal Rules corresponds practically to rule 29 of the rules in Bihar, with the same provision

(1) (1928) I. L. R. 56 Cal. 52.

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JAMES, J.

that the decision at the time of nomination will be final. But rule 42 of the Bengal rules deals with the decision of disputes regarding qualifications of voters at an election, wherein there is no express provision that the decision shall be final. By the Bengal rule 1A the District Magistrate is appointed to decide disputes arising under the rules other than rules 15 and 42; and the learned Judges treated the dispute before them as one under rule 42, which could not be decided by the District Magistrate and in which the original decision was not by the rules declared to be final. With due respect to the learned Judges who decided that case, we may be permitted to say that, although we would not question the correctness of the decision, the grounds on which it is based are open to criticism. It appears to us that the dispute in that case was one under rule 15; and if the making of the decision of the District Magistrate final by rule 1A excludes the jurisdiction of the civil courts, there is no logical reason why the jurisdiction should not be equally held to be excluded by the finality given to decision of the presiding officer regarding a nomination by rule 15. At the same time, it must be observed that the learned Judges did not expressly find that the decision of the Magistrate under rule 1A was not liable to be challenged in the civil court, since they were not required to do it, as they held that the case before them was not one in which the Magistrate was empowered to decide a dispute by rule 1A.

In our judgment, the view which has been taken by the lower courts in this case is correct; the civil courts have jurisdiction to entertain cases of this nature; and the provisions of section 42 of the Specific Relief Act apply to such suits in the absence of any express provision excluding the jurisdiction of the civil court. It is argued that the Local Government has made the District Magistrate the court for the hearing of election petitions; but if this had been intended, the point would have been made clear by the rules, and the jurisdiction of the civil courts would

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have been expressly excluded. It appears to us that the provision in rule 68 that disputes under the rules are to be decided by the District Magistrates where they have not been decided already by any authority whose decision is declared to be final is only a precautionary measure to see that some authority is provided by the rules for the decision of disputes, necessary when rules are being framed, since it is difficult to make provision for possible grounds of dispute over the observance of every rule.

It is no part of our duty to decide whether under rule 68 a District Magistrate can determine the result of an election; but it appears to be obvious that even if he can do so, he is not empowered to hear election petitions which are based on anything more than some irregularity in the election rules. The most common grounds on which elections of all kinds are liable to be attacked are the improper rejection or acceptance of nomination papers; bribery or corruption, intimidation, or personation discovered after the election. It does not appear that the rules empower the Magistrate to hear petitions based on any of these grounds; but if it had been intended that the District Magistrate should be the exclusive court for the hearing of election petitions, and that the jurisdiction of the civil courts should be excluded, he would have been given general powers to entertain petitions based on more serious grounds than those of mere disputes arising under the electoral rules.

We are not required to lay down the precise circumstances in which the civil courts may entertain a suit framed under the Specific Relief Act for a declaration at variance with the decision of a Magistrate or a Returning Officer under the electoral rules. As Mr. Nawal Kishor Prosad suggests, it may be unreasonable to hold that the civil courts should reopen the whole question, when a candidate has been rejected whose qualifications are really questionable, who entered into evidence before the Returning Officer, on the ground that if more evidence had been tendered,

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the candidate's case might have been proved. The present case is not one of that nature. The Returning Officer had before him the electoral rolls of his subdivision; and it appears from the evidence of one of the defendants that he did examine these rolls in order to check the qualifications of those candidates whose nominations were admitted. The respondent now before the court was correctly described in the nomination paper as on the Aurangabad roll and his number in that roll was specified. The Returning Officer, although he had the Aurangabad Roll before him, examined the roll of the Kutumba-Nabinagar Circle where the candidate's name would certainly not be found; but he did not examine the Aurangabad roll as he ought to have done. Rule 29(*2*) provides that the production of a certified copy of an entry made in the electoral roll shall be conclusive evidence of the right of any elector named in that entry to stand for election, unless it is proved that the candidate is otherwise disqualified. The Returning Officer summarily rejected the nomination on the grounds, first, that the name of the candidate was not borne on an electoral roll other than that on which he claimed to be borne; and, secondly, on the ground that he had produced no certified copy of the electoral roll on which he claimed to be borne. It is needless to remark that if any electoral roll is to be examined by the Returning Officer, it should be that on which the candidate's name purports to be borne. It is suggested on behalf of the respondent that the Returning Officer may reasonably have thought that rule 29(*2*) implied that the absence of a certified copy could be treated as if it afforded proof that the candidate's name was not on the electoral roll; but no such meaning can be reasonably read into the rule, and it is impossible to hold that the Returning Officer exercised the jurisdiction which was vested in him when he thus rejected the nomination paper without making any real enquiry at all. As the learned District Judge has pointed out, an order of this nature may certainly be challenged under section 42 of the Specific Relief Act.

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because this arbitrary decision of the Returning Officer not only took away the right of the candidate to stand for election, but also deprived the electors of the exercise of their right of franchise in choosing their own representative. The decision of the learned District Judge must accordingly be affirmed and this appeal must be dismissed with costs.

JAMES, J. FAZL ALI, J.—I agree.

Appeal dismissed.

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Nov., 8, 9.
Dec. 12, 13, 15.

Before Wort and Fazl Ali, JJ.

J. H. PATTINSON

v.

SRIMATI BINDHYA DEBI.*

Interest—Interest Act, 1839 (*Act XXXII of* 1839)—*proviso—money wrongfully detained—no stipulation as to interest—interest, whether recoverable in law or equity—Contract Act*, 1872 (*Act IX of* 1872), *section* 73, *scope of—equity, justice and good conscience, rule of, when applicable—Courts, duty of—company incorporated under Companies Act*, 1913 (*Act VII of* 1913), *whether is a separate legal entity—both principal and agent joined in an action—liability, whether attaches to both.*

Section 73 of the Contract Act, 1872, is only declaratory of the right of damages for breach of contract.

Unless the matter can be brought within the Interest Act, 1839, or the proviso, there is no warranty under section 73 of the Contract Act for awarding interest for the mere detention of money, however wrongful, from the date upon which it should have been paid.

Held, further, that in the absence of an agreement, express or implied, interest on money wrongfully detained is not recoverable either under the Interest Act or by law as contemplated by the proviso.

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* Appeals from Original Decrees nos. 88 of 1929 and 77 of 1930, from a decision of Babu Gajadhar Prasad, Subordinate Judge of Dhanbad, dated the 6th February, 1929.

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Cases in India, as in England, in which interest is already " payable by law " within the meaning of the proviso includes cases in which interest is allowed on equitable principles.

Page v. Newman(1), *London Chatham and Dover Railway Company* v. *The South Eastern Railway Company*(2), *Lala Chhajmal Das* v. *Brijbhuken Lal*(3), *Lala Kalyan Das* v. *Sheikh Maqbul Ahmad*(4), *Jamal* v. *Moolla Dawood Sons and Company*(5), *Surja Narain Mukhopadhya* v. *Pratap Narain Mukhopadhya*(6), *Ramnath Karmakar* v. *Hiralal Shaha*(7), *Mahamaya Prasad Singh* v. *Ram Khelawan Singh Thakur*(8), *Kandappa Mudalliar* v. *S. R. Muthuswami Ayyar*(9), *Jwala Prasad* v. *Hoti Lal*(10), *Kirpal Singh* v. *Jiwan Mal*(11), *Hurropersaud Roy* v. *Shamapersaud Roy*(12), *Inglis* v. *Sarju Prasad*(13) and *Hamira Bibi* v. *Zubaida Bibi*(14), reviewed.

Courts in India are enjoined to apply the rule of equity, justice and good conscience where there is no rule of law applicable to the facts; but that does not mean that each Judge may decide a case as he thinks fit and bound by no rules. The decision of the case must depend on rules and not upon caprice..

Often the rule of equity, justice and good conscience means the rule of the Common Law of England or rules of equity, not as binding upon Indian Courts, but as a guidance in determining the matters which come before them in which there is no rule of Indian Law.

Maine and New Brunswick Electrical Power Company, Ltd., v. *Hart*(15), referred to.

A company incorporated under the Indian Companies Act, 1913, is a separate legal entity.

(1) (1829) 9 B. & C. 378.
(2) (1893) A. C. 429.
(3) (1895) 22 Ind. App. 109.
(4) (1918) 22 Cal. W. N. 866, P. C.
(5) (1915) I. L. R. 43 Cal. 493, P. C.
(6) (1899) I. L. R. 26 Cal. 955.
(7) (1925) 93 Ind. Cas. 647.
(8) (1911) 15 Cal. L. J. 684.
(9) (1926) I. L. R. 50 Mad. 94, F. B.
(10) (1924) 22 All. L. J. 558.
(11) (1927) I. L. R. 8 Lah. 524.
(12) (1878) I. L. R. 3 Cal. 654, P. C.
(13) (1923) 6 Pat. L. T. 297.
(14) (1916) I. L. R. 38 All. 581, P. C.
(15) (1929) App. Cas. 631.

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Solomon v. *Solomon and Company*(1), followed.

If an agent for an undisclosed principal is sued as such, he would be liable, but where both the principal and the agent are joined in an action, only one would be liable.

Appeal by the defendants.

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

P. R. Das and *N. N. Roy*, for the appellants.

Sir Sultan Ahmad (with him *Manohar Lal* and *A. K. Mitra*), for the respondent.

WORT, J.—These appeals arise out of two actions brought by the plaintiff claiming royalty, cess and damages. Incidentally there was also a claim for interest prior to the institution of the suit as well as afterwards. These claims were based on a mining lease, dated the 17th March, 1915. The defendants are the appellants. The first defendant is one J. H. Pattinson, the second defendant is the New Sinidh Coal Company, Limited, and the third defendant is H. V. Low and Company, Limited.

In the action out of which Appeal no. 88 of 1929 arises there was a claim for royalty, cess, damages and interest. In the action out of which Appeal no. 77 of 1930 arises, there was involved the question of royalty and interest only but before this court no question arises as regards royalty. The matters which come before us are questions of cess, damages and interest.

I propose, in the first place, to deal with the position of the defendants in the action. Under a patta, dated 1908, the plaintiff had got a prospecting lease with regard to certain mining lands. In March of 1915 by reason of an option which had been granted by a sub-lease of 1914, Pattinson, the first defendant, took a mining lease for the unexpired term created by the patta of 1908 in favour of the plaintiff, and

(1) (1898) A. C. 22.

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it is under that lease of 1915 that this claim is brought. It is not necessary to state any other fact at the moment in dealing with the position of the three defendants in the action. It is clear that on the merits of the questions themselves, that is to say, the question of cess, interest and damages, considerations which apply to one apply to the others: but Mr. P. R. Das in appearing for all the defendants contends that there are certain other questions which are applicable to defendants 2 and 3 only and on the submissions which he makes it is contended that they must be dismissed from the action. The New Sinidh Coal Company, that is, the second defendant, appears to have been a company which was promoted by Messrs. Pattinson and Low, who were the lessees under the lease of 1915. There is no clear evidence regarding them but it is suggested in the plaint that Pattinson, Low and the New Sinidh Coal Company are one and the same person. That statement may be true in the sense that there are no share-holders in those two companies other than Pattinson and Low but of that we have no evidence. But it cannot be said that the New Sinidh Coal Company, Limited, and Low and Company, Limited, are the same person or persons as Pattinson and Low in the eyes of the law. There is no dispute that they, defendants 2 and 3, are companies which had been incorporated under the Indian Companies Act and the position, therefore, in law is that they are separate legal entities. Of that there can be no doubt—*Solomon* v. *Solomon and Company*(1). There is a recent Full Bench decision(2) of this court which bears on the point.

Now we have no evidence in the case as to whether the New Sinidh Coal Company had taken an assignment or sub-lease from Pattinson and Low. It is clear, however, that the New Sinidh Coal Company, Limited, in spite of what the learned Judge in his judgment has said, was not a party to the lease of

(1) (1898) A. C. 22.
(2) (1931) I. L. R. 11 Pat. 174, F. B.

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1915; but that does not conclude the matter. I have already referred to the suggestion made in the plaint as regards the personality of these three defendants, but in the written statement defendants 2 and 3 made this averment, having denied their liability to pay cess,

> "that these defendants are bound and governed by the terms of the Indenture, dated the 17th March, 1915 and nothing is payable by these defendants except what is mentioned in the said Indenture."

Mr. P. R. Das would have us ignore the admission on the ground that, if we accept that as an admission that the defendants are liable, we shall be splitting up the contentions in the written statement and disregarding therefore their denial of their liability as regards cess. But their denial as regards liability to cess is a denial that in point of law, on the construction of the deed by which they say they are bound, they are liable; but the paragraph which I have just read can be construed only on the assumption that they are admitting that some transaction had taken place which binds them to the terms of the lease because, as I have said, it is clear that they were not parties to the lease; they could be bound only by the terms of the lease if there had been a sub-lease, incorporating the terms of the head lease or an assignment, and, in my judgment, by pleading as they did in paragraph 5 of the written statement, they have made it unnecessary for the plaintiff to prove that there was some transaction such as the assignment or sub-lease which imposed the obligation of the lease of 1915 or the patta of 1908 upon the defendants. In my judgment, therefore, so far as the New Sinidh Coal Company is concerned, any liability which Pattinson is found to have incurred in this action must also be the liability of the New Sinidh Coal Company. The same argument which was advanced by the plaintiff with regard to the New Sinidh Coal Company was advanced as regards H. V. Low and Company, Limited. That question is somewhat more difficult. We still have paragraph 5 of the written statement which admits liability on the part of Low and Company, Limited, as well as the New Sinidh Coal

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Company, Limited. But the defendants, third party, have contended in paragraph 2 of the written statement that they were merely managing agents of the defendants. Had the matter rested there, it seems to me that no other conclusion could have been reached than that at which I have arrived in the case of the New Sinidh Coal Company, Limited. But the judgments of both the cases the learned Judge has stated that the defendants H. V. Low and Company, Limited, were the managing agents. It is true, as Sir Sultan Ahmad has pointed out, there was no evidence of that; but, in my judgment, it is impossible to say that there was not some material upon which the learned Judge could have arrived at that decision. The mere statement in the written statement itself, of course, is insufficient; it was necessary for the defendants to prove it. But they have been excused from proving it by an admission on the part of their advocates, and there is nothing in the case to show that what the learned Judge has stated was incorrect. It seems, therefore, that one has to read paragraph 2 with paragraph 5 of the written statement, and even taking paragraph 5 of the written statement by itself, although both parties may have been bound by the lease of 1915, when once it is shown, as the Judge states here, that one of them was the managing agent of the other, in law both cannot be held liable. Had Low and Company, Limited, stood alone as agents for an undisclosed principal, undoubtedly under the Contract Act they would have been liable; but having joined both principal and agent, in law only one can be held liable. As I have come to the conclusion that the New Sinidh Coal Company is liable, in my judgment, for the considerations which I have stated, it necessarily follows that Low and Company, Limited, must be dismissed from the action.

Now to come to the question of cess, damages and interest. In the lease of 1915 there is a clause which reads:

"The lessees also duly observing all the covenants and conditions in the said instrument of lease or pattah of the seventh day of May

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One thousand nine hundred and eight contained on the part of the lessees thereunder to be observed and performed."

Then comes the ordinary covenant for quiet enjoyment of the mines and premises on the part of the lessors.

Mr. P. R. Das' argument, in the first instance, was that that covenant was merely the conveyancer's method of imposing liability on Pattinson for such covenants in the head lease as he would otherwise be liable for in law. But it is well established in the law that a covenant such as I have read out incorporates covenants of the head lease. One of the covenants in the head lease was that

" if Government levies any tax or road cess on me in regard to these leasehold mines or coal business he shall pay it ".

In my judgment, therefore, that covenant being incorporated in the lease of 1915 the lessee becomes liable. The point, although made by Mr. Das, was not seriously pressed. In my judgment, therefore, Pattinson and the New Sinidh Coal Company are liable as the learned Subordinate Judge has held them to be liable for cess.

Before I come to the question which involved the chief argument in the case, namely, the question of interest, I propose to deal with the question of damages.

Damages, which were claimed by the plaintiff, were the costs which the plaintiff had to pay as defendant in the suit by her lessor, and in order to recover them she sought to prove an agreement by which Pattinson had undertaken to pay the liabilities direct to the head landlord. The learned Judge had said that there was some evidence of this but has come to the conclusion that there was no contract binding between the parties. There were letters which were produced which show some such arrangement for a period prior to the period for which the royalty and cess in these actions were claimed, but they are far from showing that during the period in dispute there was such an

agreement, and without such an agreement it is impossible for the plaintiff to say that it was reasonable for her to defend the action in the suit of the lessor: in other words, her liability was one under the head lease. The liability of Pattinson was a separate liability under his lease, and by declining to pay, the plaintiff could not pass on the liability to pay costs to the defendant Pattinson, which resulted from her defending the action. In my judgment the learned Subordinate Judge was right on this point. That disposes of all the questions other than the question of interest.

Interest in this case was claimed and was allowed by the Subordinate Judge on the amounts claimed at the rate of 12 per cent per annum. An elaborate argument, as I have already stated, was addressed to the court on that question. The argument, if I may say so, was out of all proportion to the sum involved, but the point was urged and it is necessary, therefore, to deal with it. At first it was sought to show that the plaintiff was liable for interest by reason of the provisions in the head lease or patta of 1908; but in clause 14 of the lease of 1915 it is clear that the covenants relating to royalty and interest to which I have referred are expressly excluded. Interest therefore could only be claimed by law, that is to say, by law other than by contract. The substance of the argument on behalf of the defendants was this. No interest can be claimed other than under the Interest Act of 1839. Sir Sultan Ahmad, on the other hand, contended that interest was recoverable other than under the Interest Act of 1839. Mr. P. R. Das modified his argument to some extent during the course of the case by admitting that there were certain cases in which interest could be claimed under the proviso to the Interest Act of 1839. Act XXXII of 1839 is as follows:—

"It is, therefore, hereby enacted that upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be recovered, may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of

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interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written statement at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment: Provided that interest shall be payable in all cases in which it is now payable by law."

WORT, J. Mr. Das' modification of his argument was to this effect, that there are certain cases in India, as in England, in which interest was already payable by law at the time of the passing of the Interest Act. Those cases include cases in which interest is allowed on equitable principles. Now the Act, as I have said, was passed in 1839 some five or six years before there had been passed in England what is now known as Lord Tenterdan's Act *III and IV, Wm, IV*, Chapter 42, the relevant section being section 28. I mention the English Act because, as Lord Tomlin said in the case to which I shall presently refer, the two Acts being indistinguishable, cases under the English law are relevant for the guidance and the consideration of the question which arises. There is no doubt what the law was in England at the time of the passing of Lord Tenterden's Act. The case of *Page* v. *Newman*(1) had been decided by Lord Tenterden and other Judges in 1829. That laid down in substance that except by contract or under some commercial usage a party could not claim interest. That the law has remained the same in England since that date, apart of course from Lord Tenterden's Act, is shown by the case of *London Chatham and Dover Railway Company* v. *The South Eastern Railway Company*(2). Lord Herschell in that case said, after discussing the various English authorities, that the matter was governed by the decision in *Page* v. *Newman*(1). I apprehend that the law at the time as since was the same in India as it is in England. It must be obvious that were it not so at the time of the passing

(1) (1829) 9 B. & C. 378.
(2) (1893) A. C. 429.

of the Interest Act there would have been no reason for passing that Act. But there may be this difference. In both the English Act and in the Indian Act there is a proviso that

> " interest shall be payable in all cases in which it is now payable by law ",

The cases in which it is payable by law in India may be different from cases in which it is payable by the law in England. But one matter is perfectly clear that for the mere detention of money, however wrongful, interest could not be claimed as damages.

Now I propose to come to those cases in India from which it might be supposed that the law was otherwise. In the case of *Lala Chhajmal Das* v. *Brijbhukan Lal*(1) Lord Morris, in dealing with the case of a bond, where interest was payable after two years and in which there was no reservation of interest after that period, agreed with the High Court in its construction of the bond and expressed the view that it could hardly be the intention of the parties that no interest was payable after the two years. He added even on that construction, that is, the construction with which he had agreed and which had been placed upon the bond by the High Court, that interest could technically be recovered by way of damages. If we are to take that statement by Lord Morris in the case in which incidentally there was no discussion of the authorities at its face value, it is difficult to reconcile it with the decision of the Privy Council in the case of *Lala Kalyan Das* v. *Sheikh Maqbul Ahmad*(2) in which Lord Sumner said that interest depends on contract express or implied. In one sense of the word, perhaps, and technically if I may say so with respect to Lord Morris, his statement that damages could be recovered by way of interest was correct. That leads me to a consideration of section 73 of the Contract Act upon which the statement that damages

(1) (1895) 22 Ind. App. 199.
(2) (1918) 22 Cal. W. N. 866, P. C.

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by way of interest may be recovered is usually founded. Lord Wrenbury in the case of *Jamal* v. *Moolla Dawood Sons and Company*(1) said that section 73 of the Contract Act was merely declaratory of the right to damages for breach of contract. If I may say so, that is obvious on the plain reading of the section itself. There is nothing in the section which could even suggest that interest could be claimed merely for withholding money that was due. *Illustration* (*n*), which is referred to, is no warranty for such a proposition. It reads—

> "*A* contracts to pay a sum of money to *B* on a day specified. *A* does not pay the money on that day; *B*, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. *A* is not liable to make good to *B* anything except the principal sum he contracted to pay, together with interest up to the day of payment."

There is nothing to show from this *Illustration* that the rule of Indian law which was the same as English law, as I have already stated, has been superseded. As Mr. Mullah says in his book on the Contract Act, the *Illustration* does not say that the defendant is necessarily liable to pay interest but assumes that he may be so under the Act, that is, the Interest Act or otherwise and says that he is not in any event liable for more. I would add that the *Illustration* is declaratory of the principle that the defendant is not liable to pay damages in those circumstances. A case which is also often referred to in this connection is the case of *Surja Narain Mukhopadhya* v. *Pratap Narain Mukhopadhya*(2). It is not necessary to state the facts of that case excepting to say that it was a claim by one brother against another for a sum of money which one brother, the plaintiff, had expended in briefing Counsel in litigation in which both brothers were engaged on the same side. Maclean, C.J., as did Banerjee, J., held that the claim for interest that was made in the action came under the Interest Act of 1839. Not content with that decision, Banerjee, J.,

(1) (1915) I. L. R. 43 Cal. 493, P. C.
(2) (1899) I. L. R. 26 Cal. 955.

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proceeded to say that the plaintiff might have recovered interest under section 73 as loss or damage caused by breach of contract; but he goes on to explain that such a claim cannot be made unless the creditor can show that actual loss or damage has accrued by reason of the defendant's breach. Cumming and Mukerji, JJ., in the case of *Ramnath Karmakar* v. *Hiralal Shaha*(1), dissenting from the proposition that in the absence of a stipulation interest could not be recoverable, awarded interest, relying on the judgment of Banerjee, J. But that case is no authority and could not be, having regard to the decision upon which the learned Judges relied, for the proposition that interest could be recoverable for mere detention of money. It is clear, therefore, what the law in India is, unless the matter can be brought within the Interest Act or within the proviso, there is no warranty under section 73 of the Contract Act for awarding interest for the mere detention of money after the date has arrived upon which it should have been paid. If it were otherwise it would involve in its turn the proposition that a breach of contract to pay money was an exception to the rule and that in claiming damages for breach of contract, damages had to be proved. In the case of *Mohamaya Prosad Singh* v. *Ram Khelawan Singh Thakur*(2) Mukerjee, J., relying on the statement of Lord Morris in the case to which I have just referred, without examining in detail the facts of the case and without referring to the case of *Surja Narain Mukhopadhya* v. *Pratap Narain Mukhopadhya*(3), allowed interest, relying on the broad proposition that damages may be awarded for wrongful detention of money, but upon what principle is not disclosed. As far as I can see, in no case, in which the principles have been examined in detail, has it been said that damages by way of interest can be had merely on the allegation that money has been detained. In this connection, in my judgment, it is

(1) (1925) 93 Ind. Cas. 647.
(2) (1911) 15 Cal. L. J. 684.
(3) (1899) I. L. R. 26 Cal. 955.

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impossible to state the case more succinctly than was stated by Coutts Trotter, C.J., in the case of *Kandappa Mudaliar* v. *S. R. Muthuswami Ayyar*(1). That was a case in which the plaintiff had advanced to the defendant money in consideration of the defendant supplying certain goods to him, the plaintiff. There was a breach of contract and the plaintiff sought to recover the sums of money which he had advanced together with interest. The decision in the case is correctly summed up in the headnote to that case:— "That in the absence of any demand or of any stipulation as to interest, a person who has advanced money to another for supply of goods at a certain time is entitled on default to recover only the advance and damages, viz. the difference in price between the contract rate and the market rate, and not also interest on the advance by way of damages for the period between the date of breach and the date of suit". In the course of his judgment the Chief Justice says this:—"I desire to point out that if the plaintiff is entitled to interest, I do not see over what period it is to be calculated. He was clearly entitled to none up to the date of breach, because up to that time it was in the contemplation of both parties that the money should remain in the hands of the seller": in other words, the parties had to abide by the contract. "For any period after that and before the plaintiff launched his suit it appears to me that he has himself to blame if such a period existed. By deferring the filing of his plaint he cannot cast an additional burden on the defendant. As for the period between the filing of his plaint and the determination of the suit, he is entitled to interest in the ordinary way and he will get it". The Chief Justice was obviously referring to the fact that so soon as the plaintiff filed his suit he would be entitled to interest; prior to that date he could not recover it except under contract: in other words, the date from which he could recover interest was entirely a matter for himself. Cases similar to

(1) (1926) I. L. R. 50 Mad. 94, F. B.

the one I have quoted are, for instance, the case of *Jwala Prasad* v. *Hoti Lal*(1) and the case of *Kirpal Singh* v. *Jiwan Mal*(2) where the proposition which I have already stated and repeated more than once was laid down, that is to say, the Allahabad High Court and the Lahore High Court had come to the conclusion that interest merely for the detention of a sum of money was not recoverable.

I then come to the question of the proviso, that is, the proviso to the Interest Act which says:

> "Provided that interest shall be payable in all cases in which it is now payable by law."

The authority which is often relied upon as giving the courts a right to award interest for the detention of money on equitable principles is the case of *Hurropersaud Roy* v. *Shamapersaud Roy*(3). This case was one of the authorities upon which Sir Sultan Ahmad relied for the proposition that interest is recoverable although that case was not covered by the Interest Act. In my judgment an examination of this authority will clearly show that this is one of those cases which is covered by the proviso. In that case there was a claim to mesne profits. Their Lordships of the Judicial Committee having examined the Interest Act of 1839 said this: "And that refers their Lordships to the state of the law and the practice in India independently of the Statute. They have taken some pains to ascertain what the law and practice has been, and have been referred to a number of cases upon the subject. It may be enough now to quote a case (*Rungmala Chowdharain*) which is to be found reported in Carren's Reports of Summary Cases in the Presidency Sudder Court, of the date of October 1st, 1850, where certain resolutions were come to at a sitting of all the Judges of the Court, and among those resolutions was this—' Interest on mesne profits may be awarded as of course from date of suit in a

(1) (1924) 22 All. L. J. 558.
(2) (1927) I. L. R. 8 Lah. 524.
(3) (1878) I. L. R. 3 Cal. 654, P. C.

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decree; when, however, interest is awarded from an earlier, or from a later date than of suit, special reasons should be assigned in the decree' ''. Their Lordships of the Privy Council then go on to say—" Their Lordships find that this resolution has been, to a great degree, acted upon in subsequent cases; indeed there have been subsequent cases in which interest has been given at a date prior to the institution of a suit, and their Lordships are far from saying that such cases have been wrongly decided ''. In the particular case before us interest was not allowed. That authority, in my judgment, is clearly an authority for the proposition that interest may be recovered on mesne profits. The principle and practice which had developed at the time of the resolution of the Judges referred to the case of a rule of law and, therefore, a case which comes quite clearly within the proviso to the Interest Act, a principle now recognised by the Civil Procedure Code.

I come now to the only authority which has been quoted from this court, the case of *Inglis* v. *Sarju Prasad*(1). Dawson Miller, C.J. contented himself with agreeing with the judgment of Mullick, J., who, in dealing with the case in which a co-owner had appropriated the profits of joint property, said—" The question, however, is whether interest is allowable here for the period anterior to the suit ''. And then said, quoting the Interest Act and referring to the case of *Hurropersaud Roy* v. *Shamapersaud Roy*(2), the case in which their Lordships of the Privy Council have referred to the resolution of the Judges—" It was clear that in their Lordships' opinion interest could be granted on equitable grounds though in the circumstances of the case before them they gave interest only from the date of the institution of the suit ''. The judgment of Mullick, J. then proceeds on the basis of an analysis of the case as to whether it came within the proviso. This much must be said

(1) (1923) 6 Pat. L. T. 297.
(2) (1878) I. L. R. 3 Cal. 654, P. C.

with respect to the learned Judge that their Lordships in the case of *Hurropersaud Roy* v. *Shamapersaud Roy*(1) did not say that interest was payable or recoverable on equitable grounds. They held, as I have already pointed out, that interest was recoverable by reason of the resolution of the Judges that the rule of practice had developed into a rule of law. In addition to this it is to be noticed that the case which Mullick, J., was dealing with was a case of mesne profits. This brings me to the consideration of what are equitable principles for this purpose. There is no doubt that the expression ' equity ' has been often used in a loose sense in Indian cases as has been the expression ' equity, justice and good conscience '. Courts in this country are enjoined to apply the rule of equity, justice and good conscience where there is no rule of law applicable to the facts but that is far from saying or meaning that each Judge may decide a case as he thinks fit and bound by no rules, but they must be rules and the decision of the case cannot depend upon caprice. Often the rule of equity, justice and good conscience means the rule of the Common Law of England or rules of equity, not as binding upon Indian Courts, but as a guidance in determining the matters which come before them in which there is no rule of Indian law. In this connection I propose to refer to the case of *Maine and New Brunswick Electrical Power Company, Limited*, v. *Hart*(2). Lord Tomlin, who delivered the opinion of their Lordships of the Judicial Committee of the Privy Council, compared there Lord Tenterden's Interest Act of 1839 and the Interest Act or the equivalent statutory provisions of New Brunswick (the Interest Act of India is in the same terms as I have pointed out) and stated that the language of the section which he had to construe was indistinguishable from that of section 28 of *III and IV Wm. IV*, Chapter 42. There, in a case not dissimilar to the one which is before us, the plaintiff under certain covenants sought to recover

(1) (1878) I. L. R. 3 Cal. 654, P. C.
(2) (1929) App. Cas. 631.

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what may be described as royalties against the defendants (who were assignees of certain conveyances) for horse power developed in an electrical station under the covenant exceeding 2,000. A claim was made for a substantial sum amounting to about 28,000 dollars together with interest. The trial court had rejected the claim for interest but the Appellate Court had allowed it, it appears, on equitable principles. Lord Tomlin in dealing with this last point makes these observations:—" It remains to consider whether any rule of equity entitles the plaintiff to interest. In order to invoke a rule of equity it is necessary in the first instance to establish the existence of the state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance ". He then points out that this case did not attract the equitable principles or the equitable jurisdiction of the court; and then came to the conclusion that neither in law nor in equity was the plaintiff entitled to interest.

The case of *Hamira Bibi* v. *Zubaida Bibi*(1) is an authority which has been relied upon for the proposition that interest is recoverable on equitable grounds. That was a case in which a Muhammadan widow had been allowed to take possession of her husband's estate in order to satisfy her dower debt with the income of it. There was no agreement express or implied that she should be entitled to claim anything other than the actual amount of dower. The claim for her dower included the claim for interest. There was a discussion at the Bar as to whether interest could be recovered by a Muhammadan under the Muhammadan law, the contention being that the Muhammadan law was against it. In deciding the question of interest Lord Parker makes this statement:—" Their Lordships think that she is so entitled, and obviously compensation for forbearance to enforce a money payment is best calculated on the

(1) (1916) I. L. R. 38 All. 581, P. C.

basis of an equitable rate of interest. This appears to be consistent with the chapter on ' The Duties (Adab) of the Kazi ' in the principal works on Musulman law, which clearly shows that the rules of equity and equitable considerations commonly recognised in the Courts of Chancery in England are not foreign to the Musulman system, but are in fact often referred to and invoked in the adjudication of cases ''. This, as I have said, has been sometimes relied upon by courts in India for the proposition that interest is recoverable under equitable principles. Lord Parker, who was one of the most eminent equity Judges in England in this century, no doubt uses the expression ' equity ' in its true significance; but it is to be noted that what the Judicial Committee awarded to the plaintiff in thatcase was compensation for forbearance to enforce a money payment for her management of the estate. There is nothing in the law to prevent compensation taking the form of interest, and, in my judgment, this case cannot be said to be an authority in law for the proposition that damages by way of interest are recoverable.

Having regard to these authorities, it remains in this case now to determine whether this is one of those cases, in which on equitable grounds interest may be recoverable. To sum up I would hold that, apart from one item, to which I shall presently refer, interest is not recoverable under the Interest Act. In my judgment it is not shown, apart from the item of which I have spoken, that it is one of those cases in which interest is now payable by law within the meaning of the proviso to the Interest Act; and clearly this being an action of law in which the equitable jurisdiction of the court is not attracted, it is not a case in which interest is recoverable on equitable principles. The claim made in the plaint was based on the lease of 1915 and it was for two sums of Rs. 2,000 for each half year and then an additional sum for excess royalty: Royalty due on the 30th September, 1926, was Rs. 2,000, on 31st March, 1927, Rs. 2,000, and then the excess commission for 1926

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due on the 1st January, 1927, Rs. 749. From the lease itself it is shown that the Rs. 4,000 per annum is described as rent and is recoverable in any event and it appears is recoverable as a separate item. It is only when the quantity is exceeded that the excess commission becomes payable. In some leases of this description when once the minimum quantity has been exceeded then royalty is payable from the first ton to the last and it becomes in that sense a matter of calculation and, therefore, uncertain. But the amount to be calculated in this case is only that sum in excess of the minimum quantity. The amount that, therefore, remains uncertain is the excess only. The rent or minimum quantity, therefore, clearly comes within the Interest Act. As this is a sum which is reserved by the lease, the plaintiff, in my judgment, is entitled to interest on it. For the reasons which I have already elaborately stated, she is not entitled to interest on the Rs. 749 in Appeal no. 88 of 1929 as not coming within the provisions of the law. The interest or rent recoverable on the minimum quantity of royalty will be at the rate of 12 per cent. per annum.

With this modification the appeals are dismissed. As the defendants have failed in substance, I think they should not get their costs. Costs should be awarded to the respondent.

FAZL ALI, J.—I agree.

Decree modified.

REVISIONAL CRIMINAL.

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Dec., 14, 15.

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

UMA SINGH

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 173—*order disposing of police report under section* 173,

* Criminal Revision nos. 513 and 514 of 1932, against the order of S. P. Chattarji, Esq., Sessions Judge of Shahabad, dated the 14th September, 1932, affirming the order passed by Mr. Nageshwar Prasad, Magistrate, 1st Class, Arrah, dated the 9th August, 1932.

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whether is a judicial order—magistrate, whether is competent to call for charge sheet after disposing of police report under section 173.

A magistrate's order directing a case, reported to him by the police under section 173, Code of Criminal Procedure, 1898, to be struck off, is a purely administrative or ministerial order and the principle of " autrefois acquit " cannot apply to it.

Therefore, a magistrate, having disposed of a police report under section 173, is competent to revise his order and call for a charge sheet.

Shukadeva Sahay v. *Hamid Mian*(1), distinguished.

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

M. Yunus (with him *P. P. Varma*, *J. N. Sahay* and *Harnandan Singh*), for the petitioners.

Jaffer Imam, *Assistant Government Advocate*, for the Crown.

SCROOPE, J.—In these two revisional applications there are four petitioners out of five convicted persons. No. 513/32 is the application of Uma Singh, Ratan Singh and Baijnath Lal and no. 514/32 is of Damodar Singh. The first-named three persons with Ramautar Singh and Damodar Singh were tried and charged under sections 420 and 120B of the Indian Penal Code by the 1st class Magistrate of Arrah. Uma Singh received a sentence of 18 months' rigorous imprisonment and a fine of Rs. 300, in default a further rigorous imprisonment of six months under section 420, Indian Penal Code. Ratan Singh and Baijnath Lal along with Ramautar Singh were sentenced to nine months' rigorous imprisonment each and a fine of Rs. 200 each, in default six months' rigorous imprisonment whilst Damodar was sentenced to six months' rigorous imprisonment and a fine of Rs. 100, in default a further period of rigorous imprisonment for three months under section 420. All

(1) (1927) I. L. R. 7 Pat. 561.

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these accused persons were also convicted under section 120B at the same trial and received sentences of six months each to run concurrently with the above-mentioned sentences, and out of the fines Rs. 200 was directed to be paid to the complainant as compensation. Damodar Singh has filed a separate revisional application no. 514 of 1932 against his conviction. The convictions and sentences under section 420, Indian Penal Code were upheld by the Sessions Judge of Shahabad but he set aside the conviction for conspiracy.

The prosecution case is shortly this: the complainant Sitaram Das is a Sadhu and lives at Morha Mathia in mouza Banwalia; petitioner Damodar Singh is one of his chelas and he came to him one day in Asarh before last and told him that he had four or five friends who knew how to double notes and that he could get the Sadhu's notes doubled if he gave him some. Then a practical demonstration was arranged and the four petitioners and Ramautar doubled currency notes of Rs. 10 each and thus gained the confidence of the complainant who then agreed to give them Rs. 1,500 worth of notes to be doubled. At the same time the complainant also gave them about Rs. 175 for incidental expenses. To make a long story short, eventually one day the petitioners got Rs. 1,300 out of the complainant and pretended to start note doubling. They gave the complainant a packet to carry home and told him that they would complete the operation on the following day, again taking incidental expenses from the complainant. On the following day then Damodar petitioner came to the complainant and told him that he could not trace the note doublers. The packet was opened and was found to contain charred papers. The complainant then threatened Damodar with a criminal prosecution and Damodar similarly threatened the complainant. A few days later the complainant met Uma Singh at Arrah Railway Station and demanded

back his money; the latter promised to pay it back. Then there was a panchayati over the affair and Damodar is alleged to have confessed his guilt and eventually offered complainant a gold necklace alleged to be worth Rs. 150. This when tested by a blacksmith turned out to be gilt. The patience of the complainant being thus at an end, he reported the matter to the police; and eventually these petitioners were put on trial on the charges mentioned above and were convicted.

The material facts for understanding the first contention urged by Mr. Yunus in this revisional application no. 513/32 are as follows: the complainant, as I have said, lodged his first information on the 25th August, 1931, charging the five petitioners with conspiracy and cheating and eventually a final report was submitted by the police under section 173, Code of Criminal Procedure, to the effect that the case was true but the evidence was insufficient. At the same time it was stated in the final report that a separate case would have to be instituted by the Sub-Inspector of Shahpur in respect of, what I may call, the necklace part of the incident, as the delivery of the necklace by Damodar Singh to the complainant constituted quite a separate offence of cheating by him. The informant Sitaram, however, filed a protest petition before the Subdivisional Officer against the police report. The complainant was directed to appear in support of it on the 8th November, 1931, and on the 20th November, 1931, the Magistrate recorded the following order:

"I have heard the Mukhtear for the prosecution and considered the police report. As there is not sufficient (sic) against the accused, the police have not sent them up for trial. I also see no reason to call for charge sheet or to put them on trial. Enter true section 420, I. P. C."

This case, it is to be noted, bore G. R. no. 865 of 1931.

On the 28th November, 1931, the Shahpur police submitted charge sheet in the necklace case no.

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1147/31 against Damodar Singh and Uma Singh and on the 12th January the complainant Sitaram Das moved the Sessions Judge against the order of the Subdivisional Magistrate declining to proceed further with the note doubling case. That is the case no. 865 of 1931. The Sessions Judge allowed this application recording the following order:

> "This application will have to be allowed, if only because the learned Magistrate failed to examine the applicant on oath on his protest petition, although surely he should have known by now that he was bound to do so. The learned Magistrate should now examine the applicant accordingly and consider his case on its merits".

Thereupon on the 22nd February the Subdivisional Magistrate recorded the following order on the order-sheet of the necklace case: that is, case G. R. No. 1147/31:

> "Call on the police to submit charge sheet against the remaining three accused also for 4th March",

and this resulted in the trial in question.

On the above facts Mr. Yunus contends that the whole trial in this note doubling case was illegal as the Magistrate, having declined to take cognizance on the original police report even after the complainant's protest petition, could not reopen the case and call for a charge sheet. There was some slight confusion in the matter as the learned Magistrate instead of recording his order for a charge sheet on the order-sheet of the note doubling case 845 did so on the order-sheet of the necklace case no. 1147 in which charge sheet had already been submitted against two persons. But it is clear enough that this order referred to the note doubling case, for he also directed that the record of the G. R. case 865/31 is to be amalgamated with this case 1147/31 and that there is to be only one trial, though eventually the two cases had to be tried separately. This is really what has given rise to Mr. Yunus' contention and I see no force in it. It is unreasonable to contend, as Mr. Yunus does in effect, that a Magistrate, having once disposed of a police

report under section 173 as here, has no power to revise his order and call for a charge sheet. The Magistrate's order directing a case reported to him by the police under section 173 to be struck off, as in this case, is not a judicial order. In *Ganga Ram* v. *Emperor*(1) of this Court it was held that a Magistrate could reopen a case by calling for a charge sheet after disposing of a police report under section 173 with the order " Enter mistake of fact ". Such orders are purely administrative or ministerial and the principle " autrefois acquit ", which is really at the basis of Mr. Yunus' contention, cannot possibly apply to them. To accept this contention would mean, for instance, that if a Magistrate after disposing of a police report in this fashion, were to suspect or discover that the report was dishonest, his hands would be tied by his previous order. He can, for instance, reopen the case under section 190 (*1*) (*c*). The only authority Mr. Yunus cites is *Shukadeva Sahay* v. *Hamid Mian*(2), where it was held that a District Magistrate has no power to direct the police to submit a charge sheet where a Subdivisional Magistrate has declined to take cognizance of an offence under section 190 (*1*) (*b*), after recommendation to that effect has been submitted by the police to the Subdivisional Magistrate under section 173 of the Code of Criminal Procedure. For one thing that case is not on all fours with the present case; and in the second place the decision does not take into account section 190 (*1*) (*c*) of the Code of Criminal Procedure, and in so far as it can be taken to lay down that administrative order of this kind cannot be re-opened either by the Subdivisional Magistrate or a District Magistrate, I must altogether dissent from it. Laws of procedure, as the Privy Council has laid down, are not meant to hamper the administration of justice. It is true that if a Magistrate takes cognizance under section 190 (*1*) (*c*) he must give the accused the option of being

(1) Cr. Rev. 10 of 1932 (unreported).
(2) (1927) I. L. R. 7 Pat. 561.

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tried by some other Magistrate; but that point does not arise here as the trying Magistrate was not the Magistrate who called for the charge sheet. Moreover, he had fresh material before him in the shape of charge sheet in the necklace case as well as in the Sessions Judge's order directing further enquiry. Mr. Yunus contends that so far as it relates to the Sessions Judge's order directing further enquiry, the Magistrate cannot fortify himself with it in respect of the order complained of because the Sessions Judge directed only that the complainant should be examined. But the Sessions Judge's order did not, in my opinion, debar the Magistrate from summoning the accused; it only directed the Magistrate to examine the complainant and consider the case on the merits. This order was complied with when the Magistrate examined the complainant in the actual trial after the charge sheet which he had called for had been submitted. In my opinion this contention must fail.

The second point was that the Magistrate did not give the petitioners opportunity of having their witnesses examined. When the defence filed their list of witnesses the Magistrate, as he was entitled to do, not being satisfied that they were bona fide witnesses insisted in the case of certain of these witnesses that their expenses should be deposited. That was on the 29th June. On the next day, 30th of June, we find the petitioners protested against this order and then the Magistrate recorded the following order:

> "I have already passed orders after consultation with the defence mukhtar. If the accused want to summon those witnesses they must pay the cost by tomorrow the latest."

It will be seen, therefore, that the order was passed after consultation with their legal advisor and the position was accepted by him. The accused took no steps in the matter of getting these witnesses summoned.

On the 11th July Ratan Singh said that he was still unable to get the cost for his witnesses. However, he was offered and accepted what was known as *dasti* summons. The witnesses were to be produced by the 15th July and thereafter the matter ended as no defence witnesses were produced and there was no further petition in the matter. This point evidently was not argued before the Sessions Judge at all; for his very exhaustive judgment is silent on the point. Above all before us and in the petition to this Court the petitioners do not refer to any particular witness, much less what he would prove in their favour. There is simply a general allegation that they did not get an adequate chance of summoning their witnesses; and I am satisfied that there is no substance in their objection. These are the points on which these two separate applications in revision were pressed and they must both fail.

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As regards the compensation which was directed to be paid to the complainant, I do not consider that he deserves any compensation as he deliberately allowed himself to be fooled in this fashion, and he deserves no sympathy from a Court, and I would set that portion of the order aside.

COURTNEY TERRELL, C. J.—I agree.

Conviction and sentence upheld.

FULL BENCH.

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

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Dec., 16, 19, 20, 23.

SANTOKHI BELDAR

v.

KING-EMPEROR.*

Evidence Act, 1872 (*Act I of* 1872), *section* 24—"*person in authority*", *meaning of—statement by a person that he has committed an act which amounts to an offence, whether*

* Criminal Appeal no. 337 of 1932, against the order of K. P. Sinha, Esq., Additional Sessions Judge of Bhagalpur, dated the 19th September, 1932.

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is a confession by a "accused person"—exculpatory statement by accused, whether admissible against co-accused—strength of evidence against the accused is a matter to be considered ***forced*** *not after conviction.*

The words "person in authority" occurring in section 24 of the Evidence Act, 1872, have reference to a person who has authority to ***regard*** in the apprehension, detention or prosecution of the ***accused***, or who is empowered to examine him. The section ***excludes*** a confession procured by inducement, threat or promise ***relating*** to the charge, only when the inducement, threat or promise is sufficient to give the accused reasonable grounds for supposing that by making it he will gain any advantage or avoid any evil in reference to the proceedings against him. When the inducement, etc., is to a person who has no power to interfere in the matter or inquiry it is not reasonable for the accused to suppose that he will benefit by confessing.

Where an extra judicial confession was made to a mahsildar who was a person of some influence in the village but had no interest in the prosecution of the accused other than the interest which every citizen has in the maintenance of law and order, and the confession was made in consequence of questions put, and a promise made by him.

Held, that the tahsildar not being a person empowered to examine the accused or one who could legitimately influence the course of proceeding, the confession was not excluded by section 24.

When a person states that he has done certain acts which amount to an offence, he accuses himself of committing the offence, and the statement is, therefore, a confession by an "accused person" within the meaning of section 24.

Deonandan Dusadh v. *King-Emperor*,(1) overruled.

Obiter: if such person makes the statement to a police officer, as such, he submits to the custody of the officer within the meaning of section 46(1) of the Code of Criminal Procedure, 1898, and is then "in the custody of a police officer" within the meaning of section 27 of the Evidence Act, 1872.

(1) (1928) I. L. R. 7 Pat. 411.

Legal Remembrancer v. *Lalit Mohan Singh Roy*(1), followed.

Semble that an exculpatory statement made by an accused is inadmissible against a co-accused.

The strength of the evidence against an accused person is a matter to be considered before, and not after conviction. Therefore, a Judge is wrong when, after he has convicted the accused of murder, he sentences him to transportation for life on the ground that the evidence was not of a sufficiently convincing character to justify the capital sentence.

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

Manohar Lal (with him *S. M. Gupta* and *Muhammad Yasin Yunus*), for the appellants.

Jaffer Imam, Assistant Government Advocate, for the Crown.

COURTNEY TERRELL, C. J. and SCROOPE AND AGARWALA, JJ.—Of these four appellants Chotka Sonar has been convicted under section 302 of the Indian Penal Code and appellants Santokhi Beldar, Dwarika Mahto and Mahabir Sanghai under section 302/149 by the Additional Sessions Judge of Bhagalpur in part agreement with the assessors and all four have been sentenced to transportation for life.

The material facts of the case are these: a dead body without the head was found in Kusumaha village which is about six miles north-west of Amarpur police-station in the Bhagalpur district, on the 5th May last at a place in the village known as Bahiar. The news spread in the village and Asharfi chaukidar of Kusumaha went to tell Radhe, another chaukidar of the same village, about it. Radhe was not found at home; but his wife Musammat Kulho told Asharfi that her husband had gone out to village Pansalla during the night and had not returned home since. Asharfi then went to see the dead body and

(1) (1922) I. L. R. 49 Cal. 167.

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found that it was the dead body of this chaukidar Radhe. Musammat Kulho also went to the spot and recognized the corpse of her husband. She then went with Asharfi to Amarpur police-station and lodged the first information. The Sub-Inspector came to the spot that afternoon and saw the dead body and on a further search, the head was found; he also found a broken earthen pot lying in the Bahair which appeared to have blood stains as well as traces of burnt pieces of matting and bits of string. He stopped for the night in the village and early in the morning was told by Syed Abdul Aziz, the local tahsildar of the Banaili Raj in whose zamindari this village is, that his labourer Santokhi Beldar had confessed to him regarding the murder. The Sub-Inspector after examining Santokhi Beldar was then taken by the latter to his house where the Sub-Inspector examined the courtyard or *angna* which appeared to have been recently washed and Santokhi produced for him a *kuchia* or knife and a small pitcher or *labni* which smelt of toddy. Next Santokhi took him out to a field about 200 paces south-east from his house and there he showed him a mouse-hole which was covered with clods in a field. The Sub-Inspector took some earth and straw from this hole; these were sent to the Chemical Examiner and were found to contain human blood. He also pointed out to the Sub-Inspector a pot or *chuka* which was at a short distance from the hole and this likewise was subsequently found by the Chemical Examiner to have stains of human blood.

Accused Santokhi Beldar was sent to Banka and his statement was recorded there by a Sub-Deputy Magistrate on the 9th May. The sum and substance of this confession was to the effect that on the Wednesday night in question Radhe came to his house for a smoke and decided to spend the night in his house. The three remaining appellants and four other persons, who have been acquitted, came to the

house after that and said that they were going to kill Radhe. Santokhi interceded and remonstrated on his behalf but he received a cut in his hand from a bhujali and could do nothing. Then they surrounded Radhe and Chotka Sonar appellant cut his throat and they took away the dead body and cut the head off. He accompanied them through fear and on his return he scraped off the bloodstains from his courtyard.

His mother-in-law Surji was also sent up to the Magistrate in order to have her statement recorded under section 164 on the same day and she stated that she had seen the two appellants Dwarika Mahton and Mahabir Sanghai and some other men whom she could not identify numbering four or five killing Radhe in her house. It was about mid-night, there was a tatti door separating her room from the room in which Radhe and the appellants were; she peeped through it and saw all this.

In the trial that subsequently ensued eight persons altogether were placed on their trial, the four persons mentioned above being convicted and four others were acquitted and the evidence in the case can best be seen by taking the case of each accused individually.

As to Santokhi Beldar and indeed as regards the case of all the appellants the first question that arises is whether the above mentioned extra judicial confession to Abdul Aziz is admissible in evidence, indeed it is on this point the appeal has been mainly argued. The learned Sessions Judge has ruled it out on the ground that Abdul Aziz was a person in authority, that the confession was made under an inducement from him that Santokhi would be saved if he made a clean breast of the whole matter and that it is, therefore, inadmissible under section 24 of the Evidence Act. The position regarding this confession is peculiar, because the learned advocate for Mahabir

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and Dwarika had to refer to it for the purpose of showing that these two appellants were not mentioned at all in the confession, and that their names were subsequently introduced. So naturally it was to the benefit of his clients that the confession should be on the record, while counsel for Santokhi contended that it was not admissible at all, and the view, as has been said above, taken by the learned Sessions Judge was that it was not admissible at all under section 24 of the Evidence Act. There is no statutory definition of the words " person in authority "; but it is well established that the words have reference to a person who has authority to interfere in the matter under enquiry. The section excludes a confession procured by inducement, threat or promise having reference to the charge, only when the inducement, threat or promise is sufficient to give the accused person reasonable grounds for supposing that by making it he would gain any advantage or avoid any evil in reference to the proceedings against him. When the inducement, etc., is by a person who has no power to interfere in the matter under inquiry it is in our opinion not reasonable for the accused to suppose that he will benefit by confessing. The reported cases on the point show that, generally speaking, a " person in authority " within the meaning of section 24 is one who is engaged in the apprehension, detention or prosecution of the accused or one who is empowered to examine him. Abdul Aziz is a tahsildar of the Banaili Raj and appears to be a person of some influence in the village but he had no interest in the prosecution of Santokhi other than the interest which every citizen has in the maintenance of law and order; and although the confession was made in consequence of the questions put and the promise made by him, he was not a person empowered to examine Santokhi or who could legitimately influence the course of the proceedings. It was also argued that section 24 applies only to a confession by an " accused person " and it was pointed out that up to the time when

Santokhi confessed to Aziz no one had accused him of the murder of Radhe. Reliance was placed on the decision in *Deonandan Dusadh* v. *King-Emperor*(1). That was a case in which a person reported at the police station that he had assaulted his wife in a particular room of their house and she had become senseless. After this statement had been made and recorded the Sub-Inspector formally arrested the informant and then went to the house where he discovered the corpse of the woman in the room indicated in the information. The Sub-Inspector deposed that he discovered the corpse in consequence of this information and the question was whether the information was admissible against the informant. The decision of this question turned on section 27 of the Evidence Act which renders admissible so much of a confession made to a police officer as relates distinctly to a fact discovered in consequence of a confession by a "person accused of any offence" whilst "in the custody of a police officer". The Court in that case took the view that at the time when the informant made the statement to the Sub-Inspector he was neither a "person accused of any offence" nor was he "in the custody of a police officer". We are unable to agree with that opinion and it must be considered as overruled. When a person states that he has done certain acts which amount to an offence, he accuses himself of committing the offence; and if he makes the statement to a police officer, as such, he submits to the custody of the officer within the meaning of section 46(*1*) of the Code of Criminal Procedure, and is then in the custody of a police officer within the meaning of section 27 of the Evidence Act. This was also the opinion of Teunon and Ghosh, JJ. in *Legal Remembrancer* v. *Lalit Mohan Singh Roy*(2). We therefore decide that when Santokhi informed Aziz of the part he had taken in the murder of

(1) (1928) I. L. R. 7 Pat. 411.

(2) (1922) I. L. R. 49 Cal. 167.

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Radhe he accused himself of the offence of murder, and that evidence of the confession made to Aziz was admissible.

The burden of this confession in effect was that he was in the conspiracy to murder Radhe Dusadh because Radhe had incurred the hostility of himself, Chota appellant, Siswa and others who had illicit relations with one Chanchalia, his cousin sister. In this confession he goes on to describe how they decoyed Radhe to Santokhi's house and got him to drink toddy and eventually Chotka appellant, Siswa and Sudinwa and he himself joined in killing him; he sat on his legs whilst Chotka cut his throat and the others helped him. Then he goes on to describe how the body was taken away and disposed of and he accounts for the different articles to which we have already referred above. He varied this confession very much when his statement was recorded at Banka on the 9th May. To Chotka Sonar, Siswa Sonar and Sudinwa Kahar he added the names of Mahabir Sanghai and Dwarika Mahton appellants as well as Darbari Mahton and Tholai Mahton and made out, as we have shown above, that he was an unwilling witness to the murder and was compelled to help in disposing of the dead body. In fact for practical purpose this latter is an entirely exculpatory statement and must be ruled out so far as concerns the other appellants; moveover, both in the committing Magistrate's Court and in the Sessions Court he went back entirely even on this latter statement and made out that his confession to the Sub-Deputy Magistrate was the result of threats and torture.

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In our opinion there is adequate corroboration of the confession to Abdul Aziz and apart from it the exculpatory statement proves his complicity in the matter.

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In our opinion, therefore, his conviction under section 302 must be upheld. It is incredible that he would have implicated himself in this complete fashion in the murder had he not taken an active part in it.

As regards Chotka appellant the important evidence against him is the extra judicial confession to Saiyid Abdul Aziz because the later exculpatory statement of Santokhi is not admissible against him, and the statement of Surji in the committing Magistrate's Court wherein she says that about mid-night she got up and saw Dwarika, Mahabir and Chotka along with Sudinwa (who has been acquitted) killing Radhe conflicts too much with her other statements and we have already given reasons for discarding her evidence. We may note that so far as Chotka is concerned his name does not appear in her statement to the Sub-Deputy Magistrate under section 164. Also it must be remembered as regards Chotka that it was he who informed Musammat Kulho and Abdul Aziz about Radhe's dead body being found. The learned Sessions Judge thinks that he may have done so, so that no suspicion might fall on him; his conduct is no doubt open to two interpretations; but the only evidence remaining against him being the extra judicial confession of a co-accused which has been retracted, we think it would be unsafe to convict him.

As regards the remaining two accused Mahabir and Dwarika, the direct evidence against them is the original statement of Surji to which we have already referred and her statement in the committing Magistrate's Court which she retracted entirely in the Sessions Court and the two former statements differ as regards the persons who committed the murder. Admittedly they are not implicated in the extra judicial confession and the prosecution case requires us to believe that these Bhumihar Brahmins combined with these Sonars and Beldars to murder this chaukidar which is to our minds most unlikely. As

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regards the motive of this murder there are two running parallel through this case, namely, that the chaukidar was murdered either because of his interference with the woman Chanchalia in the matter of her misconduct with Santokhi, Chotka and Sisua or because of his giving evidence in a criminal case against Dwarika; and the full development of the prosecution evidence in the case which is reached in Surji's statement to the committing Magistrate would show that these two sets of persons not otherwise in any way connected, combined their separate motives to murder the chaukidar.

* * * * * *

Another piece of evidence relied on by the learned Sessions Judge as regards Dwarika and Mahabir was the exculpatory statement of Santokhi; but that cannot be used against them. There is evidence that the accused Mahabir who is the nephew of the accused Dwarika had come to call the deceased on Wednesday on the pretext of a punchaiti and on his refusal to go had threatened him. This incident may have occurred but it does not seem to be in accordance with a deliberate plot to murder the man on the same night. Dwarika and Mahabir may have been hostile to the chaukidar on account of the criminal case the details of which are unknown; but on the evidence as it stands the prosecution case against them goes no further and the evidence is far too weak to justify their conviction. We accordingly acquit them.

It is necessary again to draw the attention of the lower courts to the rule repeatedly laid down by us that the strength of the evidence against the accused is a matter to be considered before but not after conviction. The Sessions Judge having convicted the accused of a murder by assassination sentenced them to imprisonment for life instead of to death and stated his reason to the effect that the evidence was not of

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a sufficiently convincing character to justify the latter punishment. This is utterly wrong and the Sessions Judge should have known it. We hope that no further occasion will arise for a comment of this nature.

Thus the only conviction maintained is that of Santokhi and notice was issued on him and the others from this Court at the time of the admission of the appeal to show cause why the sentence of transportation for life should not be enhanced; but having regard to the time that has elapsed since his conviction by the Sessions Judge and as he appears to have more or less repented of his action by making a clean breast of the whole matter, we think that the justice would be satisfied with his sentence as it stands. We therefore discharge the rule.

The result is that the conviction and sentence of Santokhi Beldar will be maintained and that the three appellants Chotka Sonar, Mahabir Sanghai and Dwarika Mahto will be acquitted.

Order accordingly.

Affld. 29 Pat. 279 (PC)

PRIVY COUNCIL

J.C. 1933.

Jan. 17.

MAHANTH RAM CHARAN DAS

v.

NAURANGI LAL.

On Appeal from the High Court at Patna.

Limitation—Adverse Possession—Religious Endowment—Sale or permanent Lease of Property of Math—When Possession becomes adverse—Limitation Act, 1908 (*Act IX of* 1908), *Schedule I, article* 144.

Although an assignment or disposition of a math and its properties by the mahanth is void, either a sale or permanent lease by him of an item of property appertaining to the math

* *Present*: Lord Blanesburgh, Lord Russell of Killowen, and Sir John Wallis.

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even if not for necessity, is valid during the tenure of office of the mahanth; consequently, upon an alienation of that nature the possession of the purchaser or lessee does not become adverse so as to cause time to run under the Limitation Act, 1908, Schedule I, article 144, until the alienating mahanth ceases to be mahanth, either by death or otherwise.

Vidya Varuthi v. *Balusami Ayyar*(1) and *Subbaiya Pandaram* v. *Mahammad Mustapha Marcayar*(2), applied.

Gnanasambanda Pandara Sannadhi v. *Velu Pandaram*(3) and *Damodar Das* v. *Lakhan Das*(4), distinguished.

Judgment of the High Court(5), reversed.

Appeal (no. 92 of 1932) from a decree of the High Court (April 8, 1930) reversing a decree of the Subordinate Judge of Patna (September 6, 1927).

On December 21, 1909, Rampat Das, the mahanth of a math, executed a mukarrari lease of certain property appertaining to the math in favour of respondent no. 1 and put him into possession; on February 13, 1911, Rampat Das executed a sale deed of the same property, subject to the lease, to respondent no. 3, the wife of respondent no. 2. In or about July 1913 Rampat Das died. After a dispute as to the office the appellant became mahanth.

On May 27, 1924, the appellant, as mahanth, instituted the present suit against the three respondents claiming possession of the property and mesne profits.

Both the mukarrari lease and the sale deed purported to have been executed in order to meet the expenses of the math, but that was negatived by concurrent findings of the Courts in India.

Upon the present appeal the sole question was whether the suit was barred by limitation as pleaded

(1) (1921) I. L. R. 44 Mad. 831; L. R. 48 I. A. 302.
(2) (1923) I. L. R. 46 Mad. 751; L. R. 50 I. A. 295.
(3) (1899) I. L. R. 23 Mad. 271; L. R. 27 I. A. 69.
(4) (1910) I. L. R. 37 Cal. 885; L. R. 37 I. A. 147.
(5) (1930) I. L. R. 9 Pat. 885.

by the defendants. Both Courts held, and it was not disputed upon the present appeal, that the article of the Limitation Act applicable was article 144 and not article 134.

The trial Judge rejected the plea of limitation, holding that both under the mukarrari lease and the sale adverse possession began to run only upon the death of Rampat Das.

An appeal to the High Court was allowed by a judgment delivered by Fazl Ali J., Wort J. agreeing. The learned Judge held that the property was to be deemed to have been vested in the math or idols, in the absence of a deed of trust, and that consequently the decision in *Damodar Das* v. *Lakhan Das*(1) applied with the result that the suit was barred. In his view the authority of that case was not affected by *Vidya Varuthi Thirtha* v. *Balusami Ayyar*(2). He was of opinion that as the vendee and the mukarraridar were of the same family adverse possession under the lease began when possession was obtained under the sale deed.

1933, December 2. *Parikh* for the appellant. Possession did not become adverse under either deed until the death of Rampat Das and consequently the suit was not barred as to either transaction. The judgment of the High Court was based upon such cases as *Damodar Das* v. *Lakhan Das*(1) and *Gnana-sambanda Pandara Sannadhi* v. *Velu Pandaram*(3), which followed *Vurmah Vahia* v. *Ravi Vurmah Mutha*(4). But in those cases the alienations were void and no property passed, as they were attempts to deal with the office of the shebait or mahanth and with the whole endowment. Here the transactions were

(1) (1910) I. L. R. 37 Cal. 885; L. R. 37 I. A. 147.
(2) (1921) I. L. R. 44 Mad. 831; L. R. 48 I. A. 302.
(3) (1899) I. L. R. 23 Mad. 271; L. R. 27 I. A. 69.
(4) (1876) I. L. R. 1 Mad. 235; L. R. 4 I. A. 76.

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voidable and not void; they were effected by the mahanth as manager, and if they had been for necessity, as they purported to be, they would have been valid. In *Vidya Varuthi Thirtha* v. *Balusami Ayyar*(1) it was held that the mahanth is not in the position of a trustee but of a manager, and that a permanent lease by him, even if not for necessity, is valid during his lifetime. For the purpose of this case no distinction can be drawn between the sale and the permanent lease. The judgments in *Subbaiya Pandaram* v. *Mahammad Mustapha Maracayar*(2) and *Nainapillai Marakayar* v. *Ramanathan Chettiar*(3) draw no such distinction. That there is a distinction between *Vidya Varuthi's case*(1) and cases such as *Damodar Das's case*(4) has been recognized by the Patna High Court in *Ramrup Gir* v. *Lal Chand Marwari*(5). On appeal to the Privy Council(6) in that case it was not necessary to determine whether adverse possession began at the date of the alienation or when the alienating mahanth died.

Wallach for the respondents. The distinction between the class of cases of which *Damodar Das* v. *Lakhan Das*(4) is typical and *Vidya Varuthi's case*(1) is that the former related to property vested in the idol as a juridical person. In the present case the plaint stated in terms that the property was vested in the named idols installed in the math. Accordingly, under the decision in *Damodar Das's* case(4) the transfers were void and possession was adverse from their date. In any case the principle applied in *Vidya Varuthi's case*(1) to the grant of mukarrari lease by a mahanth does not extend to a sale. The transactions are essentially different as under

(1) (1921) I. L. R. 44 Mad. 831; L. R. 48 I. A. 302.
(2) (1923) I. L. R. 46 Mad. 751; L. R. 50 I. A. 295.
(3) (1923) I. L. R. 47 Mad. 837; L. R. 51 I. A. 83.
(4) (1910) I. L. R. 37 Cal. 885; L. R. 37 I. A. 147.
(5) (1922) I. L. R. 1 Pat. 475.
(6) (1925) I. L. R. 5 Pat. 812; L. R. 53 I. A. 24.

mukarrari lease the math has a reversion with the rights attached thereto, whereas upon a sale the property is cut out of the endowment. There is no judgment of the Board so extending the principle. In *Subbaiya Pandaram* v. *Mahammad Mustapha Maracayar*(1), Lord Buckmaster who was a party to the judgment in *Vidya Varuthi's* case(2) pointed out that it referred only to a mukarrari lease. In the last case before the Board in which the question was raised, namely *Lalchand Marwari* v. *Ramrup Gir*(3), the judgment expressly declared that the question was still open.

Parikh replied.

1933, January 17. The judgment of their Lordships was delivered by

LORD RUSSELL OF KILLOWEN.—The question for determination on this appeal is whether the plaintiff's suit is barred by limitation.

The relevant facts must first be stated. In December, 1909, one Rampat Das was the mahanth of a math situate at Paliganj in Patna district. On the 21st December, 1909, he executed a *mukarrari* or permanent lease of some 70 acres of land to Munshi Naurangi Lal under which the latter paid a premium and an annual rent to the mahanth. On the 13th February, 1911, he executed a sale deed of the land subject to and with the benefit of the lease to Musammat Sampat Kuer in consideration of Rs. 900. Each document states that it is executed by the mahanth for the expenses and necessities of the math, but in view of the findings at the trial these statements may be disregarded, and it must be taken that neither of these documents was executed for legal necessity or was for the benefit of the math or the deities installed therein.

Mahanth Rampat Das died in or about July, 1913. On his death one Sant Das took possession of

(1) (1923) I. L. R. 46 Mad. 751; L. R. 50 I. A. 295.
(2) (1921) I. L. R. 44 Mad. 831; L. R. 48 I. A. 302.
(3) (1922) I. L. R. 1 Pat. 475.

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the math claiming to be mahanth, but on the 20th February, 1916, by registered deed he surrendered all his rights to the plaintiff, who was and is the mahanth of a math at Ramdih Baga. The registered deed included the 70 acres. The plaintiff claimed that Rampat Das had died without leaving behind any disciple, and that in those circumstances he, as mahanth of the Ramdih Baga Math, was entitled to take possession of the Paliganj Math (which was subordinate to and a branch of the Ramdih Baga Math) and all properties appertaining to it. Their Lordships, however, are not now concerned with any question of title, because both the Courts below have found that the plaintiff is the person in actual possession of the Paliganj Math and as such entitled to maintain a suit to recover property not for his own benefit but for the benefit of the math.

The plaintiff instituted the present suit on the 27th May, 1924, against the lessee, the purchaser and the husband of the purchaser, claiming possession of the 70 acres as property appertaining to the Paliganj Math and mesne profits.

A number of contentions were raised by the written statements, the two main ones being (1) that the 70 acres were the personal property of Rampat Das, and (2) that the suit was barred by the Limitation Act. The first contention failed completely. The 70 acres undoubtedly appertained to the math. The second contention failed at the trial and it is the sole contention which survived before the Board. The Subordinate Judge held that the suit was not barred and gave the plaintiff a decree.

On appeal, the High Court decided that the suit was barred. Both Courts agreed (and rightly) that Article 134 of the Limitation Act did not apply. The only Article applicable is Article 144. This article, which applies to a suit " for possession of immovable property or any interest therein not hereby otherwise

specially provided for," prescribes as the period of limitation twelve years from the time "when the possession of the defendant becomes adverse to the plaintiff."

The question then resolves itself into this: did the possession of the relevant defendant become adverse to the math or to the mahanth as representing the math at the date of the relevant assurance or at the date of the death of Rampat Das?

The Subordinate Judge held the latter date to be the correct date, and the suit to be within the 12 years. The High Court held the former date to be correct and the suit to be barred.

The Subordinate Judge, it would seem, reached his conclusion upon the footing that the title to the property was in the mahanth and not in the idols. His view was that, had the title been in the idols, the act of alienation would have been a challenge to the title of the idols and the limitation period would begin to run from the act of alienation; but since (as he found) the title was in the mahanth, possession only became adverse when a new title came into existence, the owner of which had not approved of the alienation. He came to this conclusion upon the authority of the cases of *Vidya Varuthi* v. *Balusami Ayyar*(1) and *Mahanth Ramrup Gir* v. *Lalchand Marwari*(2), distinguishing the case of *Damodar Das* v. *Lakhan Das*(3).

The Judges of the High Court, in deciding that the period of limitation ran from the date of alienation, delivered a most painstaking and elaborate judgment, in the course of which all available authorities were reviewed and considered. They held that two cases before this Board (*Gnanasambanda*

(1) (1921) I. L. R. 44 Mad. 831; L. R. 48 I. A. 302.
(2) (1922) I. L. R. 1 Pat. 475.
(3) (1910) I. L. R. 37 Cal. 885; L. R. 37 I. A. 147.

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Pandara Sannadhi v. *Velu Pandaram*(1), and *Damodar Das* v. *Lakhan Das*(2) had affirmed the view that in a suit to recover the property of an idol or a math the starting point for the period of limitation was the date of the alienation and not the date on which the successor of the alienor assumed office. They also held that the authority of those cases was in no way affected by the later decision of this Board in *Vidya Varuthi's* case(3).

Their Lordships do not think that it is necessary to follow the learned Judges of the High Court in their examination of the older authorities, but they must point out that *Gnanasambanda's* case(1) and *Damodar Das'* case(2) were both of them cases in which the assignment or disposition consisted of an assignment or disposition of the math and its properties. Such an assignment was void and would in law pass no title, with the result that the possession of the assignee was perforce adverse from the moment of the attempted assignment. *Vidya Varuthi's* (3) case, however, was the case (as here) of a disposition by the mahanth of an item of property appertaining to the math, the disposition being in the form of a grant of a permanent lease. The disposition was one not made for necessity and so was beyond the powers of the mahanth to grant. But in delivering the judgment of the Board, Mr. Ameer Ali used this most relevant and important language:—

"In view of the argument it is necessary to discover when, according to the plaintiff, his adverse possession began. He was let into possession by mahanth no. 1 under a lease which purported to be a permanent lease, but which under the law could endure only for the grantor's lifetime. According to the well-settled law of India (apart from the question of necessity which does not here arise) a mahanth is incompetent to create any interest in respect of the math property to endure beyond his life. With regard to mahanth no. 2, he was vested with a power similarly limited. He permitted the plaintiff to

(1) (1899) I. L. R. 23 Mad. 271; L. R. 27 I. A. 69.
(2) (1910) I. L. R. 37 Cal. 885; L. R. 37 I. A. 147.
(3) (1921) I. L. R. 44 Mad. 831; L. R. 48 I. A. 302.

continue in possession and received the rent during his life. The receipt of rent was with the knowledge which must be imputed to him that the tenancy created by his predecessor ended with his predecessor's life, and can, therefore, only be properly referable to a new tenancy created by himself. It was within his power to continue the tenancy during his life, and in these circumstances the proper inference is that it was so continued, and consequently the possession never became adverse until his death."

In other words, a mahanth has power (apart from any question of necessity) to create an interest in property appertaining to the math which will continue during his own life, or to put it perhaps more accurately, which will continue during his tenure of office of mahanth of the math, with the result that adverse possession of the particular property will only commence when the mahanth who had disposed of it ceases to be mahanth by death or otherwise.

If this be right, as it must be taken to be, where the disposition by the mahanth purports to be a grant of a permanent lease, their Lordships are unable to see why the position is not the same where the disposition purports to be an absolute grant of the property: nor was any logical reason suggested in argument why there should be any difference between the two cases. In each case the operation of the purported grant is effective and endures only for the period during which the mahanth had power to create an interest in the property of the math.

The same view is apparent in a later judgment of this Board, *Subbaiya Pandaram* v. *Mohamad Mustapha Maracayar*(1). The disposition in that case was a sale in 1898 of land devoted to charitable purposes, under an execution decree against the person who was the trustee of the charity. In the year 1913 the person who was then trustee of the charity sued to recover the property from the purchaser at the execution sale, or those claiming under him. It was held, not unnaturally, that ... purchaser's possession was adverse from the date of the sale; but in delivering the judgment of the Board, Lord Buckmaster, after

(1) (1923) I. L. R. 46 Mad. 751; L. R. 50 I. A. 295.

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referring to *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose*(1) and to *Vidya Varuthi's* case(2), said :—

> In each case they relate to the effect of an attempt on the part of a trustee to dispose of the property by a permanent *mukarrari* lease. This he has no power to do, though he is at liberty to dispose of it during the period of his life, and a grant made for a longer period is good, but good only to the extent of his own life interest. It follows, therefore, that possession during his life is not adverse.

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This is a clear statement that a mahanth is at liberty to dispose of the property of a math during the period of his life and that a grant purporting to be for a longer period is good to the extent of the mahanth's life interest. Here again their Lordships think that the reference to life is upon the footing that the mahanth continues during his life to hold that office.

It will be observed that the statement is in no way confined to the grant of a lease, but covers the case of a purported out and out grant of the property. Whatever the intended duration of the attempted grant may be, it is good, but good only for the limited period indicated.

In view of these statements by the Board, their Lordships hold that in the present case the lease and the deed of sale of the 13th February, 1911, were good and effective so long as Rampat Das continued to be mahanth, and that therefore adverse possession only commenced when he died.

The result is that the plaintiff's suit is not barred, and the appeal succeeds. The decree of the High Court should be set aside with costs in that Court, and the decree of the Subordinate Judge restored. Their Lordships will humbly advise His Majesty accordingly. The respondents must pay the costs of this appeal.

SOLICITORS for appellant: *Watkins and Hunter.*

Solicitors for respondents:—*H. S. L. Polak and Co.*

(1) (1910) I. L. R. 38 Cal. 526; L. R. 38 I. A. 76.
(2) (1921) I. L. R. 44 Mad. 831; L. R. 48 I. A. 302.

APPELLATE CIVIL.

1933.

Nov., 17, 18, 21, 22, 23, 24, 28, 29.
Dec., 1, 2, 5, 6.
Jan., 19.

Before Kulwant Sahay and Macpherson, JJ.

JURAWAN SINGH

v.

RAMSAREKH SINGH.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *Schedule III, article* 3—*raiyat, dispossession of, by an order of magistrate, whether is dispossession by landlord—Code of Criminal Procedure*, 1898 (*Act V of* 1898), *sections* 145 *and* 146—*attachment under section* 146, *whether is dispossession within article* 3—*land submerged under water—raiyat not taking possession on reappearance—possession by landlord, whether amounts to dispossession—rent, non-payment of, during period of submersion, whether of itself determines tenancy—abandonment, whether a question of intention on the part of tenant—Receiver appointed under section* 146, *settlement by, whether binding on rightful owner—act of Receiver, whether can prejudicially affect the rights of party entitled to possession—lands attached—case of continuing wrong—Limitation Act*, 1908 (*Act IX of* 1908), *section* 23 *and article* 120—*suit for declaration, whether barred by lapse of six years from date of attachment—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XLI, rule* 33—*court to exercise discretion to further ends of justice.*

In order to attract the operation of Article 3, Schedule III of the Bengal Tenancy Act, 1885, the dispossession of the raiyat must be by the landlord or at his instance. Therefore, a dispossession of the raiyat by an order of the Court under section 145, Code of Criminal Procedure, 1898, is not a dispossession by the landlord within the meaning of the article.

Likewise, the dispossession of the raiyat on account of an attachment of the lands by the Magistrate is not a dispossession by the landlord.

Gajadhar Rai v. *Ram Charan Gope*(1), followed.

Held, further, that Article 3 does not apply to a case where the possession of the tenants ceased on account of the

* Appeals from Original Decrees nos. 43 of 1927 and 73 of 1929, from the decisions (respectively) of Babu Suresh Chandra Sen and Babu Jatindra Nath Ghosh, Subordinate Judges at Muzaffarpur, dated the 6th September, 1926, and 19th December, 1928.

(1) (1930) I. L. R. 9 Pat. 788, S. B.

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land being submerged under water, and after reappearance of the land there was no actual taking of possession by the raiyat and no dispossession by the landlord.

Srish Chandra Bhaduri v. *Brojobashi Pramanik*(1), *Rajani Kanta Biswas* v. *Panchanon Mondal*(2), *Panchoo Kapali* v. *Jajneswar Majhi*(3) and *Rakhal Das* v. *Khirode Bandhu Nandi*(4), followed.

Where limitation has already begun to run before an order of attachment under section 146, Criminal Procedure Code, 1898, there cannot be a fresh start to limitation from the date of the attachment.

Deo Narayan Chowdhury v. *G. R. H. Webb*(5), followed.

Mere non-payment of rent by the tenant during the period of submersion of his lands by the action of the river does not of itself determine the tenaucy. The question of abandonment is a question of intention on the part of the tenant.

Mazhar Rai v. *Ramgat Singh*(6) and *Arun Chandra Singh* v *Kamini Kumar*(7), followed.

Hemnath Dutt v. *Ashgar Sindar*(8), dissented from.

An attachment made under section 146, Code of Criminal Procedure, 1898, lasts until a competent court has determined the rights of the parties to the land in dispute or the person entitled to possession thereof. When there has been such a determination, it is the duty of the Magistrate to withdraw the attachment and to make over possession of the land, as it was before the attachment, to the party entitled to possession.

Any act done by the Receiver appointed under section 146 during the period of attachment cannot prejudicially affect the rights of the party found by the court to be entitled to possession of the land in dispute.

Therefore, a settlement-holder with whom the Receiver settled the land during the period of attachment cannot claim a right of occupancy as against the rightful owner.

(1) (1928) 48 Cal. L. J. 554.
(2) (1925) 90 Ind. Cas. 793.
(3) (1920) 32 Cal. L. J. 9.
(4) (1929) 51 Cal. L. J. 36.
(5) (1900) I. L. R. 28 Cal. 86.
(6) (1896) I. L. R. 18 All. 290.
(7) (1913) I. L. R. 41 Cal. 683, P. C.
(8) (1879) I. L. R. 4 Cal. 894.

Raja Kameleshwari Prasad Singh v. *Biseshwar Rai*(1), dissented from.

Madhu v. *Sabar Ali*(2), distinguished.

Where a land is attached under section 146, it becomes a case of a continuing wrong under section 23 of the Limitation Act, 1908, and the right to sue accrues from moment to moment so long as the attachment lasts; therefore, a suit for declaration is not barred, under Article 120 of the Act, by lapse of six years from the date of the order of attachment.

Brojendra Kishore Roy Choudhury v. *Sarojini Roy*(3), followed.

Raja of Venkatagiri v. *Isakapalli Subbiah*(4), distinguished.

Order XLI, rule 33, Code of Civil Procedure, 1908, gives discretion to the Court of appeal in order to further the ends of justice and not to favour one party as against another.

Appeals by the defendants.

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

S. N. Sahay (with him *R. N. Lall*, *Bhagwan Prasad*, *G. P. Shahi* and *D. C. Varma*), for the appellants in Appeals no. 43 and 73.

S. S. Singh and *B. N. Singh*, for appellants in Appeal no. 73 only.

S. M. Mullick (with him *Rai T. N. Sahai*, *Ram Prasad* and *K. N. Varma*), for the respondents in Appeals no. 43 and 73.

C. P. Sinha and *Ramnandan Prasad*, for the respondents in Appeal no. 43 only.

KULWANT SAHAY, J.—These two appeals are by some of the defendants in two suits which were instituted by a large number of plaintiffs for declaration of their title in respect of different parcels of

(1) (1916) S. A. 1044 of 1915 (unreported).
(2) (1910) 14 Cal. W. N. 681.
(3) (1915) 20 Cal. W. N. 481.
(4) (1902) I. L. R. 26 Mad. 410.

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lands which they claimed as their occupancy holdings in mauza Fatehpur Shahbazpur, bearing tauzi no. 2602 in the district of Muzaffarpur. Appeal no. 43 of 1927 arises out of Title Suit no. 28 of 1924, while Appeal no. 73 of 1929 arises out of Title Suit no. 3 of 1927, the first suit having been filed in June, 1924, and the second in January, 1927. The suits were tried by two different Subordinate Judges, but on the application of the defendants-appellants in both these appeals, to which the respondents made no objection, it was ordered that these appeals should be heard one after the other. There are many points common to both the appeals and, although we have heard the appeals separately one after the other, it will be convenient to deal with the points raised in both the appeals in one judgment.

The case of the plaintiffs in both the suits was that the lands in dispute formed their occupancy holdings and that they or their ancestors and predecessors in title were recorded in the record-of-rights as occupancy raiyats of the lands claimed by them. The village Fatehpur Shahbazpur lies between two rivers, the river Gandak being on the north of the mauza and the river Ganges to the south of it, and lands of the village frequently go under water. The defendants-first-party in both the suits were also occupancy raiyats in respect of several holdings in the village. The plaintiffs or some of them and the defendants-first-party acquired proprietary interests in the village by purchase from the previous proprietors under whom they originally held the lands as raiyats. The purchases were made on different dates and by different instruments. The defendants-second-party are also some of the purchasers of the proprietary interest but they had no raiyati holding in the village before the acquisition of their proprietary interest.

It appears that some time in 1901 or 1902 a large area of land in the north of the village went under water and remained submerged for about 13

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or 14 years. About 400 bighas of the submerged lands reappeared in 1914 and about 1,000 bighas in 1918. The two suits relate to portions of these lands which the plaintiffs claim as their old occupancy holdings to which they are entitled as raiyats. After the reappearance of the first 400 bighas there was a dispute as regards possession and a proceeding under section 145 of the Criminal Procedure Code was started, which resulted in an order made on the 15th of December, 1916, whereby the Magistrate attached the whole of the 400 bighas under section 146, Criminal Procedure Code, being unable to find which of the parties was in actual possession of the land, and the Collector was appointed as the receiver. Similarly, disputes arose as regards the 1,000 bighas of land which had reappeared in 1918 and proceedings were again started under section 145 of the Code of Criminal Procedure, which resulted in an order, dated the 8th of July, 1921; by this order 200 bighas was declared to be in possession of the defendants-first-party as landlords, while the remaining 800 bighas was attached under section 146 of the Code. Thus 1,400 bighas of land formed the subject-matter of the two proceedings; and the plaintiffs in the two suits claim portions of each of the three blocks of lands, viz., the blocks of 400 bighas attached in 1916, the 200 bighas declared to be in possession of the defendants-first-party, and the 800 bighas attached in 1921. The lands claimed by the plaintiffs in each of the suits are set out in the schedules attached to the plaints. The lands claimed in the first block of 400 bighas are set out in schedule no. 1, those claimed in the block of 200 bighas are set out in schedule no. 2, while those claimed in the third block of 800 bighas are set out in schedule no. 3. The Collector was appointed the receiver also of the 800 bighas which was attached in 1921. The Subdivisional Officer of Hajipur acting for the Collector as receiver settled the attached lands, set out in schedule no. 1, with the defendants-fourth-party, and these defendants now claim the lands as occupancy tenants or, in any event, as non-occupancy

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tenants under the settlement made by the receiver. The lands set out in schedule no. 3 were, similarly, settled by the receiver with the defendants-fifth-party; but these defendants do not now claim any tenancy right in the lands under the settlement. The defendants-third-party have obtained leases of some of the lands from the defendants-first or second-party.

The suits were contested by the defendants-first and fourth-parties and also by some of the defendants-third-party. The defence of the defendants-first-party in each case was that the plaintiffs had no subsisting raiyati interest in the lands in dispute; that the plaintiffs abandoned their holdings when the lands went under water; that after reappearance of the lands the plaintiffs and the defendants took possession as landlords treating the lands as their bakasht lands; that they amicably divided the lands amongst themselves as proprietors; and that the plaintiffs had, therefore, no subsisting title as raiyats and are not entitled to take possession of the lands in dispute as such. Questions of limitation, abandonment and the identity of the lands in dispute with the original occupancy holdings were raised in the Court below as well as in this Court. The defendants-fourth-party claimed that they were settled raiyats of the village and as such had acquired occupancy right under the settlement made with them by the receiver.

Suit no. 28, giving rise to Appeal no. 43, has been decreed substantially as claimed by the plaintiffs; while suit no. 3, giving rise to Appeal no. 73, has been in part decreed by the Subordinate Judge. The defendants have accordingly preferred the present appeals.

I shall first deal with Appeal no. 43. This appeal is by defendants nos. 1, 7, 8, 9, 81 and 111 of the defendants-first-party and by the defendants-fourth-party. The plaintiffs in this case own

2-annas 19-gandas proprietary interest, while the defendants-first and second-parties are the owners of the remaining 13-annas 1-ganda.

The first point raised by the learned Advocate for the appellants was the question of limitation. The order for attachment of the 400 bighas of land, out of which the lands claimed by the plaintiffs are set out in schedule no. 1, was made on the 15th of December, 1916, and the order in the second proceeding under section 145 relating to the 1,000 bighas of land was made on the 8th of July, 1921. Out of the 1,000 bighas 200 bighas was declared to be in possession of the defendants-first-party and 800 bighas was attached under section 146 by the second order. The suit giving rise to Appeal no. 43 was instituted on the 7th of July, 1924. It is contended on behalf of the appellants that as regards the lands claimed in schedule no. 2 of the plaint the suit was barred under the special limitation of two years under Article 3, Schedule III of the Bengal Tenancy Act. The plaintiffs contend that the period of limitation was three years from the date of the order under section 145, under Article 47 of the Indian Limitation Act. It is to be noted that although an issue was raised on the question of limitation, yet at the hearing of the suit before the Subordinate Judge the question was not pressed by the defendants, and the learned Subordinate Judge observed that in fact the question did not at all arise in the suit. Moreover, the special limitation under Article 3, Schedule III of the Bengal Tenancy Act, was not pleaded by the defendants-first-party in their written statement, the plea taken being a general plea of limitation. The guardian-ad-litem of some of the minor defendants did raise the plea in the written statement that the suit was barred by the general and special law of limitation but, as I have said, the point was not pressed at the hearing. It is, therefore, contended on behalf of the plaintiffs-respondents that as the plea of special limitation was not specifically taken

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the plaintiffs did not give evidence on this point. I would, therefore, discuss this question only in so far as it raises a point of law and would not enter into the question in so far as it raises a question of fact.

The question of law raised is that the effect of the order under section 145 declaring the defendants-first-party to be in possession of the 200 bighas of land amounts to dispossession of the plaintiffs by the landlords and, therefore, the suit, having been filed more than two years after the date of the order, was barred under Article 3, Schedule III of the Bengal Tenancy Act. In my opinion this contention is not sound. The fact that the defendants-first-party were declared to be in possession did not amount to a dispossession by the landlord. If the dispossession was caused by the order of the Magistrate it cannot be taken to be a dispossession by the landlord. It has been held that in order to attract the special limitation provided in Article 3, Schedule III of the Bengal Tenancy Act, the dispossession of the raiyat must be by the landlord or at his instance. Although there are conflicting rulings on the point, yet the question is settled so far as this Court is concerned, by the Full Bench decision in *Gajadhar Rai* v. *Ram Charan Gope*(1). It is, however, contended that the fact that the defendants-first-party were declared to be in possession of the 200 bighas by the Magistrate was evidence of the fact that these defendants were in fact in possession of the lands on the date of the proceeding, and that they came into possession after dispossession of the plaintiffs. In this connection it is important to notice that the case of the defendants was that the plaintiffs had abandoned their holdings when the lands went under water and that after reappearance in 1914 and 1918 the tenants did not take possession of their holdings, but that the parties took possession as landlords treating the lands as

(1) (1930) I. L. R. 9 Pat. 788, F. B.

their bakasht and not as their raiyati holdings. If that is so, it is clear that there was no dispossession of the plaintiffs as raiyats by the defendants as landlords. [Article 3, Schedule III of the Bengal Tenancy Act, applies only to cases of actual dispossession by the landlord. If the possession of the tenants ceased on account of the land being submerged under water, and if after reappearance of the land there was no actual taking of possession by the raiyats and no dispossession by the landlords, Article 3, Schedule III of the Bengal Tenancy Act, would not apply. In order that there should be dispossession by the landlord there should first have been possession of the raiyats; but where the plaintiff had not taken possession after reappearance, the fact that the defendant succeeded in taking possession would not amount to a dispossession within the meaning of Article 3, Schedule III of the Bengal Tenancy Act.] In *Srish Chandra Bhaduri* v. *Brojobashi Pramanik*(1) it was held that where the plaintiff had never been in possession, the fact that the defendant had continued in possession did not amount to dispossession within the meaning of Article 3. Similarly, in *Rajani Kanta Biswas* v. *Panchanon Mondal*(2) it was held that for Article 3, Schedule III to operate, there must be actual dispossession by the landlord of the tenant and that it did not apply where the landlord refused to allow the plaintiff to take possession of the land and there has thus been what may be described a constructive dispossession by the landlord. In *Panchoo Kapali* v. *Jajneswar Majhi*(3) Mookerjee, A. C. J. observed that the term dispossession implies the going out of the person in possession and his being followed into possession by another. In that case the plaintiff took a lease of 12 kathas of land from the defendants but they obtained possession of 7 kathas only and the defendants agreed to vacate the remaining 5 kathas

(1) (1928) 48 Cal. L. J. 554.
(2) (1925) 90 Ind. Cas. 793.
(3) (1920) 32 Cal. L. J. 9.

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after three months. The defendants, however, continued in possession of the 5 kathas notwithstanding the lease and it was held that this fact did not amount to a dispossession under Article 3, Schedule III of the Bengal Tenancy Act, the learned Judge observing "We cannot possibly accept the argument that there was dispossession in law though not in fact, for this Court has emphatically discouraged recourse to the fiction of constructive dispossession which, however attractive, has tended to create much confusion." The same view was expressed in *Rakhal Das* v. *Khirode Bandhu Nandi*(1). In that case there was an abandonment of the holding upon which the landlord took possession. The tenant brought a suit for possession and it was held that the discontinuance of possession by the plaintiff did not amount to dispossession by the landlord such as to attract the operation of Article 3, Schedule III. I am, therefore, of opinion that having regard to the fact that there was no actual possession of the raiyati holding by the plaintiffs after reappearance, and no actual dispossession by the landlords in the present case, the special limitation of two years under Article 3, Schedule III of the Bengal Tenancy Act, did not apply in respect of the lands claimed in schedule 2 of the plaint, and that the period of limitation applicable is that provided in Article 47 of the Indian Limitation Act, and as such the suit is within time.

It is contended that the claim of the plaintiffs as regards the lands attached under section 146 of the Criminal Procedure Code, is also barred by limitation. The contention of the defendants-appellants is that the plaintiffs were dispossessed from the schedule 3 lands at least by the beginning of January, 1921, before the order under section 146 of the Criminal Procedure Code was passed on the 8th of July, 1921, and limitation having commenced to run the subsequent attachment will not affect the question and enlarge the period of limitation. If

(1) (1929) 51 Cal. L. J. 36.

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limitation began to run before the date of the order of attachment, it is clear the plaintiffs could not have a fresh start of limitation from the date of the subsequent attachment [*See Deo Narain Chowdhury* v. *C. R. H. Webb*(1)].

The question, however, is whether the defendants have established that the plaintiffs were actually dispossessed in the beginning of 1921. The defendants refer to certain kabuliyats for the purpose of showing that there was such dispossession. A commissioner was appointed in the Court below and he prepared certain maps showing the three blocks of land in schedules 1 to 3 of the plaint, and showing further the Cadastral Survey plots included in each of the three blocks and also the partition khasra plots in respect of the amicable partition alleged by the defendants to have taken place between all the proprietors, inculding the plaintiffs, after the reappearance of the lands. Commissioner's map no. 2, which shows the partition khasra plots lying in the three blocks of schedules 1 to 3 of the plaint shows that some of these plots are in the 800-bigha-block of schedule no. 3. Plots 52 and 66 are in this 800-bigha-block. In respect to these two plots the defendants refer to certain kabuliyats showing that the lands contained in these plots were given in settlement with raiyats by the parties. Exhibit C, dated the 3rd of October, 1920, is a kabuliyat executed by Amir Singh of the defendants-fifth-party in favour of Gopi Singh one of the defendants-first-party (but who is not an appellant in this appeal), in respect of 10 bighas of land in khasra no. 66. Exhibit E-2 is a putta, dated the 14th February, 1921, executed by Mukhram Singh (one of the plaintiffs in the present suit) in favour of one Keshwar Singh, settling 19 bighas of land in khasra no. 52. Exhibit D is a putta, dated the 3rd October, 1920, executed by a large number of proprietors amongst whom are included Mukhram Singh and Brijkumar Singh, two of the plaintiffs in the present suit, in favour of one Sheoraj Singh, one of the

(1) (1900) I. L. R. 28 Cal. 86.

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defendants third party in the present suit, in respect of 5 bighas of land in khasra no. 12. Exhibit E is a putta, dated the 27th January, 1921, executed by Musammat Girja Dai Kuar, one of the defendants-second-party, in favour of one Rambaran Singh, in respect of certain lands which are described as having fallen to her share under the private partition. The defendants refer to the partition khasra Exhibit F and state that the land let out under this putta was a part of khasra no. 11. Exhibit E-1 is another putta by Musammat Girja Dai Kuar, dated the 27th January, 1921, in favour of Chandi Prasad Singh, and it is alleged that this is in respect of the remaining portion of the lands of the partition khasra no. 11. Exhibit E-4 is a putta, dated the 6th November, 1920, executed by a large number of proprietors including some of the present plaintiffs, in favour of Rashbihari Singh, in respect of certain lands in partition khasras nos. 12 and 824. The defendants-appellants rely upon these documents to show that the proprietors treated these lands as their zerait or bakasht lands and settled them with tenants and that some of the present plaintiffs took part in such settlement, and they contend that these documents shows that the plaintiffs had no raiyati interest in the lands and were dealing with them as proprietors. As these documents bear dates prior to the date of the order of attachment, the defendants contend that they show that the plaintiffs had been dispossessed of their raiyati interest in these lands before the order of attachment. They thus contend that the actual ouster of the plaintiffs took place in the year 1920 or in the beginning of 1921, and the attachment being in July, 1921, there had been dispossession before the attachment and therefore the limitation of two years began to run from before the attachment. The plaintiffs-respondents, on the other hand, contend that there was no actual ouster of the plaintiffs at any time before the attachment. They refer to the written statement filed by the defendants in which they stated that the lands were attached because they were then

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jungle, sandy and waste lands. Paragraph 13 of the written statement of Jurawan Singh (defendant no. 1) and others contains the statement that the Subdivisional Officer attached the first block of 400 bighas in view of the fact that the lands were then jungle, sandy and waste lands. Similarly, in paragraph 16 of the said written statement, it is alleged that the 800 bighas were attached by the Subdivisional Magistrate in view of the fact that they were then jungle and sandy lands. The attached lands being jungle, sandy and waste lands were not capable of actual possession by either party and, therefore, there was no actual possession by the plaintiffs and dispossession by the defendants after the reappearance of the lands. The entire 1,400 bighas admittedly went under water between 1901 and 1903 and the raiyats lost possession on account of the submersion, and it is therefore contended that as there was no actual possession by the plaintiffs and dispossession by the defendants, Article 3, Schedule III of the Bengal Tenancy Act, did not apply. It is further contended on behalf of the plaintiffs-respondents that the case of the defendants is, that after reappearance all the proprietors, including the plaintiffs, came into and remained in possession of the lands by some arrangement among themselves, and thus it is admitted by the defendants that the plaintiffs were not actually ousted from the lands, though no doubt it is contended that the possession was in the capacity of proprietors and not of raiyats, but the fact of possession is admitted. If the parties treated the lands as bakasht the defendants did not dispossess the raiyats and, in fact, there was no intention to dispossess them, and thus it is contended there was no actual dispossession before the order of attachment. As regards the kabuliyats and puttas relied upon by the defendants-appellants the case of the plaintiffs is that these documents came into existence with the ulterior object of preventing the lands from being attached by the Magistrate in the proceeding under section 145 and,

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as a matter of fact, those puttas and kabuliyats were never acted upon. The learned Subordinate Judge has held that these documents came into existence for the purpose of the proceeding under section 145 and that they were never acted upon. There is no reliable evidence on the record of actual possession of the persons with whom the lands were settled, or of any realisation of rents from those persons on the basis of these kabuliyats and puttas. I am, therefore, of opinion that the defendants have failed to prove that there was actual dispossession of the plaintiffs-raiyats from their holding before the order of attachment was passed by the Magistrate. The dispossession of the plaintiffs on account of the attachment of the lands by the Magistrate was clearly not a dispossession by the defendants-landlords. I have already referred to the Full Bench decision of this Court in *Gajadhar Rai* v. *Ram Charan Gope*(1), according to which in order to attract the operation of Article 3 of Schedule III of the Bengal Tenancy Act, the dispossession must be by the landlord and a dispossession under an order of Court is not dispossession within the meaning of the Article. Even assuming that the cases which decide that a dispossession of a raiyat at the instance of the landlord, even if it be under process of a Court, is a dispossession within the meaning of the Article are correct, it is clear that in the present case the dispossession as the effect of the attachment cannot be held to be a dispossession at the instance of the landlord. The possession both of the landlords and of the tenants was under consideration of the Magistrate, and the Magistrate merely found that neither party had succeeded in establishing its possession. In this view of the case it is clear that no part of the claim of the plaintiffs is barred by limitation and this contention of the defendants-appellants must, therefore, be overruled.

(1) (1930) I. L. R. 9 Pat. 788, F. B.

The next point taken on behalf of the defendants-appellants is one of abandonment. The plea is that the tenants-defendants abandoned their holdings soon after submersion when they thought that the lands were not likely to come out of the water in the near future. They contend that the abandonment of the holdings is proved by the non-payment of rent from the time of submersion to the date of suit and by the conduct of the parties after reappearance of the land.

As regards abandonment by non-payment of rent from the time of submersion, it is no doubt true that the evidence goes to show that no rent was ever paid after the submersion; but the non-payment of rent under such circumstances cannot be treated as evidence of abandonment. The learned Advocate for the appellants has relied upon an old decision of the Calcutta High Court in *Hemnath Dutt* v. *Ashgur Sindar*(1). This decision no doubt supports the contention of the appellants. It was held in this case that where land held by tenants with rights of occupancy was completely submerged for a number of years and during the period of such submersion no rent was paid by the tenants, the tenants had by non-payment of rent forfeited their rights of occupancy. But this case was dissented from by the Allahabad High Court in *Mazhar Rai* v. *Ramgat Singh*(2) where it was held that mere non-payment of rent when the lands had become submerged by the action of the river does not of itself determine the tenancy; and this view was accepted as correct by the Privy Council in *Arun Chandra Singh* v. *Kamini Kumar*(3) where their Lordships observed that they did not find themselves in accord with the rule of law expressed in the case of *Hemnath Dutt* v. *Ashgur Sindar*(1) and approved of the decision in *Mazhar Rai* v. *Ramgat Singh*(2) as correctly enunciating the principle applicable to this

(1) (1879) I. L. R. 4 Cal. 894.
(2) (1896) I. L. R. 18 All. 290.
(3) (1913) I. L. R. 41 Cal. 683, P. C.

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class of cases. The question of abandonment is a question of intention on the part of the tenant. The tenants had acquired a fractional proprietary interest in the lands, and the evidence goes to show that they claimed to set off the rent payable to the other proprietors as against the rent receivable by them from those proprietors as raiyats.

This is evident from the judgment Exhibit 8 in a rent suit instituted against some of the tenants in which the defence taken was that the rent for the shares sued for had been paid off by set-off for rents due to the defendants as maliks of a portion of the said share. Exhibit 3 is a written statement in the proceeding under section 145 on behalf of Amar Singh and others, and in paragraph 3 thereof it is stated that the jama or the rent as stated in the record-of-rights used to be set off amongst the proprietors.

There is no evidence from which an intention can be gathered on the part of the raiyats to abandon their holdings during the period of submersion. On the other hand, we find that as soon as the lands reappeared and before they became fit for cultivation the plaintiffs and other raiyats claimed their occupancy holdings and dispute arose between the parties as regards possession. The intention, therefore, of the raiyats appears to have been to keep their occupancy holdings intact.

* * * * * *

I now come to the case of the defendants-fourth-party. They are the persons with whom the block of 400 bighas was settled by the receiver. They claim to be settled raiyats of the village and as such to have acquired occupancy rights by virtue of the settlement made by the receiver. The possession of a person taking settlement of lands attached under section 146 of the Criminal Procedure Code from the receiver appointed under that section cannot in my opinion be such as to affect the rights of the person whose title may be declared by the civil court. An attachment is made under section 146 for the purpose of

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preventing a breach of the peace, and the attachment is to last until a competent Court has determined the rights of the parties to the land in dispute or the person entitled to possession thereof. When a competent Court has determined the rights of the parties or the person entitled to possession of the lands in dispute, it is the duty of the Magistrate to withdraw the attachment and to make over possession to such party. Any act done by the receiver appointed under section 146 during the period of attachment cannot and ought not to prejudicially affect the rights of the party found by the Court to be entitled to possession of the land in dispute. The settlement made by a receiver of attached land can enure only during the period of such attachment and no right can be created under such settlement which might prejudicially affect the rightful owner of the land; otherwise it may lead to future complications. Suppose, for instance, that a dispute as to possession of a piece of land arose between a person who claims the land as proprietor affirming title to possession of the land as his bakasht, and a person who claims the said land as his occupancy holding: the Magistrate on account of such dispute attaches the land in dispute under section 146 of the Criminal Procedure Code and appoints a receiver; if the receiver settles the land with a third person who happens to be a settled raiyat of the village, can it be said with any show of reason that such settlement-holder would acquire occupancy rights by virtue of such settlement from the receiver? If it be held that he does acquire occupancy right the result would be that the claim of both the contesting parties would be defeated. A competent Court may declare the land to be the bakasht land of the landlord who may be declared to be entitled to possession of it, yet the decree made by the competent Court becomes infructuous if the settlement-holder can successfully set up a right of occupancy to the land. Similarly, if the competent Court holds that the party who claims a tenancy right

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as an occupancy raiyat is entitled to possession as such, the decree will again become infructuous if the settlement-holder from the receiver can set up his right of occupancy to the land. Such a result cannot be held to have been contemplated by the Legislature in providing for the appointment of a receiver under section 146 of the Code of Criminal Procedure. In my opinion, the rights of the parties in whose favour the competent Court may make a declaration cannot be affected by any act done by the receiver and such party is entitled to possession of the land as it was at the time of the attachment.

It is contended on behalf of the defendants-fourth-party that, in any event, they acquired the rights of an under-raiyat. I am unable to accede even to this contention. The utmost that they can ask for is a declaration that they are entitled to retain possession up to the end of the agricultural year in which the decree is pronounced by the civil Court, but beyond that they can go no further and they are not even entitled to a notice to quit before they can be ejected. Their possession is merely that of a licensee or a farmer and they are bound to give up possession as soon as the attachment is withdrawn as an effect of the decree of the competent Court.

Reliance has been placed on behalf of the defendants-fourth-party upon an unreported decision of this Court in *Raja Kamleshwari Prasad Singh* v. *Bisheshwer Rai*(1) which was decided on the 24th of July, 1916. In that case it was held by a Division Bench of this Court that the receiver during the time of his management of the property under section 146, was in the position of the party to whom the land was afterwards made over and everything done by him bound that party as an act done by the landlord for the time being, and it was held that the status of the person taking a settlement of the land for agricultural purposes from the receiver was at the very least that

(1) (1916) S. A. 1044 of 1915 (unreported).

of a non-occupancy raiyat. With very great respect to the learned Judges, I am unable to agree with this view. The status of such a settlement-holder as a non-occupancy raiyat can be maintained only as against the receiver, if at all, and not against the rightful owner. Reliance has next been placed upon the decision in *Madhu* v. *Sabar Ali*(1). That was an entirely different case in which the question raised was, whether a receiver under section 146 was entitled to settle lands which had accreted to the attached lands after the order of attachment under section 146, and it was held that he was entitled to do so. The question was not raised as between the person with whom the receiver had settled the land and the party whom the Civil Court had ultimately declared to be entitled to the land. I am, therefore, of opinion that the defendants-fourth-party acquired no title by virtue of the settlement as against the present plaintiffs and the plaintiffs are entitled to possession of the lands in the condition in which they were at the time of the attachment, in other words, free from the settlement made by the receiver.

It is next contended that there was no prayer in the original plaint for a decree for delivery of possession of the lands as against the defendants-fourth-party. In paragraph 11 of the plaint, however, it was clearly stated that the defendants-fourth-party were bound to withdraw their possession in favour of the plaintiffs, and in the application for amendment of the plaint, already referred to, a prayer was made for a decree awarding possession to the plaintiffs as against the defendants-fourth-party. This amendment was rightly allowed and the decree for possession made against the defendants-fourth-party is right. As the title of the plaintiffs has been established they are entitled to possession of the lands as well as to the money held in deposit by the receiver on account of the profits arising out of the lands in dispute since the time of the attachment by the criminal Court.

(1) (1910) 14 Cal. W. N. 681.

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* * * * * *

The result is that Appeal no. 43 must be dismissed with costs, except as between the appellants and the plaintiffs nos. 63 to 71 (respondents) who have entered into a compromise, and as between them the decree will be in terms of the petition filed on the 11th of November, 1932.

F. A. 73 of 1929.

I now take up Appeal no. 73 of 1929. This appeal arises out of suit no. 3 of 1927 in which the plaintiffs claimed 136 bighas in schedule no. 1 which relates to the 400-bigha block, 48 bighas in schedule no. 2 which relates to the 200-bigha block, and 293 bighas in schedule no. 3 which relates to the 800-bigha-block involved in the two proceedings under section 145. These plaintiffs have acquired 1-anna 11-gandas proprietary interest in the village. The appeal is by some of the defendants-first-party, by the defendants-fourth-party and some of the defendants-third-party. Most of the points raised in this appeal are the same as those raised in Appeal no. 43. It is necessary only to refer to the additional points or such additional arguments on the common points as have been advanced in this appeal.

At the outset I may dispose of the few preliminary objections raised on both sides. An objection was raised on behalf of the plaintiffs-respondents to the effect that the appeal was incompetent inasmuch as the memorandum of appeal had not been sufficiently stamped, the court-fee paid being only Rs. 15 and not upon the valuation of the suit which was Rs. 6,700. In this suit the learned Subordinate Judge, who was an officer different from the one who decided the other suit, has held that the plaintiffs' claim as regards the lands comprised in schedule no. 2 of the 200-bigha-block was barred by limitation, that as regards the lands claimed in schedules 1 and 3 the plaintiffs were

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entitled only to a decree declaring their title to the lands in dispute which had been established and not to a decree for recovery of possession, his finding being that the defendants-third and fourth-parties, who had taken settlement of the schedules 1 and 3 lands, had acquired the status of under-raiyats and could not be ejected without a notice to quit. The defendants-appellants, therefore, appeal against the declaration made in favour of the plaintiffs and paid a court-fee of Rs. 15 only. The Subordinate Judge further made a decree in favour of the plaintiffs entitling them to recover the amount of rents and profits of the period during which the receiver was in possession under the attachment which was held in deposit by the receiver, and the contention of the respondents is that ad valorem court-fee ought to have been paid upon this. It is clear that there is no substance in this objection. So far as the right of the plaintiffs to recover the sum held in deposit by the receiver was concerned there could be no decree as against the defendants. The mere declaration of title in favour of the plaintiffs was sufficient to entitle them to ask the receiver to make over the sum held in deposit by him to the plaintiffs. The memorandum of appeal was, therefore, sufficiently stamped and the appeal is competent.

* * * * * *

The next point argued on behalf of the defendants-appellants was one of estoppel. The estoppel was set up in favour of the defendants-third and fourth-parties and it was argued that the receiver in making the settlement with the defendants third and fourth-parties was acting as the representative of the plaintiffs. I have already dealt with this point in Appeal no. 43. It has not been shown that there was any representation on the part of the plaintiffs upon which the defendants-third and fourth-parties acted to their prejudice and no ground has been made out to create an estoppel against the plaintiffs.

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The learned Subordinate Judge has held that section 178 of the Bengal Tenancy Act operates as a bar in favour of the plaintiffs. It is contended on behalf of the defendants-appellants that there is nothing in section 178 to prevent the raiyat from surrendering his holding, and that the agreement between the parties to divide the lands as bakasht lands and to abandon the raiyati lands was an agreement between two sets of landlords and not an agreement between landlords and tenants and, therefore, section 178 of the Bengal Tenancy Act had no application. This contention is sound, but it does not affect the merits of the case.

The next point taken was as regards the identity of the lands claimed by the plaintiffs with their old holdings and with respect to the lands forming the subject-matter of the proceedings under section 145 of the Criminal Procedure Code. In this case no commissioner was appointed, but the report and maps of the commissioner appointed in the suit which gave rise to Appeal no. 43 were used as evidence in the present case. The defendants-first-party of the present case were also parties in the previous suit and no serious objection was raised to the use of the maps and the report of the commissioner in the present case. In this suit the claim of the plaintiffs, in so far as the lands comprised in schedule no. 2 of the plaint are concerned, has been dismissed on the ground that the claim was barred by limitation and a declaration has been made in favour of the plaintiffs in respect of the lands comprised in schedules 1 and 3 only. It is contended on behalf of the defendants-appellants that there is nothing to show how much of the different plots claimed by the plaintiffs lie in schedules 1 and 3 and how much of the same lay in schedule no. 2. No doubt it is true that no actual finding has been arrived at on this point; but a mere declaration of title to so much of the holdings as lie within the two blocks of 400 bighas and 800 bighas, is sufficient for the purpose of the present suit, and the actual areas will have to

be determined when the plaintiffs go to take possession of the lands. It is not necessary to deal with this point at any great length as the question has already been dealt with in Appeal no. 43. The decree of the Subordinate Judge in this case is in accordance with the plaint which was drawn up on the basis of the red lines and the amin's pillars indicated in the commissioner's map.

The next question raised is one of limitation. The suit was instituted more than six years after the order passed by the Magistrate in the second proceeding under section 145. The claim of the plaintiffs, therefore, as regards the 200 bighas comprised in schedule no. 2 was clearly barred under Article 47 of the Indian Limitation Act. As regards the claim to the attached lands, it is sufficient to refer to the decision of the Calcutta High Court in *Brojendra Kishore Roy Choudhury* v. *Sarojini Roy*(1). The question has been exhaustively dealt with in that case and I entirely agree with the decision therein. This is a case of continuing wrong under section 23 of the Indian Limitation Act and the right to sue accrues from moment to moment so long as the attachment lasts, and the suit cannot be held to be barred by lapse of six years from the date of the order. The decision of the Madras High Court in *Raja of Venkatagiri* v. *Isakapalli Sibbiah*(2), upon which reliance has been placed by the learned Advocate for the appellants. was considered in the decision of the Calcutta High Court in the case just cited. Although the Madras Court held that a suit for declaration of title to the land was barred under Article 120, yet it was held that such bar affected only the remedy or relief by way of declaration and did not extinguish the right and title of the true owner to the property, that the right of the true owner continues however long the attachment may last, that the rightful owner has the right to sue for the rents and profits accrued within the

(1) (1915) 20 Cal W. N. 481.
(2) (1902) I. L. R. 26 Mad. 410.

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period of limitation, and that in determining the right of the true owner to the rents and profits his title to the land under attachment will have necessarily to be determined. This case, therefore, does not really help the defendants-appellants. I am, therefore, of opinion that the claim of the plaintiffs in so far as his right to a declaration to the lands comprised in schedules 1 and 3 are concerned is not barred by limitation.

It is contended that the claim of the plaintiffs to the lands has not been proved and they cannot get a decree in respect of the whole of the khata claimed by them. This point has already been dealt with in Appeal no. 43 and need not be considered again.

These were all the points raised on behalf of the defendants-appellants and, with the exception of the preliminary objection as regards the defendant no. 58, there is no substance in any of the points raised on behalf of the appellants.

On behalf of the plaintiffs-respondents it has been argued that the decision of the Subordinate Judge declaring that the defendants-third and-fourth parties have acquired the status of under-raiyats and rejecting the claim of the plaintiffs for a decree for delivery of possession to them as against these defendants was erroneous and, although no appeal or cross-objection had been filed by the plaintiffs-respondents against this portion of the decree of the Subordinate Judge, this Court ought to grant them relief and set aside that portion of the decree under Order XLI, rule 33, of the Code of Civil Procedure. On behalf of the defendants-appellants, it is contended that Order XLI, rule 33, was never intended to give relief to parties under the present circumstances; it gave discretion to the Court of appeal in order to further the ends of justice and not to favour one party as against another, and that the provisions of the Court-fees Act and the Indian Limitation Act would be defeated if the decree of the Subordinate Judge is

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reversed in favour of the plaintiffs and against the defendants third and fourth parties. In my opinion the objection raised by the defendants-appellants is sound and this is not a case in which this Court will be justified in acting under Order XLI, rule 33, and reversing a portion of the decree, in so far as it is in favour of the defendants third and fourth parties, and against the plaintiffs.

The result is that with the slight modification as regards the defendant no. 58, as stated above, this appeal must be dismissed with costs.

MACPHERSON, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Wort and James, JJ.

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Dec. 20, 21.

Evidence Act, 1872 (*Act I of* 1872), *section* 13—"*right*", *meaning of*.

The word "right" as used in section 13 of the Evidence Act, 1872, means incorporeal right as distinct from ownership of property.

Gujja Lall v. *Fateh Lall*(1), followed.

Appeal by the objectors.

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

* Appeal from Original Decree no. 21 of 1930, from a decision of J. G. Shearer, Esq., I.C.S., District Judge of Patna, dated the 3rd August, 1929.

(1) (1880) I. L. R. 6 Cal. 171, F. B.

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P. R. Das and *Brij Kishore Prasad*, for the appellants.

Sir Sultan Ahmad (with him *N. K. Prasad* and *S. K. Mazumdar*), for the respondent.

WORT, J.—Having listened to the argument which is just concluded, I come to a very clear decision in this case. The matter to be determined arises in an appeal from the decision of the learned District Judge in a reference under section 30 of the Land Acquisition Act.

There appears to have been a plot no. 69 which the Government sought to acquire under the Act. the plot being situate in Patna City. On one corner of the plot it is admitted that a temple for worship was built. On representations made to the authorities that part of the plot upon which the temple was built was excluded from the acquisition, but there remained the other part of the plot .030 acres in extent which in fact was acquired. Compensation was made to the extent of Rs. 1,825, and it is with regard to that compensation that this dispute arises. On the one hand Ram Kishun and others purporting to represent the Hindu community claimed the sum as trust money: on the other hand Niranjan Pande claimed the compensation as being given in respect of property which was his own personal property under a deed of gift by his uncle dated the 10th August, 1925. There is no dispute in the case that the uncle of Niranjan Pande, one Makund Pande, was the shebait of the temple of which I have spoken, and the real dispute in the case is whether there was a dedication not only of the temple itself for public worship but whether the whole plot no. 69 was likewise dedicated to the public uses. The evidence in the case is of an equivocal character. There is no deed of dedication in respect of the temple itself and had we to determine the question of whether there had been a dedication of the temple we might find ourselves in very

considerable difficulty; but that there was a public dedication of the temple there can, in the circumstances of the case, be no dispute. As regards the remainder of the plot, as I have already stated, the evidence which has been adduced on both sides is of an equivocal character. It is true that some witnesses came to state that they had subscribed sums of money for the purpose of building a temple and for general purposes of the dedication. But that evidence, accepted as it is by the learned District Judge, does not dispose of the question as to what was the extent of the dedication. I should have stated that this plot, if my memory serves me, was surrounded by a wall. There were two rooms inside the courtyard, there was a verandah, there was a door leading from the street into the temple and from the temple into the courtyard. In the verandah of the two rooms was installed the idol of Mahabirji. So far as the evidence with regard to this idol is concerned, it is stated on the one hand that the Hindu community worshipped the idol and had access to the verandah as of right: on the other, it is contended that—and there is evidence to that effect—the access of the public for the purpose of worship of that idol was allowed only by the leave and license of the shebait. There is also evidence that the womenfolk of the shebait, that is, the womenfolk of the original shebait Makund Pande, lived in one of the rooms of which I have made mention, and as far as the evidence goes it seems to show that they lived there until those rooms were demolished and that part of the plot had been acquired by the public authorities. There is also evidence that in the other room the food for the gods or idol was kept. The parties to this dispute rely on that evidence each for his own purpose. On the one hand, it is contended by the shebait Niranjan Pande that the fact that the womenfolk remain in one of the rooms shows that it was not dedicated for the use of public worship: on the other, it is contended by Mr. P. R. Das on behalf of his client representing the Hindu community that the

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fact that the idol was kept in one of the rooms shows that it was property dedicated for the use of public worship. Another fact which was the fact relied upon by the appellant was that there was a door leading to the temple from the courtyard. Now, in my judgment, as I have already indicated, this evidence does not assist the Court in coming to any definite conclusion with regard to the matter. The fact that the food for the idol was kept in one of the rooms is not inconsistent with the fact that it was the personal property of the shebait; it is consistent with the state of affairs in which the bhog or food was kept in a convenient place. On the other hand, the fact that the womenfolk of the shebait lived in the other room is also equivocal. So long as they were there and so long as their presence did not interfere with the purpose of the trust, if trust there was, it could not be said that that conclusively proved that the property was the personal property of the shebait. Now, I have already mentioned the contention of one of the parties that the public worshipped the idol Mahabirji which was inside the house. One of the witnesses Durga Charan Dass proves that and states that offerings were made by the public: but until it can be determined whether this access by the public was by the leave and license of the shebait or whether it was as of right, the evidence suffers, in my judgment, the same fate as the other items of evidence to which I have already referred. In that state of facts we have three documents which were produced in the case and relied on by the respective parties. On the 10th August, 1925, Makund Pande, the uncle of the present shebait, made a Tamliknama in favour of his nephew of the residential house on this plot 69. One of the recitals in the deed is this:

"Be it known that in the residential house of me the executant situate in mahalla Muradpur, one of the quarters of Patna, there is a temple in which the idol of Sri Radha Krishnaji is installed and I, the executant, perform pujapath (worship) of and render service to the said idols."

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This document is produced in support of Niranjan Pande's case. It is stated that it is consistent only with the fact that he had a personal right over this property and that it had nothing to do with any dedication for the purpose of the worship of this temple. I have very grave doubts, in the first place, whether the document is admissible in evidence at all. It would be clearly admissible and relevant if there were recitals which could be used against the persons who were parties to the deed. But I assume that it is used under the 7th clause of section 32 of the Evidence Act together with the 2nd clause of section 13 of the Evidence Act, section 13, clause (*b*) reading

> "Particular instances in which the right or custom was claimed, recognised or exercised, or in which its exercise was disputed, asserted or departed from."

I assume, although it has not been argued before us, that it was used under that section for showing the assertion of Niranjan Pande's right to this property. I hold rather strong views about this section. The view taken in the leading case of *Gujja Lall* v. *Fateh Lall*(1) in my judgment is the true view to be taken of section 13. That case takes the view that when the word 'right' is used in section 13 of the Evidence Act it means "incorporeal" right and cannot possibly refer to any question of ownership of property in contradistinction to, as I say, incorporeal rights. The deed was used here not to show that there was any dedication but to show in other words that Makund Pande and his nephew in turn had a right of ownership, in fact had the ownership in their personal capacity to this property. But assuming that the document is admissible, it is quite consistent with the case which is set up by the appellants in this case: in other words, it is not inconsistent with there having been a dedication to public uses of this property. It is the kind of document that one would expect to find where, as in this case, Makund Pande was fearful that after his death there might be some question as

(1) (1880) I. L. R. 6 Cal. 171, F. B.

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to the right of Niranjan Pande to the shebaitship; and in addition to that there is the recital, to which I have already made reference, that the temple is situate in the residential house which is conveyed by this deed. It is unnecessary to reiterate the fact that it is not now disputed or could not be disputed that there was a public dedication of the temple. In addition to this somewhat ambiguous document there were two petitions, one by Makund Pande to the Chairman of the Patna City Municipality on the 5th March, 1921. This petition was presented to the Municipality not more than two years, probably less than two years, after the dedication, if a dedication in fact took place. In paragraph 4 of that petition is this statement:

"That as the said holding is exclusively used for religious purposes such as worship of Sri Radha Krishna, Debi Astaphna in Asin and Rath Jatra in Asarh, it should be exempted from all taxation."

Now, it must have been clear to Makund Pande the petitioner that when he claimed exemption from Municipal taxes, which exemption might be given under the procedure set out in section 93 of the Bihar and Orissa Municipal Act of 1922, that exemption could be given only in the case where the place of worship was a public place of worship and that matter is not seriously disputed before us. Again on the 9th February, 1928, when this land acquisition was taking place Niranjan Pande the respondent to this appeal also presented a petition to the Land Acquisition Deputy Collector of Patna in paragraph 1 of which he states:

"That the holding no. 69 is a temple and a public place of worship, where the idols of Sri Jagernathji, Sri Radha Krishnaji and Sri Mahabirji are installed and as such is exempt from payment of taxes."

There is no dispute that what the petitioner was representing was that the whole of this plot was the subject-matter of a public dedication. That is the effect of the petition. Now, we are invited by Sir Sultan Ahmad to treat these petitions in a similar way to that which the learned District Judge treated

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them. It seems to have been argued before him that these petitions acted as an estoppel. Having come to a perfectly correct decision on that matter the learned District Judge seems to think that the matter is disposed of. He comes to the decision that it is not an estoppel and, if I may so, the learned District Judge was right, but I also hold that that does not dispose of the matter, and, speaking for myself, I do not propose to treat the matter in the way that the learned Judge has done. Having disposed of the question of estoppel he declined further to consider the petitions. Whether the argument was confined to that point in the court below I do not know but it may well have been. It is obvious that the petitions cannot be held to be an estoppel under section 115 of the Evidence Act but they are statements as to matters made by persons as to which, if anybody should have knowledge, it was they. If anybody, to repeat myself, could know whether a dedication of the whole of plot 69 had taken place or not, it was these persons, Makund Pande on the one hand, and Niranjan on the other. It is said in this case that without there being a proof of the formalities of dedication the Court is not in a position to hold that a dedication took place. There seems to be two answers to that question, one is the authority of the Judicial Committee of the Privy Council in the case of *Pujari Lakshmana Goundan* v. *Subramania Ayyar*(1) and the other seems to be this, that we are not here determining whether in this case the dedication has been made out but we are here to determine whether at some previous time a dedication in fact took place. The witness who could speak to this fact may not have been called, but we still have to determine this question whether in or about the year 1919 a dedication in fact took place of this plot 69. We have here these two petitioners, one making a representation to the Municipality which can be interpreted in only one way and that is that the dedication had at some former time in fact taken place, and the other making a representation to the like effect to the Land Acquisition authorities. Sir

(1) (1928) 29 Cal. W. N. 112, P. C.

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Sultan Ahmad, as I have already stated, invites us to say that these are merely lies on the part of these petitioners and that he is now entitled to explain them. The learned District Judge has dealt with them by holding that the petition cannot operate in itself as a deed of endowment. That, if I may say so, is perfectly obvious; but we have the statements of two persons who must have known the true state of affairs and the representations were made at a time when no dispute such as the dispute before us now was going on. In my judgment, it seems to me that on the state of the evidence all that we can do is to hold that what the petitioners themselves represented was in fact the true case. That being so, it seems to me that the decision of the learned District Judge on this point is wrong and must be set aside.

The appeal must, therefore, be allowed with costs. The proper order, in my judgment, to make in this case is to send the matter back to the learned District Judge to deal with the compensation of Rs. 1,825 under section 32 of the Land Acquisition Act of 1894.

There is a deficit court-fee of Rs. 150 payable by the appellant. This has been deposited. Let it be accepted.

JAMES, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Fazl Ali and Scroope, JJ.

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Jan. 12.

ZAHIRUDDIN MOHAMMAD

v.

BUDHI BIBI.*

Malicious prosecution—suit for damages—order for issue of process recorded by magistrate—process not actually issued —plaintiff, whether has cause of action.

* Circuit Court, Cuttack. Appeal from Original Decree no. 14 of 1930, from a decision of B. Harihar Charan, Subordinate Judge of Cuttack, dated the 20th August, 1930.

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Where an order for the issue of process under section 204 of the Code of Criminal Procedure, 1898, and of a search warrant was formally recorded by the magistrate but before any process could issue, the accused appeared in court, *held*, that the prosecution of the accused had commenced and, therefore, that on the dismissal of the complaint he had a cause of action for a suit for damages for malicious prosecution.

DeRozario v. *Gulab Chand Anundjee*(1), *Golap Jan* v. *Bhola Nath Khettry*(2), *K. Sheikh Meeran Sahib* v. *C. Ratnavelu Mudali*(3), *A. A. Arunachala Mudaliar* v. *K. Chinnamunusami Chetty*(4) and *Subhag Chamar* v. *Nand Lal Sahu*(5), distinguished.

Per SCROOPE, J.—The stage at which the accused appeared in court may affect the question of the amount of damages, but the fact that he appeared before the processes had actually been issued does not justify his case being thrown out.

Appeal by the plaintiff.

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

M. Subba Rao, for the appellant.

B. K. Ray, (with him *B. Mahapatra* and *A. S. Khan*), for the respondents.

FAZL ALI, J.—The appellant brought the present suit for recovery of damages for malicious prosecution; but the trial court held that his plaint did not disclose any cause of action and dismissed the suit. Hence this appeal.

On the 15th January, 1929, the defendant no. 2 instituted a criminal case against the plaintiff under section 380 of the Indian Penal Code and certain other sections. The Magistrate ordered summons to be issued upon the plaintiff and also directed the issue of a search warrant against him for the production of

(1) (1910) I. L. R. 37 Cal. 358.
(2) (1911) I. L. R. 38 Cal. 880.
(3) (1912) I. L. R. 37 Mad. 181.
(4) (1926) 97 Ind. Cas. 351.
(5) (1929) A. I. R. (Pat.) 271.

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certain articles. Before, however, any process could issue, the plaintiff appeared through a pleader before the Magistrate and on hearing the pleader the Magistrate cancelled his orders for the issue of summons and the search warrant. He then made over the case to an Honorary Magistrate for enquiry and on the report of the said Honorary Magistrate the case was dismissed under section 203 of the Code of Criminal Procedure. On these facts it was contended on behalf of the defendants before the learned Subordinate Judge that the plaintiff had no cause of action as he had never been placed on trial and a number of decisions were cited to show that no action for malicious prosecution could be maintained unless the prosecution had commenced and that the prosecution did not usually commence until some legal process had been actually issued against the accused. The cases relied on by the defendants were as follows:—*Golap Jan* v. *Bhola Nath Khetry*(1), *K. Sheikh Meeran Sahib* v. *C. Ratnavelu Mudaly*(2), *A. A. Arunachala Mudaliar* v. *K. Chinnamunusami Chetty*(3) and *Subhag Chamar* v. *Nand Lal Sahu*(4).

In all these cases no process had either issued or had been directed to be issued and in some of them an enquiry had been ordered under section 202, Code of Criminal Procedure, and the accused had appeared and taken part in such enquiry. In one of these cases the accused appeared in response to a notice and took part in the enquiry under section 202, Code of Criminal Procedure. Notwithstanding these facts it was held in all these cases that there had been no commencement of the prosecution and that the accused had, therefore, no cause of action for a suit for damages for malicious prosecution. It may be stated here that the Bombay High Court has taken a different view and has held that the mere fact of lodging a complaint

(1) (1911) I. L. R. 38 Cal. 880.
(2) (1912) I. L. R. 37 Mad. 181.
(3) (1926) 97 Ind. Cas. 351.
(4) (1929) A. I. R. (Pat.) 271.

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would amount to commencement of prosecution. The balance of authority is, however, in support of the view that unless a process is issued and the accused is brought into Court as a result of such process, he has no cause of action for a suit for damages for malicious prosecution. This is also the view which has been held by a Division Bench of this Court in *Subhag Chamar* v. *Nand Lal Sahu*(1) and we find no good reason to dissent from that view.

The present case, however, is distinguishable from the cases relied upon by the defendants. Here although no process was actually issued or served upon the plaintiff, yet an order for the issue of process under section 204 of the Code of Criminal Procedure and of a search warrant was formally recorded by the Magistrate and, therefore, it cannot be said that the appearance of the accused after such an order had been recorded was altogether voluntary. Technically, therefore, the prosecution had commenced and the plaintiff must be deemed to have a cause of action. That being so, the case will have to be remanded to the court below to be tried on the merits.

Mr. Ray who appears on behalf of the defendants also contended that the plaintiff's suit should fail not only because no prosecution in the real sense of the term had commenced in the case but also because no damage had been sustained by the plaintiff. In support of his proposition he relied upon an observation of Mr. Justice Mookerjee in *Bishun Prasad Narain Singh* v. *Phulman Singh*(2) which is to the effect that in certain cases an action may fail on the mere ground that the plaintiff had sustained no damage. Now there is no doubt that in considering the question of actual damage one cannot lose sight of the fact that the present case cannot in substance be distinguished from those cases in which the person accused actually appears in court and takes part in

(1) (1929) A. I. R. (Pat.) 271.
(2) (1914) 19 Cal. W. N. 935.

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an enquiry under section 202 and ultimately the complaint is dismissed under section 203. It is clear that in the circumstances of the present case if the plaintiff has suffered any damage at all that damage must have been of a very slight or nominal character. As I have already stated, before any summons or search warrant was actually issued in the present case the Magistrate changed his mind and cancelled his previous order. The enquiry that followed was an enquiry under section 202 of the Code of Criminal Procedure and, as has been pointed out in the cases relied upon by the defendants, the plaintiff was under no obligation to take part in such an enquiry. Strictly speaking, therefore, the measure of damage in this case would be the damage suffered by the plaintiff between the order directing the issue of process and the cancellation of that order. Unfortunately, however, the Subordinate Judge decided the case on a preliminary ground without recording any evidence and in the absence of evidence this Court cannot fix even the nominal damages to which the plaintiff might be entitled and the case in these circumstances will have to be remanded to the court below for disposal according to law.

Another point which was brought to our notice was that the plaintiff had not given any particulars of damages in his plaint and that he had mentioned merely a lump sum of Rs. 5,250 which, on the face of it, is a highly exaggerated amount. That circumstance also will have to be considered by the court below in assessing the damages.

The judgment and the decree of the Subordinate Judge are, therefore, set aside and the case is remanded to him for disposal according to law. Each party will bear its own costs in this appeal.

SCROOPE, J.—In my opinion the cases relied on by the learned Subordinate Judge and cited by the learned Advocate for the respondents, namely,

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DeRozario v. *Gulab Chand Anundjee*(1), *Golap Jan* v. *Bhola Nath Khettry*(2) and *K. Sheikh Meeran Sahib* v. *C. Ratnavelu Mudali*(3) are very clearly distinguishable from the present case, in which there was an order for issuing summons on the accused and for search of his house and, in my opinion, it makes no difference that he came to Court before the processes were actually issued. The stage at which he came to Court may affect the question of the amount of damages, but the fact that he came before the summons and the search warrant had actually been issued does not, in my opinion, justify his case being thrown out. In my opinion his prosecution had started and the plaintiff was entitled to have the question of damages investigated. I agree with my learned brother that the case should be remanded and the damages assessed on the lines indicated by him. I entirely agree also that the claim as assessed at Rs. 5,250 about which no details have at all been given is quite fantastic and at best the plaintiff would be entitled to little more than nominal damages. The case arises out of a family dispute which it was desirable to settle without recourse to the courts, but both sides seem firm in their determination to fight the matter to the end.

Appeal allowed.

Case remanded.

APPELLATE CIVIL.

Before Wort and James, JJ.

MAHADEO LAL JWALA PRASAD

v.

MUSAMMAT BIBI MANIRAN.*

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Dec. 21, 22, 23.
Jan. 13.

Muhammadan Law—Dower—payment postponed until demanded by the wife—whether prompt dower—transfer of

* Appeal from Original Decree no. 22 of 1930, from a decision of Babu Narendra Nath Chakravarti, Special Subordinate Judge of Daltonganj, dated the 5th August 1929.

(1) (1910) I. L. R. 37 Cal. 358.
(2) (1911) I. L. R. 38 Cal. 880.
(3) (1912) I. L. R. 37 Mad. 181.

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property by husband in lieu of real dower debt, whether can be impeached—Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 53.

A dower the payment of which may be postponed until demanded by the wife would be classed as prompt dower.

A transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the power of the creditors for the benefit of the debtor. As soon as it is found that the transfer was made for adequate consideration in satisfaction of a genuine debt and without reservation of any benefit to the debtor it follows that no ground for impeaching it lies.

Musahar v. *Lal Hakim Lal*(1), followed.

Therefore, a transfer of property by a Muhammadan husband in favour of his wife, in lieu of a real dower debt equal to or exceeding the value of the property transferred. cannot be impeached under section 53 of the Transfer of Property Act, 1882, on the ground that it defeated or delayed other creditors, so long as it is a genuine transfer.

Appeal by the defendants.

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

P. Dayal and *Raghosaran Lal*, for the appellants.

Hasan Jan and *A. A. Syed Ali*, for the respondents.

JAMES, J.—The plaintiff in this litigation is the wife of Munshi Jamaluddin, formerly a prosperous merchant of Daltonganj, whose prosperity has declined during the last nine or ten years. In 1927 a firm of Daltonganj obtained judgment against him in a suit for money, in execution of which certain houses were attached. Jamaluddin's wife, Bibi Maniran, preferred a claim to these houses under Order XXI, rule 58, on the strength of a baimokasa deed executed on the 9th of March, 1926, by which Jamaluddin had

(1) (1915) I. L. R. 43 Cal. 521, P. C.

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conveyed to her property to the value of ten thousand rupees, including these houses, in satisfaction of a dower debt. The Munsif in whose court the execution was proceeding rejected the claim of Bibi Maniran, finding that her dower had been fixed at a very much lower sum than that which she alleged, and that the transfer was a colourable transaction made only for the benefit of the judgment-debtor. Bibi Maniran thereupon instituted this suit praying for a declaration that the two houses were her property and that they were not liable to attachment and sale in execution of a decree against her husband. She alleged that her dower had been fixed at forty thousand rupees and five ashrafis, payable on demand, and that the conveyance of the houses had been made in good faith in part satisfaction of that debt, of which she had remitted the balance. The suit was contested by the firm who had attempted to execute the decree, who denied that the dower had been fixed at anything like forty thousand rupees, and alleged that the baimokasa deed had been executed merely in order to place the property beyond the reach of creditors; that the transaction was merely colourable, and that possession had not passed to Bibi Maniran. The learned Subordinate Judge found that the dower had been fixed as claimed by the plaintiff; that the baimokasa deed had been executed in good faith in satisfaction of her claim, and that title and possession had actually passed to Bibi Maniran. He, therefore, dismissed the suit. The decree-holder-defendants appeal from that decision.

Mr. Parmeshwar Dayal on behalf of the appellants argues in the first place that the learned Subordinate Judge was not justified by the evidence in his finding that the dower was fixed at forty thousand rupees and five ashrafis. He points out that in coming to this decision, the learned Subordinate Judge has given some weight to a remark of the late Mr. Ameer Ali in his book on Muhammadan Law, to the effect that forty thousand rupees is generally

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speaking the customary dower in Behar, without taking into account Mr. Ameer Ali's qualifications, that this applies only to the upper middle class. But the learned Subordinate Judge appears to have recognised that this amount of dower was only customary among high class Muhammadans; and he has come to the conclusion that the plaintiff was of a sufficiently respectable family to make it possible that such a dower should be fixed at her wedding, particularly in view of the fact that her husband was then a man of means. The plaintiff's case depended on oral evidence; her own evidence, that of her brother Abdul Ali Khan and her uncle Asgar Khan, and of two men of Sasaram, Mirza Sultan Beg and Walait Hussain, who were present at the wedding. There was also the evidence of one Abdul Wahab Khan of Palamau district, who said that he had gone with Jamaluddin to Sasaram at the time of his marriage; and that of a copyist in the Deputy Commissioner's office at Daltonganj, a native of Sasaram, who also said that he was present at the marriage, and added that in marriages of Muhammadan ladies in Sasaram of the class of the plaintiff, the dower was invariably fixed at forty thousand rupees and five ashrafis. The formal witnesses of the marriage are dead; but the Kazi who performed the ceremony is still living, working as a school-master at a village named Kora. The Kazi was not summoned on behalf of the plaintiff; and Mr. Parmeshwar Dayal naturally argues that an inference adverse to the plaintiff should be drawn from that fact; but if the plaintiff chose to rely on the witnesses whom she did examine, it was for her to decide whether she would or she would not summon any more; and if the Kazi's evidence would have been in favour of the defendants they could have called him as a witness on their behalf. When the plaintiff was giving evidence in the summary proceeding under Order XXI, rule 58, she was brought into court in a closed dooli and gave her evidence from inside it. The Munsif recording her evidence understood her to say

that her dower was forty rupees and five ashrafis; but when this evidence was read over to her she did not admit it to be correct, saying that the amount which she had stated was forty thousand rupees and not forty. The Munsif noted this fact, remarking that the question had been repeated twice and that she actually had said twice that her dower was forty rupees. She says now that the Munsif could not have heard her clearly when she spoke from inside the dooli; and that from the sound of the Munsif's voice, it appeared that she was at some distance from him. The learned Subordinate Judge came to the conclusion, taking her evidence before the Munsif as a whole, that her explanation was correct, that the Munsif did not hear her correctly when she was giving evidence and that she could never have said that her dower was only forty rupees and five ashrafis. Whatever may be thought regarding the probability that a sum of forty thousand rupees would be fixed as her dower, it must at least be regarded as far more probable that such a sum would be fixed, in view of the circumstances of the parties, than the sum of forty rupees which would indeed be incredibly low. Sh. Fariduddin and Wali Mohammad of Daltonganj both say that they were present at Jamaluddin's marriage at Sasaram when the dower fixed was forty rupees; but Sh. Fariduddin has been present at several marriages of persons of this class and he can mention no other in which the dower was so low. The defendants' witness Shamsuddin is the step-son of the plaintiff who has a claim against his father on account of his mother's deferred dower which he says was fixed at forty thousand rupees and five ashrafis. The learned Subordinate Judge considering his evidence came to the conclusion that in the matter of social status there was no practical difference between Shamsuddin's mother and the plaintiff; and this witness Shamsuddin also made the damaging statement that the minimum dower among persons of the plaintiff's class in Sasaram is eleven thousand rupees and two ashrafis. There would

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appear to be no justification for differing from the finding of the learned Subordinate Judge that at the plaintiff's wedding the dower was fixed at forty thousand rupees and five ashrafis.

The learned Subordinate Judge has accepted the evidence of the plaintiff to the effect that the dower debt was payable, not at the time of the marriage, but when it should be demanded by the wife, and he therefore describes it as deferred dower, although it would not be deferred dower in the technical sense of being payable only at the dissolution of marriage by death or divorce. In her deposition in the proceeding under Order XXI, rule 58, the plaintiff said that her dower was deferred dower; and her witness Abdul Ali Khan in that court said the same. A dower the payment of which may be postponed until demanded by the wife would be classed as prompt dower, but since such a dower would be in a sense deferred, it can hardly be assumed that these witnesses when they spoke of deferred dower necessarily meant a dower debt which would not become due until the dissolution of the marriage-partnership.

Mr. Hasan Jan on behalf of the respondents argues that the finding of the learned Subordinate Judge on this point should be accepted; but he contended also that the point is not of great importance because even if the dower was deferred, in the strictly technical sense of the term, the husband could at any time cancel the postponement, and treat the debt as immediately payable, in which case it would be a valid debt immediately due from the husband. On this point he cites the decision in *Suba Bibi* v. *Balgobind Das*(1) where Mr. Justice Straight citing from the *Fatwai Kazi Khan* held that payment in circumstances similar to that now before us of deferred dower was payment of an existing debt; but the finding of the learned Subordinate Judge may be accepted that the dower fixed was payable on demand by the wife.

(1) (1886) I. L. R. 8 All. 178.

There appears to be no doubt that Jamaluddin was indebted at the time when the baimokasa was executed and that the alienation of this property was likely to make him unable to satisfy his other creditors. It would appear from the evidence of Shamsuddin that one reason which may have led Jamaluddin to execute this baimokasa deed was the possibility that Shamsuddin's sister would institute a suit for her share of her own mother's dower. The plaintiff herself says that she pressed for it because she saw his business declining and wished to be secure; but if there was a real debt due to the plaintiff, equal to or exceeding the value of the property transferred, the transfer cannot be impeached under section 53 of the Transfer of Property Act on the ground that it defeated or delayed other creditors, so long as it was a genuine transfer, as has been pointed out in many cases, of which I need only mention the decision of the Judicial Committee of the Privy Council in *Musahar* v. *Lal Hakim Lal*(1) in which it was held that a transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the power of the creditors for the benefit of the debtor. As Lawrence Jenkins, C.J. remarked in that case, so soon as it is found that the transfer was made for adequate consideration in satisfaction of a genuine debt and without reservation of any benefit to the debtor, it follows that no ground for impeaching it lies. In the present case if the creditors on being apprised of this transaction in the proceeding under Order XXI, rule 58, had taken steps for the adjudication of Jamaluddin as an insolvent debtor, the transaction might possibly have been set aside; but they cannot impeach it as a transfer defeating or delaying creditors within the meaning of section 53 of the Transfer of Property Act, unless they can show that the debtor reserved some benefit for himself.

On this last point it is argued that the learned Subordinate Judge ought to have found that the trans-

(1) (1915) I. L. R. 43 Cal. 521, P. C.

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action was benami. The learned Subordinate Judge has considered the evidence regarding possession and has come to the conclusion that possession of the property conveyed by the baimokasa has actually passed to the plaintiff. It appears that a new lease of the sites of the houses transferred has been executed by the superior landlord in favour of the plaintiff in place of Jamaluddin, and that the tenants of these houses now pay rent to Abdul Ali Khan the son of the plaintiff who manages the property for her. On behalf of the defendants, Naumi Lal Deo, a tenant whose house has now been let to the Singer Company, says that in 1926 or 1927 he paid rent for it to Jamaluddin producing a small scrap of paper which purports to have been given by somebody on behalf of Jamaluddin for payment made on the 6th of November, 1926. On the other hand, we have for this payment exhibit 2, an entry in the plaintiff's counterfoil receipt book, indicating that the formal receipt was granted on behalf of Maniran Bibi. Ganesh Lal Sao, who occupied part of one of the houses from Jamaluddin in 1926, says that he paid rent to Jamaluddin in July and August of that year, producing entries of payments in his own account book but not producing the receipts which were granted. It does not appear that the witness personally made these payments: and from the fact that the formal receipts are withheld, it may be fairly inferred that they were granted on behalf of the plaintiff, whether for the sake of convenience Jamaluddin took the money on her behalf or not. The finding of the learned Subordinate Judge may be accepted that the transaction was not benami, and that Jamaluddin retained no benefit for himself.

In this view of the facts the decision of the learned Subordinate Judge must be affirmed and I would dismiss this appeal with costs.

WORT, J.—I agree.

Appeal dismissed.

PRIVY COUNCIL.

On Appeal from the High Court at Patna.

RAJA RAGHUNANDAN PRASAD SINGH

v.

COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.

J. C.* 1933.

Jan., 24.

Income-tax—When Income accrues—Realization of Profit—Mortgage for Principal and Interest due under earlier mortgage—Mortgage decree—Purchase by mortgage—Assessment of Profit so realized—Income-tax Act, 1922 (*XI of* 1922), *section* 10.

When a mortgage has been accepted in discharge of the principal and interest due under an earlier mortgage, and the mortgagees' books of account do not treat the interest as being thereby paid, the interest does not become a profit or gain assessable to income-tax until the mortgage is realized. If the mortgaged property is sold under a mortgage decree, and is purchased by the mortgagee, then so far as the purchase price exceeds the principal sums advanced there is a realization, and therefore payment, of the interest. In assessing the profit so arising sums paid by the mortgagee in respect of claims upon the mortgaged property which he knew of when he purchased are not permissible deductions from the purchase price. The purchase price can properly be taken as the value of the property although the valuation by the Civil Court for purpose of the sale proclamation is lower.

Californian Copper Syndicate v. *Harris*(1), applied.

Judgment of the High Court(2) affirmed.

Appeal (no. 18 of 1931) from a decree of the High Court (August 7, 1928) upon questions referred to the court under section 66, sub-section 2 of the Indian Income-tax Act, 1922.

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* Present: Lord Macmillan, Sir George Lowndes, and Sir Dinshah Mulla.

(1) (1905) 6 F. 894; 5 T. C. 159.

(2) (1929) I. L. R. 9 Pat. 48.

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The case related to the assessment of the appellants under the above Act for the year 1926-27 in respect of profits or gains arising in 1925-26 from a money-lending business which they carried on. In 1904 the appellants had accepted a mortgage bond in discharge of the principal and interest due under the earlier bond. On December 22, 1917, they obtained a mortgage decree under the mortgage of 1904, and at court sales on November 19, 1924, and January 31, 1925, they purchased the mortgaged property, the sales being confirmed on December 18 and 21, 1925. The purchase price largely exceeded the principal sums advanced. Shortly stated the question referred were whether the transaction of 1904 was a payment of the interest due under the earlier bond so as to render the present assessment in respect of it invalid under section 34 of the Act, and as to the proper computation of the profits or gains arising upon the sale and purchase of the mortgaged property.

The terms of the questions and the material facts appear from the judgment of the Judicial Committee.

The questions referred were argued before Das, Kulwant Sahay and Wort, JJ. The proceedings are reported at I. L. R. 9 Pat. 48, and the case stated is there set out.

1933, November 11, 14. *DeGruyther, K. C.* and *G. D. McNair* for the appellants.

Dunne K. C. and *R. P. Hills* for the respondents.

1933, January 24. The judgment of their Lordships was delivered by—

LORD MACMILLAN.—This appeal brings before their Lordships eight questions relating to the taxable income of the appellants for the year 1926-27. The appellants carry on the business of moneylenders and are liable under section 3 of the Indian Income-tax Act, 1922, to pay income-tax for the year 1926-27 in respect of the profits or gains of their business in the previous year, 1925-26, as computed in accordance with the provisions of section 10 of the Act.

Being dissatisfied with the assessment of the income-tax officer and with the result of an appeal to the Assistant Commissioner, the appellants under section 66 (*2*) required the Commissioner to refer to the High Court of Judicature at Patna a series of questions purporting to be questions of law arising out of the Assistant Commissioner's order. The Commissioner accordingly, as directed by the Act, drew up a statement of the case and referred it to the High Court with his own opinion on the eight questions which he formulated.

The transactions which have given rise to the questions at issue relate to the lending of money by the appellants or their predecessor (hereinafter called "the assessees") in connection with a property known as the Srinagar estate. It appears that on the death of the proprietor of this estate in 1880 a one-third share thereof was in a partition suit awarded to his son Nityanand and the other two-thirds jointly to Kamlanand and Kalikanand, his sons by another wife. In 1894 Nityanand mortgaged his one-third share to the assessees for two lacs of rupees. Five years later he borrowed on further mortgage of his share a sum of three and a half lacs from the Benaili Rajas. On this latter mortgage the Benaili Rajas obtained in 1902 a decree against Nityanand for Rs. 4,57,159, principal and interest. His half-brothers in 1903 bought this mortgage decree for five lacs and in security of the purchase price mortgaged their two-thirds of the Srinagar estate to the Benaili Rajas. In the same year they purchased Nityanand's equity of redemption.

In July, 1904, there was due to the assessees under the mortgage of 1894 a sum of Rs. 4,33,135, being Rs. 2,00,000 of principal and Rs. 2,33,135 of interest, and to the Benaili Rajas under the mortgage of 1903 a sum of Rs. 5,25,815. The debtors, Kamlanand and Kalikanand, settled with the Benaili Rajas by paying them Rs. 815 from their own cash,

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and Rs. 3,00,000 borrowed from the assessees and by executing a fresh mortgage for the balance of Rs. 2,25,000 in favour of the Benaili Rajas. This left them indebted to the assessees to the extent of Rs. 4,33,135+Rs. 3,00,000=Rs. 7,33,135, for which sum they, along with Kamlanand's two minor sons, through him as their guardian, executed on 18th July, 1904, a mortgage on the Srinagar estate in favour of the assessees.

In 1912 there was due on the mortgage for Rs. 2,25,000 to the Benaili Rajas a sum of Rs. 3,34,000, and this was met by Kalikanand as *karta* of the joint family, borrowing three lacs on mortgage from the assessees on 7th November, 1912, and providing the balance of Rs. 34,000 in cash. The Benaili Rajas were thus finally paid off.

The assessees subsequently brought suits on the mortgage for Rs. 7,33,135 of 18th July, 1904, and the mortgage for Rs. 3,00,000 of 7th November, 1912, on which, taken together, a sum of Rs. 27,13,379 of principal and interest was due. Decrees were passed in favour of the assessees on 22nd December, 1917. The mortgaged property was put up for sale and was bought by the assessees at the price of Rs. 25,65,100 at Court sales on the 19th November, 1924, and the 31st January, 1925. The sales were confirmed on the 18th and 21st of December, 1925.

The general question arising may be said to be—How much, if any, of this sum of Rs. 25,65,100 is liable to income-tax in the year 1926-27 as being profits or gains of the assessees' moneylending business for the year 1925-26? The assessees, it is important to bear in mind, keep their accounts on a cash basis.

Their Lordships propose to deal with the eight particular questions stated by the Commissioner in the order in which he has numbered them, although this may not be the most logical sequence and it has not been followed in the judgment of the High Court.

The first question is thus formulated by the Commissioner:—

"1. When a bond is discharged and extinguished by a fresh bond and where the assessees have credited the principal and interest of this bond in their books of accounts, can notional interest on the first bond be said to arise in years subsequent to the execution of the second bond, and can it be charged to income-tax subsequently?"

Their Lordships deprecate the statement of questions of law in this abstract form divorced from the facts of the particular case. The real question is whether, when the assessees on 18th July, 1904, accepted a new mortgage for Rs. 7,33,135, representing to the extent of Rs. 2,33,135 the arrears of interest due under a previous mortgage of 14th June, 1894, and discharged the previous mortgage and all sums due thereunder, they thereby in effect received payment then and there of the arrears of interest due under the previous mortgage.

The assessees contended that the acceptance of the new mortgage in 1904 and the extinction of the previous mortgage operated payment of the arrears of interest due under the previous mortgage, which were included in the capital sum for which the new mortgage was granted; and that the sum representing the arrears of interest should have been taxed, if at all, as a receipt of the year 1904 in which the new mortgage was granted. According to the Commissioner, the assessees were as a matter of fact as essed at the time in the amount of these arrears of interest, but the assessment was, on the appeal of the assessees, discharged on the ground that the interest was not taxable until the mortgage was realised. As, under section 34 of the Act, income which has escaped assessment in any year can be subsequently assessed only within one year from the end of that year, the assessees have now an obvious reason for reversing the contention which they appear to have successfully put forward on the previous occasion. The Commissioner further finds that the sum of Rs. 2,33,135 was "not shown separately as interest realised in the assessees'

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books of account of that year [*i.e.*, 1904] either in the interest account or in the personal account of the debtor "—a finding which seriously stultifies the question as framed by the Commissioner.

Their Lordships fully recognise that income may be received in kind as well as in cash and that the receipt of an equivalent of cash may be a receipt of income. In the case of *Californian Copper Syndicate* v. *Harris*(1), a company which dealt in mining properties sold certain property for fully-paid shares in another company and was held to be liable to income-tax on the profit made on the transaction although no cash passed, but this was on the ground that the shares taken in exchange were realisable and were thus money's worth and the equivalent of cash. In the case of *Royal Insurance Company, Ltd.*, v. *Stephen*(2), an insurance company, which admitted that any profit which it made on the realisation of investments was liable to tax, effected an exchange of securities in pursuance of a railway amalgamation scheme. The new stocks received in place of the surrendered stocks had at the date of the exchange a definite market value which was less than the original cost to the company of the surrendered stocks. A claim was made by the company in computing its profits to deduct the difference as a loss sustained by it. For the Crown it was contended that there has been no realisation of investments, but merely an exchange of one set of investments for another. The company's claim was upheld by Rowlatt, J. on the ground that it had in substance realised its former holdings and received for them money's worth of a definite amount. The loss was thus a realised loss susceptible of exact estimation in money. The transaction was on "a money basis." Reference may also be made to the recent case in the House of Lords of *Westminster Bank, Ltd.*, v. *Osler* (15th November, 1932)(3), where the bank surrendered certain holdings of National

(1) (1905) 6 F. 894; 5 Tax. Cas. 159.
(2) (1928) 44 T. L. R. 630; 14 Tax. Cas. 22.
(3) (1933) A. C. 139.

War Bonds in exchange for other Government securities and the Crown claimed tax on the excess value of the substituted over the original securities. The question was whether these transactions were the equivalent of a realisation of the original holdings, and it was held that they were. "The exchange effected in the present case," said Lord Buckmaster, "was in fact the exact equivalent of what would have taken place had instructions been given to sell the original stock and invest the proceeds in the new security." The bank had thus in effect realised its profit, for it had received it in money's worth of a definitely ascertained amount. From these cases it is plain that the essence of the matter is that there must be an actually realised or realisable profit or loss.

Applying this principle to the assessees' transaction in 1904, their Lordships are of opinion that there was in the circumstances no realisation of the principal and interest of the original mortgage of 1894 and that when the assessees received the new mortgage for Rs. 7,33,135, which included the principal and interest of the original mortgage, they did not thereby receive payment or the equivalent of payment of the principal and interest of the original mortgage. No doubt the grantors of the new mortgage were not indentical with the grantor of the original mortgage and the property mortgaged was greater in extent, but the substitution effected cannot in any real sense be described as the equivalent of a realisation of the original mortgage, principal and interest. What happened was that the assessees received a new and substituted security for an existing debt. To give security for a debt is not to pay a debt. If the assessees had received payment in kind of the amount outstanding on the original mortgage, in the shape, say, of realisable shares or bonds, the case would have been different, but they merely received further and better security for their debt. It is, in their Lordships' view, quite immaterial that the assessees discharged the original mortgage and all liability under it, for that was merely an incident in the transaction whereby

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the new security was substituted for the old. Their Lordships accordingly hold that the assessees did not by virtue of the transaction of 1904 receive payment of the arrears of interest amounting to Rs. 2,33,135 then outstanding on the mortgage of 1894; that the assessees were not liable to be taxed on this sum as being income received when the new mortgage was granted; and that this sum of arrears of interest (though after 1904 secured by the new mortgage) continued to retain its character and remain due to the assessees down to the time of the judicial sales of November, 1924, and January, 1925. In so holding their Lordships find themselves in agreement in result with the Commissioner and the High Court.

The next question is unfortunately also stated in abstract form as follows:—

"2. When a property is purchased in execution of a mortgage decree by the mortgagee subject to deposit of security sufficient to safeguard the interest of a party claiming a one-eighth share in the property to be unaffected by the decree, can the value of the whole property be taken into account for the purpose of computing profits, or, on the other hand, can the amount deposited in the court as security in these circumstances be claimed as deductible expenditure in computing profits?"

The facts are that in 1923 Ghananand Singh, a minor son of Kalikanand, sued the assessees for a declaration that his one-eighth share of the Srinagar estate was not affected by the mortgage decrees obtained by the assessees on 22nd December, 1917. Pending a decision in this suit the assessees deposited in Court Rs. 3,20,633, being one-eigth of the purchase price of Rs. 25,65,100, at which they bought the property at the judicial sales. The Subordinate Judge pronounced a decree in favour of Ghananand Singh on 15th September, 1927. It is not stated whether an appeal was taken. The question is whether, on the assumption that any part of the purchase price of Rs. 25,65,100 at which the assessees bought the Srinagar estate is computable as income of the assessees in the year 1925-26, it is permissible to deduct from such part the amount of this deposit of Rs. 3,20,633.

The dates are important. It will be observed that the suit was brought in 1923, while the judicial sales at which the assessees purchased the property took place at the end of 1924 and beginning of 1925. The assessees were thus aware when they bid for the property that there was a possibility that they might in the event only obtain seven-eighths of it. They were nevertheless prepared to bid Rs. 25,65,100 for it. Had it not been for this risk they would presumably have given more for the property. In the next place, no decision was pronounced in the suit till 15th September, 1927, and until then the assessees could not say whether or not they would have to pay over the amount of the deposit to Ghananand Singh, and if an appeal was taken the question would continue to remain in suspense. In these circumstances their Lordships are unable to see how in computing the profits or gains of the assessees' business for the year 1925-26 this deposit can legitimately be claimed as a deduction from the purchase price of the Srinagar estate or from such part of that purchase price as may be held to be an income receipt. It was not in its nature a deduction from the purchase price, for the purchase price was paid in the knowledge of the claim; nor was it a sum actually expended in the year 1925-26, so as to be a debit in that year in the books of the assessees, which are kept on a cash basis, for it was then at most a contingent liability; and in no respect does it answer the description of expenditure incurred in the year 1925-26 by the assessees solely for the purpose of earning the profits or gains of that year within the meaning of section 10 (*2*) (*ix*). Their Lordships accordingly agree with the Commissioner and the High Court that the amount of the deposit is not a permissible deduction in the computation of the assessees' profits or gains for the year 1925-26.

The third question stated by the Commissioner is in the following terms:—

"3. Can assessees claim as admissible deduction from their income of that year the amount of decree obtained against them by a

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subsequent mortgagee who has subsequently been held by the courts to hold a prior mortgage over the property, and is the sum which eventually turns out to be a charge on the property purchased by the assessees in a mortgage decree (which sum had not been considered by the assessees to be such charge on account of an express covenant embodied in an original mortgage bond) an allowable deduction from taxable income in this case?"

Here the facts are that the Benaili Rajas in 1923 sued the proprietors of the Srinagar estate and the assessees to recover the amount due on a mortgage of the estate, dated the 29th April, 1910. On the 18th September, 1926, the Rajas obtained a decree in their favour for Rs. 1,50,818, which the court held to be a valid and prior charge on the property purchased by the assessees.

It will be observed in this instance also that the assessees purchased the property at the judicial sales in 1924-25 in the full knowledge of the Rajas' claim and in bidding Rs. 25,65,100 presumably allowed for the possibility of this claim succeeding, as it ultimately did. Moreover, in the year 1925-26 the assessees made no expenditure of Rs. 1,50,818 and it was not till the 18th September, 1926, that this sum was declared to be a charge on the property purchased by the assessees. Their Lordships accordingly, for the reasons assigned in disposing of the preceding question, are of opinion that this sum of Rs. 1,50,818 is not a permissible deduction in the computation of the assessees' profits or gains for the year 1925-26, and in this result they agree with the Commissioner and the High Court.

On the fourth question no argument was offered by the assessees. Their Lordships are accordingly not called upon to deal with it, and the decision of the Commissioner and the High Court, which was adverse to the assessees, will stand.

The fifth question stated by the Commissioner is as follows :—

"5. Does the law contemplate taxation of notional receipts of income and profits arising from the purchase by the mortgagee of the mortgaged property? Is not a purchase by the mortgagee of the mortgaged property sold in execution of a decree a capital transaction?"

This is logically the first question for determination between the parties, for if no part of the price of Rs. 25,65,100, at which the assessees acquired the Srinagar estate, can be treated as an income receipt, the other questions would not appear to arise.

When a mortgage decree-holder, with the permission of the Court, bids for and purchases the mortgaged property at a judicial sale, Order XXI, rule 72 (*2*), of the Civil Procedure Code provides that "the purchase money and the amount due on the decree..... may be set off against one another and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly." The decree-holder thus in effect receives a transfer of the property at the value of the purchase price in satisfaction *pro tanto* of the liability of the mortgagors for principal and interest. So far as the purchase price exceeds the principal sum due under the mortgage the excess is applicable to any arrears of interest. The costs of the mortgage suits and the expenses of the sales may for the purposes of the argument be disregarded. To the extent, therefore, that the purchase price exceeds the principal sum due there is a realisation of interest—that is, a payment of interest. The interest is paid in the form of a credit in account and is re-invested in the purchase of the property.

In the present instance the principal sums due under the mortgages of 18th July, 1904, and 7th November, 1912. on the Srinagar estate when it was judicially sold amounted to Rs. 7,33,135 + Rs.3,00,000 = Rs. 10,33,135. The price paid was Rs. 25,65,100, or Rs. 15,31,965 in excess of the principal sums due. This excess was plainly available to be set against the arrears of interest, costs and expenses. But the special question which arises is whether in the circumstances a further sum is attributable to interest, viz., the sum of Rs. 2,33,135, which on 18th July, 1904, was due as arrears of interest under the former

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mortgage of 14th June, 1894, and which was included in the principal sum of Rs. 7,33,135, for which the mortgage of 18th July, 1904, was granted.

Their Lordships, in disposing of the first question in the case, have decided that this sum of Rs. 2,33,135 of arrears of interest was not paid in 1904, and they are of opinion that when the assessees as the result of the judicial sales received payment in account of the sum of Rs. 7,33,135 due under the mortgage of 18th July, 1904, they then received payment for the first time of the arrears of interest included in that sum. To the extent of Rs. 2,33,135, therefore, the sum of Rs. 7,33,135 represented an income receipt and must, as already indicated, be brought into computation as such by the assessees for tax purposes.

On the general issue raised in this fifth question their Lordships accordingly find themselves in agreement with the answer given by the Commissioner and the High Court. The special point with which their Lordships have just dealt is a corollary to the answers to the first and fifth questions and the decision given upon it below will be affirmed.

The next question is thus stated by the Commissioner:—

"6. If the profits or gains arising to the assessees from the buying in of mortgaged property are taxable, what is the date on which the profits are deemed to have arisen? Is it the date of decree, the date of sale, the date of confirmation of sale, or the date of delivery of possession?"

The answer of the Commissioner and of the High Court was that the profits must be deemed to have arisen on the confirmation of the sales, *i.e.*, on the 18th and the 21st December, 1925, and their Lordships are of the same opinion. The decree is only a step towards realisation, and the date of the decree is therefore plainly not the date of realisation. Nor on the date of the sale does the purchaser obtain an indefeasible right, for under Order XXI, rules 89, 90 and 91, the sale may be set aside on various grounds. It is only where no application is made under these

rules or where such application is made and disallowed that the Court under Order XXI, rule 92, makes an order confirming the sale, whereupon " the sale shall become absolute." It is then that the process of realisation is completed and any profit or income is realised by the decree-holder. This is so whether the property is purchased by the decree-holder himself or by a third party, for the right of set-off conferred on the purchasing decree-holder must also be dependent on the sale being rendered absolute by confirmation. No doubt section 65 of the Code provides that " where immovable property is sold in execution of a decree and such sale has become absolute the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute," but this provision does not come into operation unless and until the sale has become absolute. The actual date of realisation is not affected by this retrospective vesting of the property.

The seventh question formulated by the Commissioner is as follows :—

" 7. Assuming that there are profits arising out of this transaction which are legally taxable, are the assessees entitled to deduct from these taxable profits expenses which are always entailed in taking delivery of possession and effecting mutation in the Collectorate Registers?"

Their Lordships agree with the Commissioner and the High Court that the expenses incurred by the assessees in completing their title and entering into possession after the sales had become absolute are not deductible by the assessees from their taxable profits. The assessees in bidding for the property must have had in view that they would incur these expenses if they were the successful purchasers and doubtless estimated accordingly the price which they thought it worth their while to bid.

The eighth and last question is as follows :—

" 8. What is the correct method of computing the value of the property acquired by the assessees in this case?"

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It appears that the Civil Court Commissioners had valued the property before the sales at Rs. 17,13,701, and the assessees' contention was that it should be taken at this value instead of being taken at the value of Rs. 25,65,100, the price at which they acquired the property at the sales. Their Lordships, agreeing with the Commissioner and the High Court, are of opinion that the price which the assessees bid for the property at the public sale must be taken to be its market value, and there is no evidence to the contrary.

As their Lordships find themselves in the result in agreement with the answers given by the High Court to the several questions raised in this appeal, they will humbly advise His Majesty that the decree of the High Court of 7th August, 1928, be affirmed and the appeal dismissed. The respondent will have his costs of the appeal.

Solicitors for appellants: *W. W. Box and Co.*

Solicitor for respondent: *Solicitor, India Office.*

PRIVY COUNCIL.

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v.

MAHARAJADHIRAJ OF DARBHANGA.

On Appeal from the High Court at Patna.

**J. C. 1933.*

Jan., 24.

Income-tax—Interest on Loans—Interest carried to suspense account—Sums paid on account of Principal and Interest—Appropriation as between Principal and Interest—Assets received in Satisfaction—Realization—Profit from Colliery—Deductions—Arrears of Rent—Income-tax Act, 1922 (*XI of* 1922), *sections* 10, 12, 13, 66.

* Present: Lord Macmillan, Sir George Lowndes, and Sir Dinshah Mulla.

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For the purposes of the Income-tax Act, 1922, the income derived by an assessee during a particular year from interest on loans may properly be computed, having regard to the proviso to section 13, as consisting in part of sums actually received in that year and in part of sums carried by the assessee to income account in that year out of receipts in previous years, which he has held in suspense account and of which no part has been previously returned as income or taxed.

Where the assessee has received a sum on account of principal and interest due, without an appropriation between them by the debtor, the income-tax officer can appropriate the sum first to outstanding interest, although the assessee in his accounts has not credited any receipt of interest.

Venkatradi Appa Row v. *Parthasarathi Row*(1), applied.

Where, however, the assessee has received, not on open account but in satisfaction of principal and interest due, assets which are realizable and therefore equivalent to cash, together with promissory notes of the debtor, the assessee is entitled to have the realizable assets allocated towards the discharge of principal, with the result that there is no payment of interest, the debtor's promissory notes not being equivalent to cash.

One of the transferred assets being a sub-lease of a colliery, taken at a valuation and stated to be free of incumbrances, the assessee is not entitled under section 10, sub-section 2, to deduct from the annual profits from working, a sum which he has paid to the landlord for fixed or dead-rent accrued before the transfer; a sum so paid is a capital loss by over-valuation of the asset, not a loss on income account.

Judgment of the High Court(2), affirmed, save as to the matter last mentioned.

Questions of law which the Commissioner refers to the High Court under section 66 should, for convenience of reference, be assembled and numbered consecutively at the end of the stated case.

Consolidated Appeals and Cross-Appeal (no. 75 of 1931) from a judgment of the High Court

(1) (1921) I. L. R. 44 Mad. 570, 573; L. R. 48 I. A. 150, 153.
(2) (1929) I. L. R. 9 Pat. 240.

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(November 25, 1929) on questions referred to the Court under section 66, sub-section 2 of the Income-tax Act, 1922.

The questions referred related to an assessment under the above Act made upon the Maharajadhiraj of Darbhanga, since deceased and represented by his eldest son, for the year 1926-7. With two exceptions the questions were as to profits from moneylending transactions, tax being chargeable thereon under section 12 as income from " other sources ". The year in which the profit was assessable was that ending September 30, 1925. Two main matters for determination were (1) whether, having regard to the manner in which the assessee had kept his books, the method adopted by the income-tax officer in assessing the interest received in the year was lawful, (2) as to appropriation between principal and interest where (*a*) sums had been received in running account against principal and interest, and (*b*) where realizable assets and promissory notes of the debtor had been taken in satisfaction of principal and interest. A further question which arose was as to the profits chargeable under section 10, from working a leasehold colliery taken over by the assessee, namely, whether the assessee was entitled under section 10, sub-section 2, to an allowance in respect of a sum paid by the assessee for dead-rent (described in the lease as royalties) accruing before he had possession.

The material facts and the questions referred appear from the judgment of the Judicial Committee.

The questions referred were argued before Terrell C. J., Das, J. and Kulwant Sahay J., and the proceedings are reported at I. L. R. 9 Pat. 240, where the case stated is fully set out.

The Commissioner of Income-tax was appellant as regards two of the questions, and the assessor's representative as to the rest.

1932, October 31; November 1, 3, 10. *Dunne, K. C. and R. P. Hills* for the Commissioner:

It is well settled that a payment in respect of principal and interest, if unappropriated between principal and interest, is attributable first to interest; that rule has been applied in India: *Venkatradi Appa Row* v. *Parthasarathi Appa Row*(1). The High Court rightly applied the rule to payments of cash, but it should also have been applied as to the assets taken over from Ganesh Singh. Even if the debtor's promissory notes could not be taken as cash, the realizable assets were equivalent to cash. *Commissioner of Taxes* v. *Melbourne Trust Ltd.*(2), and should have been attributed to the outstanding interest. The assessee was not entitled to deduct from the colliery profits the sum paid for arrears of royalties. Even if the royalties were "rent" within the meaning of section 10, sub-section 2 of the Act, the sum paid was not a permissible allowance thereunder. It was not rent due from the assessee and did not accrue in the year of assessment. It was not shown that the assessee could not have recovered the sum from Ganesh Singh. The payment was really on capital account, and represented an overvaluation upon transfer of the colliery: *Royal Insurance Co.* v. *Watson*(3), *John Smith and Co.* v. *Moore*(4).

Latter, K. C. (with him *Wallach and H. W. Williams*) for the assessee. Having regard to the fact that the assets were taken over from Ganesh Singh in complete discharge the assessee was entitled to have the realizable assets applied towards the principal: *Smith* v. *Law Guarantee and Trust Society Limited*(5); *Cory Brothers and Company* v. *Owners of the "Mecca"*(6); *English Life Assurance Company* v. *Lord Advocate*(7). The arrears which

(1) (1921) I. L. R. 44 Mad. 570, 573: L. R. 48 I. A. 150, 153.
(2) (1914) A. C. 1001.
(3) (1897) A. C. 1.
(4) (1921) 2 A. C. 18.
(5) (1904) 2 Ch. 569.
(6) (1897) A. C. 286.
(7) (1910) A. C. 143.

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the assessee paid, though described as royalties, were fixed or dead-rent and were distrainable: *In re Roundwood Colliery* (1); *Daniel* v. *Gracie*(2), McSwinny on Mines, 5th edn. pp. 133, 147. The assessee was therefore entitled under section 10, sub-section 2 (*i*) or (*ix*) to allowance of the sum paid. In an assessment under the head "business" change of ownership makes no difference. The words "actually paid" in section 10, sub-section 3 show that a payment though made for an arrear may be deducted. It can be presumed that the assessee could not have recovered the sum from Ganesh Singh.

To the cross-appeal. The method applied in assessing the income from money lending was unlawful. Assessments were made on a cash basis in respect of interest assumed to have been received in the year of assessment, and at the same time interest which the assessee had credited from previous year's receipts were brought in, though on the cash basis they were excluded by section 34. Mere book entries are not evidence of a profit: *Doughty* v. *Commissioner of Taxes*(3). There must be an actual receipt: *St. Lucia Usines and Estates Company* v. *Colonial Treasurer*(4); a "coming in": *Income-tax Commissioner* v. *Shaw Wallace and Company*(5). There was no real attempt to find what were the actual receipts in the year of assessment; without evidence a lakh of rupees was added as "probable omissions".

Dunne, K. C. in reply. The assessee's books of account were misleading, and the method pursued in assessing him therefore was permissible under the proviso to section 13. The questions raised as to the income from moneylending are really questions of fact, and it is not shown that the Commissioner's conclusions were wrong in law.

(1) (1897) 1 Ch. 373, 389
(2) (1844) 6 Q. B. 295.
(3) (1897) A. C. 327, 330
(4) (1924) A. C. 508.
(5) (1932) L. R. 59 I. A. 206.

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The judgment of their Lordships was delivered by—

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LORD MACMILLAN.—Their Lordships have to dispose of two consolidated appeals from a judgment of the High Court of Judicature at Patna, dated the 25th November, 1929, dealing with certain questions referred to the Court by the Commissioner of Income-tax, Bihar and Orissa, under section 66 of the Indian Income-tax Act, 1922. The questions all relate to the assessment for tax purposes of the income for the year 1926-27 of the Maharajadhiraj of Darbhanga, who died on the 3rd July, 1929, and is now represented in these proceedings by his eldest son. As regards two of the questions, the Commissioner of Income-tax is appellant; as regards the rest the assessee is appellant.

By section 3 of the Act of 1922, income-tax is chargeable in India " in respect of all income, profits and gains of the previous year ". The assessee's practice was to make up his accounts for the Fasli year which ends on 30th September and consequently, under section 2 (*11*) (*a*) of the Act, the " previous year " in the present case is the Fasli year 1332, which ended on 30th September, 1925. The taxable income of the assessee for the year 1926-27 thus consists of his income, profits and gains for the year ending 30th September, 1925, as computed in accordance with the provisions of the Act.

The assistant Commissioner of Income-tax, acting as income-tax officer, having made an assessment of the assessee's taxable income for the year in question, the assessee appealed to the Commissioner of Income-tax, Bihar and Orissa, acting as Assistant Commissioner, who made an order reducing the assessment in respect of three particular items but otherwise affirming it. The assessee then required the Commissioner under section 66(*2*) to refer to the

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High Court certain questions, purporting to be questions of law arising out of his order. The Commissioner, as required by the Act, drew up a statement of the case and referred it with his own opinion thereon to the High Court. It is against the answers rendered by the High Court to certain of the questions formulated in the case so stated that the present appeals have been taken.

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With one exception, the points which were debated before their Lordships relate to moneylending transactions of the assessee. As the assessee was held not to be carrying on the business of moneylending he was assessed in respect of these transactions, not under section 10 which provides for the computation of the "profits or gains" of a business, but under section 12, which provides for the computation of "income, profits and gains" from other sources. In the one exception, which relates to the carrying on of a colliery taken over by the assessee from a debtor, the assessment was under section 10.

As the questions which have arisen are in large measure due to the assessee's method or want of method in recording his moneylending transactions, it will be convenient to give a description of his practice in the matter as furnished in the case stated by the Commissioner. The assessee, it appears, kept "a deposit register in which payments made by debtors are ordinarily first of all recorded but without any allocation between principal and interest. Subsequently, if and when allocation is made, an entry in respect of the interest portion of these payments is made in the interest ledger as well as in the interest account of the general ledger. This allocation is not necessarily made in the year in which the money has actually been paid to the assessee. It may be made in the following year or, indeed, several years later."

Prior to the year 1331 Fasli the assessee produced to the income-tax authorities only his interest ledger

and did not disclose his deposit register. In these previous years he claimed to be and was assessed in each year on the total of the sums credited as interest in the preceding year in his interest register. Owing to the system on which the interest register was kept, it is obvious that the assessee was in each year assessed not on the total of the sums actually received by him as interest during the preceding year, but on such sums as the assessee had chosen during that preceding year to allocate to interest and carry to his interest register out of payments received by him in that and former years. In computing the income of the assessee for the year 1331 Fasli the assessing officer had for the first time available to him the assessee's deposit register. On this occasion the officer made his computation by taking first all the sums allocated to interest and entered in the interest register for that year, irrespective of the years in which these sums had actually been received by the assessee; he then resorted to the deposit register, noted the sums there shown as actually received in that year by the assessee but from which no allocations to interest had been carried to the interest register, made his own calculation of the proportions of interest comprised in such sums and added the result to the sum of the entries in the interest register for that year.

In computing the income of the assessee for the next year, viz., 1332 Fasli, being the income of the year of account with which their Lordships are concerned in this appeal, the assessing officer again took first the amount shown as credited in that year in the interest register, but on this occasion, less the sums which he had in the previous year taken into account from the deposit register and which now appeared in the interest register; he next examined the deposit register and in the case of sums there shown as received in 1332 Fasli but from which the assessee had made no allocation to interest account he himself calculated the proportion of each receipt

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which represented interest and added the result to the figure obtained, under the deduction stated, from the interest register.

The Commissioner states as follows the general question which in these circumstances arises for decision :—

1. "Assessees' method of accounting in respect of receipts from interest on loans being as described above, was the assessing officer's action in calculating the profits and gains of the previous year as he has done warranted by law?"

The Commissioner has not attached numbers to the various questions and their Lordships have found it convenient to number those which they have had to consider in the order in which they have dealt with them.

The authority empowering the income-tax officer to discard the assessee's method of accounting and to adopt a method of his own is to be found in section 13 of the statute which after enacting in general terms that income, profits and gains shall be computed in accordance with the method of accounting regularly employed by the assessee, goes on to provide *inter alia* that "if the method employed is such that in the opinion of the income-tax officer the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the income-tax officer may determine."

There can be no question that in the circumstances the income-tax officer was entitled to disregard the assessee's method of accounting and adopt a method of computation of his own. But the fact that the income-tax officer has justifiably proceeded on a basis and in a manner of his own in computing the assessee's income, profits and gains does not, of course, exempt his computation from examination on appeal and if it appears that he has adopted a wrong method the assessment may be set aside. Their Lordships have

therefore to consider whether the Commissioner and the learned Judges of the High Court were right in answering in the affirmative, as they did, the question above posed.

Now it will be observed at once that the method adopted by the income-tax officer has the result of bringing out a sum composed in part of actual interest receipts of the assessee in the year of computation and in part of sums received in previous years and allocated by the assessee to interest in that year. The question is whether this method or combination of methods was legitimate. That it was legitimate to ascertain in the first place the actual receipts of interest in the year of computation is undoubted. Was it legitimate to add the items which the assessee in the year of computation carried to interest account out of sums received in previous years? Was the officer entitled to treat these allocations as income of the year of computation?

Where an assessee keeps his books on a cash basis disclosed to the revenue authorities and the officer accepts that basis, it is clear that the calculation must be based on actual receipts in the year of computation. Here, however, the assessee kept his books on a hybrid system and it was his practice to enter sums as he received them in a deposit register not made available to the revenue authorities, without discriminating between interest and capital payments, and then subsequently to allocate and treat as income certain portions of these sums which he attributed to interest. What the officer is directed to compute is not the assessee's receipts but the assessee's income and *in dubio* what the assessee himself chooses to treat as income may well be taken to be income and to arise when he so chooses to treat it. (See *per* Lord Dunedin in delivering the judgment of the Board in *Commissioner of Taxes* v. *Melbourne Trust, Limited*.(1). The

(1) (1914) A. C. 1001, 1011.

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sums which the officer has brought into account from the interest register in so far as consisting of allocations from sums received in previous years have never borne tax and in their Lordships' opinion the assessee cannot complain if the officer agrees with the assessee in treating them as income of the year in which the assessee himself first thought fit so to regard them. Their Lordships see nothing contrary to principle in the computation of an assessee's total income for a particular year as consisting in part of actual receipts in that year and in part of sums carried by the assessee to income account in that year out of the receipts of previous years which have been held in suspense and no part of which has previously been returned as income. Their Lordships do not find that the income-tax officer in the present case has acted in any way illegally in computing the profits of the transactions in question for the year 1332 Fasli by taking into account both actual receipts of interest in that year and sums treated by the assessee in that year as receipts of interest by their transference to the interest register from what for this purpose may be regarded as a suspense account.

Their Lordships accordingly in the result find themselves in agreement with the affirmative answer rendered below to this question.

Their Lordships now pass to the consideration of two particular transactions as to which questions have arisen.

It appears that the assessee in respect of two mortgage decrees which he held against one Damodar Das Burman received payment in the relevant year of two sums of Rs. 3,400 and Rs. 2,78,000. The assessee appropriated the whole of the first of these sums to interest and no question arises with regard to it. As regards the second sum he appropriated only Rs. 18,816 to interest and claimed to attribute the balance towards the discharge of capital. The income-

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tax officer brought the whole sum of Rs. 2,78,000 into computation as an interest receipt and the commissioner and the High Court have agreed with him. The question as framed by the commissioner is as follows :—

2. "In the circumstances of this case, what portion of the amount received from Damodar Das Burman in the previous year is legally taxable?"

The facts as stated by the Commissioner are that the total amount of interest irrespective of whether it was paid or not, which had as a matter of calculation, accrued on the debt from the date of its commencement down to the date of the payment of Rs. 2,78,000 to the assessee in the year 1332 Fasli was Rs. 3,09,281. During the currency of the debt the debtor made regular payments over a number of years to the assessee, the total of which payments is not stated. These payments were entered in the deposit register but no allocations thereof were made as between principal and interest and no part of these payments was carried to the interest register. Consequently, no part of these payments was subjected to tax until the year Fasli 1331, when the deposit register became available to the income-tax officer. In that year the deposit register showed the receipt of Rs. 38,091 and on this the officer claimed and was paid tax on the footing that it was attributable to interest and not to principal. The result is that against the total interest on the debt, viz., Rs. 3,09,281 no sums had been attributed by the assessee to interest out of the payments made to him by the debtor down to the date of the receipt by him from the debtor of the sum of Rs. 2,78,000 in the year Fasli 1332, but that the income-tax officer had himself treated the sum of Rs. 38,091 received in the year Fasli 1331 as interest and taxed it accordingly. That leaves Rs. 2,71,190 as the balance of the total interest on the debt during its currency towards which balance the assessee made no attributions of interest out of the

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payments received by him from the debtor during its currency No tax has accordingly been paid in respect of any of these receipts other than the Rs. 38,091 which the officer treated as an interest payment in the year 1331 Fasli. How in those circumstances should the receipt of Rs. 2,78,000 in the year 1332 Fasli be treated? The assessee contends that the whole of this sum, other than a sum of Rs. 18,816 which he admits may be treated as a payment of interest, should be treated as a payment against the capital liability of the debtor. But at the date when the assessee received payment of the Rs. 2,78,000 he had not either in his own books or in relation to the tax collector as yet attributed any sum towards the debtor's liability in interest, apart from the sum of Rs. 38,091 which the officer in the previous year had treated as interest. So far as the assessee's interest register showed he had not treated himself as having received any interest and so far as that book, which he put forward to the revenue authorities as showing the interest which he had received is concerned, there was still outstanding the whole sum of Rs. 3,09,281 of interest, as against which must, of course, be set the sum of Rs. 38,091 taxed as interest in the preceding year. In disposing of the first question dealt with above their Lordships have held that the assessee can not complain if sums which he himself in a particular year treats in his interest register as interest received in that year are also treated by the revenue authorities as income of that year although such sums were in fact received in previous years. Similarly and conversely, their Lordships are of opinion that the assessee cannot complain if he is treated as not having received any payment of interest in years in which he made no appropriations to interest out of sums received by him in these years and neither disclosed such receipts to the revenue authorities nor made any return of any part of them as income. Their Lordships therefore approach the question of how the sum of Rs. 2,78,000 actually received in the year Fasli 1332

is to be dealt with on the footing that up to then no interest had been treated as paid out of the total of Rs. 3.09,281 due other than the sum of Rs. 38,091. Now where interest is outstanding on a principal sum due and the creditor receives an open payment from the debtor without any appropriation of the payment as between capital and interest, by either debtor or creditor, the presumption is that the payment is attributable in the first instance towards the outstanding interest (*Venkatradi Appa Row* v. *Parthasarathi Appa Row*(1). This presumption is no doubt operative primarily in questions between debtor and creditor, but in their Lordships' view, the income-tax officer, finding that the assessee received a payment from his debtor of Rs. 2,78,000 in the year Fasli 1332 and that the assessee had not up till then credited himself as having received any interest or disclosed or accounted for any interest receipts to the revenue authorities, was entitled in the circumstances to treat this sum of Rs. 2,78,000 as applicable to the outstanding interest to the extent of Rs. 2,71,190, and accordingly to treat the payment to that extent as income of the assessee in the year of payment. It will be noted that the result of this is that the assessee will be able to treat all the unallocated payments received by him in the years before 1331 Fasli as payments towards capital and none of these prior payments will have borne or can be called upon to bear tax. Under section 34 of the Act, the income-tax officer cannot re-open any assessment after the expiry of one year from the end of the year of original assessment.

Their Lordships therefore agree with the learned Judges of the High Court that the answer to this question is in figures Rs. 2,71,190.

The next question relates to the interest on the debt of one Amarnath Bose, against whom the assessee held a judgment. The debtor in the year 1332 Fasli

(1) (1921) I. L. R. 44 Mad. 570, 573; L. R. 48 I. A. 150, 153.

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made a payment to the assessee of Rs. 1,38,955. In his interest register for that year he appropriated and entered Rs. 20,000 out of this sum as interest, but he also entered in his interest ledger for that year a sum of Rs. 1,40,107 being appropriations then first made to interest out of sums received from the debtor in previous years, which, of course, had not borne any tax. The appropriations to interest by the assessee in his interest register for the year in question consequently amounted to Rs. 20,000+Rs. 1,140,107= Rs. 1,160,107. But of the Rs. 1,40,107 then first appropriated to interest by the assessee Rs. 80,000 was actually received by him in the year 1331 Fasli and was in that year subjected to tax by the revenue authorities, so that the balance of Rs. 60,107 represented appropriations to interest by the assessee out of sums received in years before 1331. This sum had never before been appropriated by the assessee to interest or treated by him as income in a question with the revenue and, following the principle already laid down by them, their Lordships are of opinion that it was properly regarded by the taxing officer as income of the assessee in the year in which he appropriated it to income.

The question on this topic which was stated by the Commissioner is thus expressed :—

3. "What is the amount of profits and gains arising out of the payments made by this judgment-debtor legally taxable in this year?"

Their Lordships agree with the High Court in answering that out of the appropriations to interest in the year of computation the total amount taxable is Rs. 60,107, over and above the porportion representing interest of the payment of Rs. 1,38,955 actually received in the year 1332, such proportion being admitted to be Rs. 1,23,906, so that the total sum chargeable with tax is Rs. 1,23,906+Rs. 60,107= Rs. 1,84,013.

Passing to the further questions raised in the case and omitting a transaction relating to a loan to a

Colonel Lewellyn as to which the assessee has acquiesced in the decision of the High Court, their Lordships have next to consider the estimate made by the income-tax officer of the income received by the assessee in the year of computation from the purchase of properties under mortgage decrees. The general question which was raised below on behalf of the assessee was not argued before their Lordships, namely, whether when a mortgagee purchases at auction under a decree of the Court the property which was the subject of the mortgage he can be said to have received to any extent the equivalent of the interest due on his mortgage. This question had been decided in the affirmative in a recent case of *Raja Raghunandan Prasad Singh* v. *Commissioner of Income-tax*(1), which their Lordships heard on appeal immediately after the present case and in which they are today delivering an affirmative judgment on this point, to which reference may be made(2). The assessee in the present case admitted the receipt of income in the year in question from this source to the extent of Rs. 4,364. This sum the income-tax officer increased to Rs. 1,04,364 and the question stated by the commissioner is :—

4. " Whether the assessing officer was right in making an estimate of Rs. 1,04,364 under this head as he has done?"

The Commissioner states that the assessee " keeps a suit register in which the progress of each case is supposed to be noted but no attempt is made to keep this register up to date and in fact the sum of Rs. 4,364 referred to above is shown neither in this register nor in the interest account. On referring to the history of assessments made in previous years I find that in the assessment made in the year 1924-25 while the assessee showed no income under this head the assessing officer estimated the income to be Rs. 6,00,000. This sum was reduced on appeal to

(1) (1929) I. L. R 9 Pat. 48.
(2) Ante, p. 305.

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two lacs and the order on appeal was maintained by the then Commissioner. In the assessment made in the year 1925-26 for similar reasons the assessing officer added back a sum of Rs. 3,00,000 without objection by the assessee. In that year assessee showed no income from this source in the return, but admitted in the course of assessment proceedings a receipt of Rs. 20,069 to which the assessing officer added back as stated above a sum of Rs. 3,00,000 without exception on the part of the assessee. Similarly in the year 1926-27 (the assessment with which we are now dealing) the assessee showed no income from this source in the statement filed with his return of income, but subsequently admitted realisation of Rs. 4,364 only." In the High Court the Chief Justice (Courtney Terrell) after pointing out that the question is one of quantum only, says:—"Learned counsel for the assessee has argued that the officer is not entitled to make a guess without evidence and I agree with that contention, but in this case the state of affairs in the previous years, coupled with the fact that the assessee had a large mortgage loan business and must have enforced mortgages by sale on many occasions, afford ample material for the assessment made. I would answer the question in the affirmative." The other Judges concurred and their Lordships also agree, adding only that if the assessee wished to displace the taxing officer's estimate, it was open to him to adduce evidence of all his purchase transactions during the year and of the financial results thereof, which he apparently made no attempt to do.

Their Lordships next turn to the consideration of a transaction between the assessee and one Kumar Ganesh Singh. In the year 1332 Fasli Kumar Ganesh Singh owed the assessee 32 lacs as principal and Rs. 6,09,571 as interest, or a total of Rs. 38,09,571 in all, in respect of an unsecured loan. In that year the assessee and his debtor entered into an arrangement whereby, as the commissioner states "the assessee took over from the debtor in satisfaction of

this amount the following items of property movable or immovable :—

		Rs.
(1) The Kajora Colliery, valued at	...	7,37,339
(2) Shares in different companies, valued at	...	94,125
(3) Bills receivable by the above brokers [*i.e.*, Ganesh Singh's firm]	... ...	48,809
(4) Decree	... ...	1,42,594
(5) Transfer of loan to the Agra United Company		10,00,000
(6) Pro-notes and hand-notes [of third parties]		52,106
(7) Hand-notes from Kumar Ganesh Singh	...	17,34,596
	Rs.	38,09,569 "

The Commissioner unfortunately omitted to formulate any question of law arising out of this transaction. The duty of the High Court under section 66(5) is to " decide the questions of law raised " by the case referred to them by the Commissioner and it is for the Commissioner to state formally the questions which arise. Here the High Court itself formulated the question to be decided as being—

— 5. " Whether the interest (*i.e.*, the sum of Rs. 6,09,571 due as interest by the debtor) can be considered to have been received and assessable?"

Their Lordships deprecate this departure from regular procedure, but in the circumstances have not thought it proper to decline to express their view on the question thus informally presented.

The Commissioner's opinion was that the transaction when rightly viewed amounted to the acceptance by the assessee from his debtor, in lieu and satisfaction of the capital and interest due to him, of assets and securities *prima facie* worth the valuation put upon them and that as the assessee had thus received payment in kind of the interest due to him in full, he should be assessed accordingly. There is, of course, no doubt that a liability to pay interest, like a liability to make any other payment, may be satisfied by a transference of assets other than cash

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and that a receipt in kind may be taxable income. But for this to be so it is essential that what is received in kind should be the equivalent of cash or, in other words, should be money's worth [*Californian Copper Syndicate* v. *Harris*(1) : *Scottish and Canadian General Investment Company* v. *Easson*(2), both cited by Das, J. below]. Now here the first six items, amounting to Rs. 20,74,973, may perhaps reasonably enough be regarded as the equivalent of cash, but the seventh item of Rs. 17,34,596, consisting of the debtor's own promissory notes, was clearly not the equivalent of cash. A debtor who gives his creditor a promissory note for the sum he owes can in no sense be said to pay his creditor; he merely gives him a document or voucher of debt possessing certain legal attributes. So far then as this item of Rs. 17,34,596 is concerned the assessee did not receive payment of any taxable income from his debtor or indeed any payment at all. In so holding their Lordships find themselves in agreement with the learned Judges of the High Court who differed on this point from the Commissioner.

This conclusion seems to have been regarded in the High Court as decisive of the whole question, but before their Lordships an argument was submitted for the Crown which does not appear to have been advanced below. Assuming that the first six items, amounting to Rs. 20,74,973, may be treated as money's worth, Counsel for the Crown contended that this sum, which far exceeded the total amount of interest due, must be treated as applicable in the first place to the discharge of the debtor's liability for interest. He relied on the presumption, already invoked in the case of Damodar Das Burman above, that a creditor is presumed to apply payments received from his debtor towards the extinction of interest claims before capital claims. But the situation which their Lordships are now considering differs materially from that which existed in the case of Damodar Das Burman. In that

(1) (1904) 6 F. 894; 5 Tax. Cas. 159.
(2) (1922) S. C. 242; 8 Tax. Cas. 295.

case, apart from other specialities, there was no settlement, but merely an open payment to account. Here there was an arrangement affecting the whole indebtedness whereby certain assets were accepted in part satisfaction and promissory notes were taken for the balance. The basis of the presumption, namely, that it is to the creditor's advantage to attribute payments to interest in the first place, leaving the interest-bearing capital outstanding, is gone. Moreover, if the question were one between Kumar Ganesh Singh and the assessee, i.e., between debtor and creditor, the assessee might up to the last moment appropriate the Rs. 20,74,973 to capital account [*Cory Brothers and Company* v. *Owners of the* "*Mecca*"(1)] and there is authority for the proposition that in a question with the revenue the taxpayer is entitled to appropriate payments as between capital and interest in the manner least disadvantageous to himself [*Smith* v. *Law Guarantee and Trust Society, Limited*(2)]. Their Lordships have also not omitted to bear in mind the provisions of sections 60 and 61 of the Indian Contract Act, though these were not relied on in argument as applicable to the case. In the result their Lordships are of opinion that, having regard to the nature of the transaction, the assessee is entitled to say that he has accepted the first six items in discharge *pro tanto* of his debtor's capital liability and that the capital debt now stands discharged to that extent. No part of the sum of Rs. 20,74,973 accordingly was received by the assessee as taxable income in the year of computation. The result is that the Commissioner's appeal against the answer of the High Court to the fifth question fails.

A subsidiary point arose as to the year to which this income, if it was received, ought to be attributed. The Commissioner put the question—

6. "Whether if any sum is held to have been realised, it was legally recovered in the year 1331 or in the year 1332?"

(1) (1897) A. C. 286.
(2) (1904) 2 Ch. 569.

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The Judges of the High Court agreeing with the Commissioner expressed the view that if there was any receipt of interest it was attributable to the year 1332. The learned Chief Justice stated that it was "conceded on both sides that the instrument of transfer was executed and dated on April 29th, 1925, that is, in 1332, and that the title to the assets conveyed passed on that date. Had the amount of interest been assessable it would have been assessable in respect of 1332". Their Lordships agree, and the answer of the High Court to the question will be affirmed.

The next question is of a different character. When Kumar Ganesh Singh, who was a sub-lessee of the Kajora Colliery, transferred it to the assessee as of the value of Rs. 7,37,339 he represented it to be free from encumbrances. The assessee subsequently discovered that there were arrears of fixed or dead rent due to the superior landlord to the extent of Rs. 67,872. The assessee paid this sum to the superior landlord and now claims to deduct it from his assessment. In this instance, their Lordships are concerned with the computation of the profits or losses of a business under section 10 of the Act, for the assessee was carrying on the business of a colliery owner.

The question arising in respect of this matter is put thus by the commissioner:—

7. "Whether the assessee is legally entitled to deduct the arrears of royalty which had accrued in previous years up to the date of his possession?"

The relevant provisions of the Indian Income-tax Act are contained in section 10 which enacts in sub-section (*2*) that the profits or gains of a business shall be computed "after making the following allowances, namely:—

(*i*) any rent paid for the premises in which such business is carried on.....

* * * *

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

Sub-section (*3*) provides that :—

"In sub-section (*2*) the word 'paid' means actually paid or received according to the method of accounting upon the basis of which the profits or gains are computed under this section."

The Commissioner was of opinion that the question which he had stated should be answered in the negative, on the two grounds that "admittedly" the assessee was entitled to recover from Kumar Ganesh Singh the arrears of rent for the period prior to the assessee's possession, and that royalties were not rent within the statutory meaning. The High Court answered the question in the affirmative, holding that royalties may properly be considered as rent; that it was "a condition without which further mining operations could not be effected"; that payment should be made of the arrears which were "of the nature of a charge in the year 1332"; and that as the previous tenants had not paid their rent during the period in arrear they had not been able to deduct rent in their returns, and there was no reason why, when the arrears came to be paid, they should not be deducted as though they had accrued in the year in which they were paid.

In their Lordships' view the solution of the problem is to be found in a consideration of the nature of the particular transaction out of which it has arisen. The assessee agreed to accept the transfer of the colliery in part satisfaction of Kumar Ganesh Singh's liability to him on the footing that it was value for Rs. 7,37,399. Had he known, what was concealed from him, that arrears of unpaid rent had accumulated which he would have to pay to the superior landlord, he would have correspondingly diminished the sum at which he was prepared to take over the colliery and, according to the commissioner, it was admitted that the assessee has a claim against Kumar Ganesh Singh for the difference, although he may not be able to recover it. If it were recovered, it would properly be credited in diminution of the figure at which the colliery was taken over and would not enter the profit and loss

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account of working the colliery. From this it follows that the sum overpaid by the assessee for the colliery cannot properly be described as a loss sustained by him on income account. It is a sum which was payable by him in order to get possession of the colliery, not a sum expended by him in the carrying on of the colliery. It is not rent for any period of his possession, nor is it an expenditure incurred by the assessee for the purpose of earning the profits or gains of the colliery business. If the assessee paid it without any legal liability or necessity on his part to do so, such a voluntary payment is not a permissible deduction from income. Their Lordships are therefore of opinion that in the circumstances of this transaction the question should be answered in the negative.

Their Lordships have now dealt with all the questions which were argued before them. The result is the affirmation of the decision of the High Court, except as regards question 7 as above numbered, on which their Lordships are of opinion that the appeal of the Income-tax Commissioner should be allowed, the finding of the High Court reversed and the Order of the Commissioner of the 24th May, 1927, restored.

Their Lordships desire to draw attention to the inconvenience which has arisen from the omission on the part of the Commissioner to number the questions which he has stated. It is desirable that the questions of law which the Commissioner refers to the High Court should, for convenience of reference, be assembled and numbered consecutively at the end of the stated case. Their Lordships have also been embarrassed in disposing of the appeal by the absence of a formal decree by the High Court following upon their judgment of the 25th November, 1929. Their Lordships have nothing before them to show whether, and if so how, the costs in the case were dealt with below.

Their Lordships will humbly advise His Majesty that in these consolidated appeals (1) the appeal of the

Commissioner of Income-tax so far as relating to the seventh question as above numbered be allowed, the judgment of the High Court reversed, and the Order of the Commissioner of the 24th May, 1927, restored, and as regards the other questions on which he appealed be dismissed; (2) the appeal of the Maharajadhiraj of Darbhanga be dismissed; and (3) the case be referred back to the High Court in order that effect may be given to the Order to be pronounced herein by His Majesty in Council.

Inasmuch as the Commissioner of Income-tax has been successful on one of the two points on which he appealed and the assessee has been unsuccessful on all the points of his appeal, the Commissioner will have three-fourths of his costs of the consolidated appeals before this Board. The costs below will be dealt with by the High Court, on the case going back to it.

Solicitor for Commissioner: *Solicitor, India Office.*

Solicitors for assessee: *H. S. L. Polak and Company.*

CRIMINAL REFERENCE.

Before Macpherson and Agarwala, JJ.

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Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 192(*1*)—"*case of which he has taken cognizance*" *meaning of—subdivisional magistrate, cognizance taken by, on charge-*

* Criminal Reference no. 95 of 1932 made by Rai Bahadur Surendra Nath Mukharji, District and Sessions Judge, Patna, in his letter no. 2625/WR., dated the 9th December, 1932.

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sheet submitted by police—case transferred to subordinate magistrate "for disposal"—order, effect of—subordinate magistrate alone in seisin of the case—order of subdivisional magistrate calling for supplementary charge-sheet against other accused persons concerned in the offence, whether legal.

Section 192(*1*), Code of Criminal Procedure, 1898, lays down :—

"Any Chief Presidency Magistrate or Subdivisional Magistrate may transfer any case, of which he has taken cognizance, for inquiry or trial, to any Magistrate subordinate to him."

Held, that "case of which he has taken cognizance", occurring in section 192(*1*), means nothing more than "the judicial investigation into any offence of which he has taken cognizance".

Where, therefore, a subdivisional magistrate, having taken cognizance of an offence on a charge-sheet submitted by the police, made over to a subordinate magistrate the charge-sheet and the accused forwarded by the police with an order that the transfer was "for disposal", and subsequently on an application being made to him, the subdivisional magistrate called for a charge-sheet against some of the other accused persons named in the original charge-sheet but whom the police did not propose to send up for trial.

Held, (*i*) that the effect of the order of transfer was that the whole case, namely, the judicial investigation into the offence, and not merely the judicial investigation into the offence so far as regards the particular accused, was made over to the subordinate magistrate;

Ajab Lal Khirher v. *Emperor*(1), followed.

(*ii*) that the subordinate magistrate alone had seisin of the case and no other magistrate was competent to deal with it and, therefore, the order of the subdivisional magistrate calling for a supplementary charge-sheet against some other accused persons concerned in the offence was without jurisdiction.

Golapdy Shaikh v. *Queen-Empress*(2), followed.

(1) (1905) I. L. R. 32 Cal. 783.
(2) (1900) I. L. R. 27 Cal. 979.

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Reference made by the Sessions Judge under section 438 of the Code of Criminal Procedure, 1898.

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

S. P. Varma (with him *Saileswar De* and *B. B. Mukharji*), in support of the reference.

Naqi Imam and *Ramnandan Prasad*, against the reference.

MACPHERSON, J.—The Sessions Judge of Patna has referred the case of Deonarain Singh and five others who are on their trial before Maulavi S. A. Ashraf, Deputy Magistrate of Patna, with the recommendation that the order of the Subdivisional Magistrate dated the 3rd October last, calling for a supplementary charge-sheet against these six persons and one other be set aside as being without jurisdiction.

The police submitted a charge-sheet in which they mentioned twenty-two persons. Of these nine were sent up on bail and of the other thirteen noted as "accused persons not sent up for trial" six were shown as absconders. When the charge-sheet was placed before the Subdivisional Magistrate on the 19th September, he passed the order "Charge-sheet received against nine accused. To Maulavi S. A. Ashraf, Deputy Magistrate, for disposal". Technically he was probably in error in saying that the charge-sheet had only been received against nine persons.

The case came on for hearing before the Deputy Magistrate on the 27th September. Apparently five of the persons described as absconders then appeared before him and the trial was taken up against fourteen persons in all without any comment by the Court, the Crown or the parties. On the same day a petition was filed before the Subdivisional Magistrate praying that a charge-sheet should be called for against the remaining seven accused (that is to say, the seven whom the

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police did not propose to send for trial) to avoid piecemeal trial. The Subdivisional Magistrate sent it to the Deputy Magistrate for necessary orders. Apparently owing to something which took place in the Court of the latter Magistrate, a further petition was filed before the Subdivisional Magistrate making the same request in view of the fact that the Deputy Magistrate 'could not dispose of the matter as he was not specially empowered to take cognizance of cases'. As a result of consultation between the two Magistrates, the Deputy Magistrate examined the diaries and on the 1st October gave it as his opinion that a charge-sheet might be called for in respect of those persons but guarded himself against a definite recommendation, leaving the matter for decision of the Subdivisional Magistrate. On the 3rd October the Subdivisional Magistrate called for a charge-sheet and when it was received, made a transfer to the same Deputy Magistrate "for favour of disposal". The two trials proceeded, to the stage of defence in the former case which was reached on the 11th November and in the latter case to the 21st November on which the case was postponed for argument and orders, to the 13th December prior to which the present reference had been made. It is a pity that the first case was not at once disposed of.

The learned Sessions Judge finding that the case of the petitioners is not distinguishable on principle from the line of authorities beginning with *Golapdy Shaikh* v. *Queen-Empress*(1) submits that the order of the 3rd October is without jurisdiction and recommends that it be set aside.

Mr. S. P. Varma relies upon the case referred to in *Radhabullav Roy* v. *Benode Behari Chattarji*(2) and several other decisions of the Calcutta High Court and also upon *Shukadeva Sahay* v. *Hamid Mian*(3). As to the last-mentioned case, it has recently been

(1) (1900) I. L. R. 27 Cal. 979.
(2) (1902) I. L. R. 30 Cal. 449.
(3) (1927) I. L. R. 7 Pat 561.

dissented from by a Bench of this Court in *Uma Singh* v. *King-Emperor*(1) but not on the point before us. It is clear that on the 19th September the learned Subdivisional Magistrate did make over the whole case ' for disposal ' and not merely the case against the nine accused whom the police had sent up on bail. Just as the Deputy Magistrate began the trial of the absconders who appeared before him, though they were not actually sent up by the police nor specifically covered by the order of transfer to him, he was, in my opinion, entitled to pass such orders as seemed to him fit in respect of the seven accused not sent up by the police who were not shown as absconders. It is true that in section 190(*1*) of the Code of Criminal Procedure the reference is to a magistrate taking cognizance of any offence, whereas section 192(*1*) authorizes certain superior magistrates to transfer any case of which they have taken cognizance. The difference in language has given rise to many surmises. But the correct view appears to be that ' case of which he has taken cognizance ' means nothing more than ' the judicial investigation into any offence of which he has taken cognizance '. Since 1900 when the decision in *Golapdy Shaikh* v. *Queen-Empress*(2) was given, there has been a *cursus curiae* that once the Subdivisional Magistrate having taken cognizance of an offence on a charge-sheet submitted by the police in circumstances like the present, has made over to a subordinate magistrate the charge-sheet and the accused forwarded by the police in custody or bail with an order that the transfer is " for disposal ", he has made over the judicial investigation into the offence and not merely the judicial investigation into the offence so far as regards the particular accused. At one time the subdivisional magistrate or joint magistrate made a distinction between making over a case " for disposal " and making it over " for hearing ", it being understood that in the latter case he did not purport to make over the whole case. With regard to this

(1) (1932) I. L. R. 12 Pat. 234.
(2) (1900) I. L. R. 27 Cal. 979.

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practice, Henderson, J., in *Ajab Lal Khirher* v. *Emperor*(1) said : " Whether such a transfer is made is a question of fact depending on the intention of the Officer making the order, which intention must be gathered from the order itself. Where no reservation is made as in the cases cited and in the case before us, I should certainly conclude that the entire case (in the sense abovementioned) had been transferred." In the present instance, the order itself appears to show that the whole case was made over. If the whole case was made over, the Deputy Magistrate had full seisin of it. In my opinion, in such circumstances it was not open to the Subdivisional Magistrate, unless he proceeded under section 528, to pass any orders with regard to the case and in particular to call for a charge-sheet against the petitioners. Manifestly he did not act under section 528.

In these circumstances, I see no reason for failing to follow the *cursus curiae* and I would hold that the learned Subdivisional Magistrate was not authorized by law to pass the order of the 3rd October which has been referred to us. I would, therefore, accept the reference and set aside that order.

The case against the fourteen accused who are on their trial, should be disposed of without further delay. As soon as he has passed orders in that case the learned Deputy Magistrate should consider whether these petitioners and the seventh accused who has not surrendered and the absconders should be placed on their trial before him. If he decides to place them on their trial, it is hoped that in view of the time already spent over the proceedings, the new trial will be conducted with all reasonable expedition.

Let the records be sent back forthwith.

AGARWALA, J.—I agree.

Reference accepted.

(1) (1905) I. L. R. 32 Cal. 783.

REVISIONAL CRIMINAL.

Before James and Agarwala, JJ.

MOONGA LAL KEOT

v.

THE KING-EMPEROR.*

1933.

Feb. 1.

Extradition Act, 1903 (*Act XV of* 1903), *sections* 7, 8*A and* 18—*Treaty with Nepal—Article V*—" *neither Government shall be bound to surrender* ", *meaning of—provisions of the Act, whether take away the discretion given by Treaty —Article V, whether excludes the operation of section* 7—*extradition sought against British subject—discretion in Local Government under the terms of Treaty—procedure to be followed—Government, exercise of powers under the Act by—Municipal courts, whether can interfere on the ground that Government had undertaken to act otherwise by Treaty.*

The Indian Extradition Act, 1903, is the law of the land, not, so far as the third Chapter is concerned, to be applied for this or that country by Order in Council or by any special means. If some special procedure has been arranged by Treaty, section 18 of the Act provides that it may be followed; but if the Government should choose to exercise the powers given by the Act, no Municipal court can interfere on the ground that the Government had undertaken to act otherwise by Treaty.

Article V of the Treaty between the East India Company and the Nepal State provides :—

" In no case shall either Government be bound to surrender any person accused of an offence, except upon requisition duly made by, or by the authority of, the Government within whose territories the offence shall be charged to have been committed, and also upon such evidence of criminality, as according to the laws of the country in which the person accused shall be found, would justify his apprehension, and sustain the charge if the offence had been there committed."

Held, (*i*) that the provision that neither Government shall be bound to surrender is to be read in its ordinary sense, as implying that each Government retains a right to exercise its discretion in the matter of the surrender of its own subjects.

In re Galwey(1), followed.

* Criminal Revision no. 25 of 1933, against the order of L. A. Duff, Esq., Subdivisional Officer of Supaul, dated the 3rd of January, 1933.

(1) (1896) 1 Q. B. 230.

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(*ii*) that the provisions of the Extradition Act do not take away the discretion of the Local Government or injuriously affect its exercise in such a way as to derogate from the provisions of the Treaty, and, therefore, that Article V does not exclude the operation of section 7 of the Act;

(*iii*) that if the person whose extradition is sought is a British subject in whose favour this discretion might possibly be exercised by the Local Government, he should raise the point before the District Magistrate, who would then refer the matter for the orders of the Local Government under section 8A of the Act.

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

S. N. Sahay and *R. N. Lal*, for the petitioners.

Sir Sultan Ahmad, Government Advocate, for the Crown.

JAMES, J.—This is a proceeding under section 491 of the Code of Criminal Procedure. The British Envoy at Nepal issued a warrant under section 7 of the Indian Extradition Act of 1903 for the arrest and extradition of the petitioners for certain offences reported to have been committed in Nepal. The District Magistrate took the statements of the petitioners and reported the matter to the Local Government under section 8A of the Act, incorporating in his report the findings of the Subdivisional Magistrate of Supaul on an enquiry which he has conducted at an earlier stage when it was understood that these persons would be tried in British India under section 188 of the Code of Criminal Procedure. The District Magistrate reported that the petitioners were residents of British India; but the Local Government after examining the records decided that there would be no justification for refusing extradition and directed that the petitioners should be made over to the Government of Nepal.

Mr. Sri Narain Sahay on behalf of the petitioners argues in the first place that the Local Government has no power to order extradition of British subjects to

Nepal, and, secondly, that in any event the issue of a warrant under section 7 of the Extradition Act against British subjects is illegal, because in any reading of the Treaty with Nepal a discretion is retained as to whether a British subject shall or shall not be surrendered. He also argues that the procedure adopted is repugnant to the provisions of the fifth article of the Treaty of 1855, which provides that neither Government shall be bound to surrender any person, except upon requisition duly made by the authority of the Government within whose territories the offence is charged to have been committed, and also upon such evidence of criminality, as according to the laws of the country in which the person accused shall be found, would justify his apprehension, and sustain the charge if the offence had been there committed. It is suggested that the provision in these articles that neither Government shall be bound to surrender should be read as meaning that neither Government shall in any circumstances surrender.

If the treaty with Nepal contained, as according to Mr. Sri Narain Sahay it does contain, an express prohibition against surrender of British subjects, it is possible that the protection of the High Court might be claimed for British subjects, as it was claimed and granted by the Queen's Bench in *Wilson's* case(1). In that case the Government of Switzerland had applied for the extradition of a British subject, which was prohibited by the Treaty; but it may be remarked that the terms of the Order in Council, which made the Extradition Act applicable to Switzerland, limited its application to cases governed by the Treaty. The Indian Extradition Act provides that nothing in the Act shall apply in derogation of treaty powers: but I doubt whether this provision can be properly treated by Municipal Courts as taking away from Government power given by the Act, merely because the power may have been previously limited by Treaty. There is a difference between the limitations imposed

(1) (1877) 3 Q. B. D. 42.

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by section 18 of the Indian Extradition Act on the one hand and an Order in Council on the other reciting the Treaty, and making the English Statute applicable only subject to the conditions of the Treaty. As my learned brother pointed out during the argument, the Indian Extradition Act is the law of the land, not, so far as the third chapter is concerned, to be applied for this or that country by Order in Council or by any special means. If some special procedure has been arranged by Treaty, section 18 of the Act provides that it may be followed; but if the Government should choose to exercise the powers given by the Act, no Municipal Court could interfere on the ground that the Government had undertaken to act otherwise by Treaty.

This question does not really arise, because the meaning of the words " shall not be bound " has been determined by authority. In nearly all the extradition treaties some provision is made either prohibiting the extradition of subjects of the country from whom extradition may be demanded, or leaving the matter within the discretion of that Government. The question of what is the meaning of the provision that the Government shall not be bound, which is found in the Treaty with Nepal, was considered by the Queen's Bench in *Galwey's* case(1). The extradition treaty with Belgium provides that

> " in no case, nor on any consideration whatever, shall the high contracting parties be bound to surrender their own subjects ".

Lord Russell of Killowen, with whom his companion Judges concurred, held in that case that the provision implied that the British Government retained a discretion as to whether British subjects should be surrendered. It was found that there was no prohibition against surrender, such as was contained in the treaty with Switzerland which had come under consideration in *Wilson's*(2) case. It appears to be clear that the provision that neither Government shall be

(1) (1896) 1 Q. B. D. 230.
(2) (1877) 3 Q. B. D. 42.

bound is to be read in its ordinary sense, as implying that each Government retains a right to exercise its discretion in the matter of the surrender of its own subjects.

Mr. Sri Narain Sahay argues in the second place that though the second article may merely mean that the Local Government is entitled to exercise its discretion in the matter of surrendering British subjects, the fact that that discretion is retained must necessarily require the Government of Nepal to take action under section 9 of the Indian Extradition Act for the extradition of British subjects, and that it must exclude the operation of section 7. Section 18 of the Indian Extradition Act provides that nothing in Chapter III of the Act shall derogate from the provisions of any Treaty for the extradition of offenders, and that the procedure provided by any such treaty shall be followed in any case to which it applies. It is argued on behalf of the petitioners that the issue of a warrant by the British Envoy addressed to the District Magistrate of the district in which the fugitive offender may be would be in derogation of the provisions of the Treaty, because where a discretion is retained by Government, the requisition should in the first place be addressed to the Local Government, since otherwise if the District Magistrate should surrender a fugitive offender without reference to Government, the Local Government would be prevented from exercising the discretion which is vested in it by the Treaty. The law of extradition, so far as the powers of Local Governments or the Government of India in dealing with British subjects are concerned, is contained in the Indian Extradition Act (XV of 1903). Section 7 of that Act provides that when an extradition offence has been committed or is supposed to have been committed by a person not being a European British subject, and such person escapes into or is in British India, and the Political Agent issues a warrant, addressed to the District Magistrate of the district in which such person is believed to be,

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the Magistrate will in due course proceed to execute it. Under section 8A, the Magistrate may report the case for orders of the Local Government; and by section 15 the Government of India or the Local Government may stay the proceedings, or may direct that the warrant be cancelled. It may be true that under the Treaty the Local Government has absolute discretion to refuse to surrender a British subject to the Government of Nepal; but it is difficult to see how the provisions of the Indian Extradition Act take away that discretion or injuriously effect its exercise in such a way as to derogate from the provisions of the Treaty. It appears to be clear that if the person whose extradition is sought is a British subject in whose favour this discretion might possibly be exercised by the Local Government, he should raise the point before the District Magistrate, who would then refer the matter for the orders of the Local Government under section 8A of the Act as was done in the present case, when the Local Government after considering all the circumstances came to the conclusion that there would be no justification for refusing extradition.

Mr. Sri Narain Sahay suggests that the procedure followed is in contravention of the fifth article of the Treaty; but the fifth article leaves a discretion to Government; and it is not for us to dictate whether the Government should proceed in accordance with the law or should take its stand on the Treaty. In this particular case, the British Envoy forwarded with his warrant a requisition from the Prime Minister himself, requesting him to take steps for the arrest and surrender of the persons accused. It does not appear that the warrant issued by the British Envoy was illegal; and there would be no justification for any interference with the order that the petitioners shall be surrendered. The rule must, therefore, be discharged, and the application must be rejected.

AGARWALA, J.—I agree.

Rule discharged.

REVISIONAL CRIMINAL.

Before James and Agarwala, JJ.

HARI CHARAN MISRA

v.

THE KING-EMPEROR.*

1933.

Feb. 17.

Criminal trial—commitment on a charge of criminal conspiracy—Penal Code, 1860 (*Act XLV of* 1860), *sections* 467 *and* 471*—sanction of Local Government not obtained—Code of Criminal Procedure,* 1898 (*Act V of* 1898), *section* 196*A*(2)*—Sessions Judge, refusal of, to record a sentence either of acquittal or conviction—order, whether improper or illegal—initiation of fresh proceeding under Chapter XVIII, whether legal—High Court, power of, to quash illegal commitment at any stage.*

The accused persons were committed for trial by the magistrate on a charge of criminal conspiracy punishable under section 120B read with sections 467 and 471 of the Penal Code, 1860. By the provisions of section 196A(2) of the Code of Criminal Procedure, 1898, the sanction of the Local Government was necessary to the initiation of proceedings before the court could take cognizance of the offence; but the sanction had not been obtained. The trial proceeded to the stage at which the opinion of the assessors was taken when it was brought to the notice of the Assistant Sessions Judge that he had no power to deal with the case. The Judge then held that the trial which had taken place was ab initio void, and he passed no sentence of conviction or acquittal. He directed that the District Magistrate should be informed of the facts and that the accused persons should remain in the position in which they were before the enquiry began. After the order had been recorded by the Judge, sanction from the Local Government was obtained to the prosecution under sections 467 and 471 read with section 120B of the Penal Code. A fresh complaint was made and the magistrate proceeded to hold a new enquiry under Chapter XVIII of the Code. The accused moved the High Court for staying further proceedings in this enquiry on the ground that the Judge acted illegally in failing to deliver final judgment, and that the trial before him must be treated as still pending.

* Criminal Revision no 13 of 1933, from an order of Babu Narendra Nath Banerji, Assistant Sessions Judge of Bhagalpur, dated the 14th March, 1932.

1938.

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Held, (*i*) that no court had power to take cognizance of the offence of criminal conspiracy unless the Local Government had by an order in writing consented to the initiation of the proceedings, so that the whole proceedings were ab initio void, the commitment was void, and the trial was void and the Judge had no jurisdiction to pronounce a verdict either of acquittal or conviction;

(*ii*) that, therefore, the order of the judge was neither improper nor illegal.

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

Nathu Rewa v. *Emperor*(2), not followed.

Kambala Narayana, In re(3) and *Ramprasad Guru* v. *The King-Emperor*(4), distinguished.

Sheikh Muhammad Yasin v. *King-Emperor*(5) and *Banerji* v. *Bepin Behary Ghosh*(6), referred to.

(*iii*) that although the High Court has power to quash an illegal commitment at any stage of the case, there were in fact no proceedings pending under the illegal commitment which required to be quashed;

(*iv*) that, therefore, there was nothing which stood in the way of the fresh proceeding under Chapter XVIII of the Code which called for an interference by the High Court.

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

D. P. Sinha and *K. N. Lal*, for the petitioner.

Assistant Government Advocate, for the Crown.

JAMES, J.—The petitioner was committed for trial by the Deputy Magistrate of Bhagalpur on a charge of criminal conspiracy punishable under sections 467 and 471 of the Indian Penal Code. By the provisions of section 196A(*2*) of the Criminal

(1) (1924) I. L. R. 3 Rang. 95.
(2) (1915) 31 Ind. Cas. 1000.
(3) (1919) 50 Ind. Cas. 832.
(4) (1929) 11 Pat. L. T. 433.
(5) (1926) I. L. R. 5 Pat. 452.
(6) (1925) 30 Cal. W. N. 382.

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Procedure Code the sanction of the Local Government was necessary to the initiation of proceedings before the court could take cognizance of the offence; but this sanction had not been obtained. The trial proceeded to the stage at which the opinion of the assessors was taken, when it was brought to the notice of the Assistant Sessions Judge that he had no power to deal with the case. He then held that the trial which had taken place was ab initio void, and he passed no sentence of conviction or acquittal. He directed that the District Magistrate should be informed of the facts, and that the accused persons should remain in the position in which they were before the enquiry began.

The case had been originally instituted on the complaint of the local Superintendent of Post Offices. After the order had been recorded by the Assistant Sessions Judge, sanction from the local Government was obtained to the prosecution under sections 467 and 471 read with section 120B of the Indian Penal Code. A fresh complaint was made and the Magistrate proceeded to hold a new enquiry under Chapter XVIII of the Criminal Procedure Code. We are asked to stay further proceedings in this enquiry on the ground that Assistant Sessions Judge acted illegally in failing to deliver final judgment, and that the trial before him must be treated as still pending. The learned Advocate for the petitioner argues that the Assistant Sessions Judge, when he had once entered on the trial, had no alternative but to proceed to judgment. He cites the decision in the case of *Nathu Rewa* v. *Emperor*(1) wherein a Sessions Judge finding at the end of the trial that there had been a misjoinder of charges cancelled the trial, and decided to hold a fresh trial against the accused. The Bombay High Court held that when the Sessions Judge had reached the stage at which the assessors' opinion had been recorded, he had no option but to deliver judgment in accordance with the provisions of the

(1) (1915) 31 Ind. Cas. 1000.

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Criminal Procedure Code. The learned advocate cites also the case of *Kambala Narayan*(1); but in that case it was merely pointed out that where a Sessions Judge was trying one offence with the aid of a jury, and another offence with the aid of assessors, the fact that he found it necessary to make a reference under section 307 of the Code of Criminal Procedure against the verdict of the jury did not absolve him from his duty to give judgment on the charge that he had tried with the aid of assessors. But the learned Assistant Sessions Judge in dealing with the present case remarked that this was a case in which the proceedings were ab initio illegal. In the case of *Abdul Rahman* v. *King-Emperor*(2), which is quoted by the learned Assistant Sessions Judge, the District Magistrate had taken cognizance of an offence punishable under section 120B, which required previous sanction of the local Government under section 196A of the Criminal Procedure Code, without obtaining that sanction. It was pointed out by Robinson, J. that the whole of the proceedings were ab initio without jurisdiction and illegal. In that case, as in the present case, no court had power to take cognizance of the offence of criminal conspiracy unless the local Government had by an order in writing consented to the initiation of the proceedings, so that the whole proceedings were ab initio void, the commitment was void, and the trial was void and the Assistant Sessions Judge had actually no jurisdiction to pronounce a verdict either of acquittal or of conviction. The learned Advocate quotes the case of *Ramprasad Guru* v. *The King-Emperor*(3) wherein this Court, dealing with an offence committed outside British India for which the sanction of the Political Agent was necessary in order to give jurisdiction to the British Court, recorded an order acquitting on appeal the person who had been convicted. In that case, to which I was a party, the form of the order must, I think, be admitted to have

(1) (1919) 50 Ind. Cas. 832.
(2) (1924) I. L. R. 3 Rang. 95.
(3) (1929) 11 Pat. L. T. 433.

been incorrect and it was apparently made by inadvertence. The order should have been that the conviction was set aside and not that the accused was acquitted.

It is not easy to say what useful purpose could be served by an order such as the learned Advocate suggests should be made by the Assistant Sessions Judge. We cannot order him to record judgment in accordance with the ordinary procedure, for that would be to order him to acquit or convict. He cannot convict because he has no jurisdiction to entertain the charge, for want of the sanction of the local Government. He cannot acquit in such a manner that his acquittal will have the effect under section 403 of the Criminal Procedure Code of staying further proceedings : [*Sheikh Muhammad Yasin* v. *The King-Emperor*(1); *Banarji* v. *Bepin Behary Ghosh*(2)]. It does not appear that the order which he has recorded is in any way improper or illegal. The learned Sessions Judge, when the application was made before him, for revision of the order of the Subdivisional Magistrate to issue process on the second complaint, treated the order of the Assistant Sessions Judge as made under section 532 of the Criminal Procedure Code. The learned Advocate for the petitioner points out that section 532 applies only to those cases, in which the Magistrate who made the complaint purported to exercise powers duly conferred which had not been so conferred; and that neither of the two alternative courses prescribed by the section were open to the Assistant Sessions Judge in this case. The Sessions Court may accept the commitment, or in the alternative it may quash the commitment and direct fresh enquiry by a competent Magistrate. The Assistant Sessions Judge could not in this case accept the commitment, because the Magistrate had no jurisdiction to entertain the charge, and the Assistant

(1) (1926) I. L. R. 5 Pat. 452.
(2) (1925) 30 Cal. W. N. 882.

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Sessions Judge in the circumstances had no jurisdiction to try it. He could not adopt the alternative procedure of quashing the commitment and directing a fresh enquiry by a competent Magistrate, because so long as the sanction of Government for the prosecution was wanting, no Magistrate was competent to hold the enquiry. There has been some discussion in this Court on the question of whether it is now open to us to quash the original commitment of the Assistant Sessions Judge under section 215 of the Criminal Procedure Code. It appears to us that there is no reasonable ground for holding that the High Court has no power to quash an illegal commitment at any stage of the case, as was held in *The Empress* v. *Shibo Behara*(1); but no order quashing the commitment is necessary in the present case. The commitment was void ab initio; and although if proceedings under that illegal commitment had been actually pending at present against the petitioner, it might have been necessary to quash them, there are now no proceedings pending which require to be quashed by any order of this Court, since the Assistant Sessions Judge himself discovered that the commitment was void ab initio; and that neither he nor any other court had any power on those proceedings to record a judgment either of acquittal or conviction. There is nothing, therefore, which stands in the way of the proceeding under Chapter XVIII of the Code now pending in the Court of the Subdivisional Magistrate, and this application must be dismissed.

AGARWALA, J.—I agree.

Rule discharged.

(1) (1881) I. L. R. 6 Cal. 584.

APPELLATE CIVIL.

Before Khwaja Mohamad Noor and Dhavle, JJ.

SRIMATI SABITRI THAKURAIN

v.

MRS. F. A. SAVI.*

1932.

Feb. 1, 2, 3, 4, 5, 12, 13, 15, 16, 17, 18, 23, 24, 25, 26, 29.

March, 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 29, 30 31.

April, 4, 5, 6, 7, 8, 11, 12, 13, 14, 19, 20, 21, 22, 25, 26, 27, 28, 29.

July, 2, 3, 4, 5, 6, 7, 9, 10, 11, 18, 19, 20, 21, 22, 25, 26, 27, 28.

August, 2, 3, 4, 5, 8, 9, 10, 11, 15, 16, 17, 18, 19, 22, 24, 25, 26, 29, 30, 31.

Sep. 1, 2, 5, 6, 8, 9, 12, 13, 15.

October, 18, 19, 20, 21.

Compromise of disputed claim, significance of—family arrangement, whether stands on different footing—compromise, when can be set aside—petition of compromise attached to formal decree, binding effect of—charge created by decree, whether can be enforced in execution—Specific Relief Act, 1887 (Act I of 1887), section 42, scope and significance of—"able to seek further relief" meaning of—court, whether can pass executable decree for future maintenance—Civil Procedure Code, 1908 (Act V of 1908), Order XXIII, rule 3—enquiry, scope of—contract to compromise a pending suit, specific performance of—analogy between enquiry under rule 3 and a suit for specific performance of contract—"lawful" meaning of—court, whether bound to record lawful compromise—decree following an order recording a compromise, whether appealable—Contract containing several promises—legal part separable from illegal part—validity of legal part—subject-matter of contract uncertain—election, effect of—executor, whether can compromise suit by agreeing to creation of charge on the estate—will, absence of restriction in—petition of compromise, whether requires registration—Registration Act, 1908 (Act XVI of 1908), section 17—construction of statute, rule of—Pardanashin ladies, law as to—transaction with pardanashin, binding effect of—what should be proved—different considerations arising in different cases—Hindu Law—law of the Mithila school, whether is the law of the Mitakshara—wife, position of, under the Mitakshara—Mithila wife, whether is a co-parcener of her husband and co-owner of property—wife, whether can demand partition in Mitakshara and the Mithila—Mithila husband, power of, to make a gift or bequest without the consent of the wife—prohibition as to gift of entire wealth (sarvasva), whether is a moral or religious injunction only—law of wills, whether is a development of law of gifts inter vivos—wife's

* Appeal from Original Order no. 156 of 1928, from an order of Babu Harihar Charan, Subordinate Judge of Monghyr, dated the 30th July, 1928.

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right to maintenance—abandonment of suit by claimant to office of shebait—whether amounts to transfer of office—validity of the transaction—failure of appointment of successor by shebait—absence of provision in the deed—management of trust, to whom reverts—Vivada Chintamani, relative authority of, in the Mithila school—evidence of translators playing the part of interpreters, whether admissible, when questions raised are not questions of foreign law—court-witness, examination of lawyer appearing in the case as, whether undesirable—lawyer supposed to be material witness—undesirability of his appearing in the case—such lawyer, whether can give evidence while appearing in the case.

The court will not examine a lawyer as a court-witness at the instance of a party who had ample opportunity of examining him but did not choose to do so, when the person, proposed to be examined, has come to know perfectly well every detail of the transaction in question which the party engaging him expects to elicit from him and the other party might reasonably say that he has had undue facilities for concentrating his mind upon every point of importance and preparing himself to meet every attack that might be made in cross-examination.

R. D. Sethna v. *Mirza Mahomed Shirazi*(1) and *D. Weston* v. *Peary Mohan Dass*(2), referred to.

Although it is undesirable that a lawyer should appear in a case in which he knows or has reason to believe that he would be an important witness, there is no harm in his giving evidence in the case.

D. Weston v. *Peary Mohan Dass*(2) and *Chandreshwar Prasad Narain Singh* v. *Bisheshwar Pratap Narain Singh*(3), followed.

The protection which is given to pardanashin ladies of India is not peculiar to them. Such protection has always been given by the Courts to persons who are weak, ignorant and infirm, and unable to look after themselves. In such cases generally the person claiming protection has to prove that as a matter of fact he was, on account of the weakness of his power of understanding and intellect, liable to be

(1) (1907) 9 Bom. L. R. 1044 (1046).
(2) (1912) I. L. R. 40 Cal. 898.
(3) (1926) I. L. R. 5 Pat. 777.

imposed upon by those who would take advantage of his position and, therefore, he needs protection.

In the case of pardanashin ladies, however, the law presumes them, from the very fact that they live in seclusion, to be incapable of protecting themselves and therefore entitled to protection.

The court when called upon to deal with a deed executed by a pardanashin lady must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorized by her with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and thirdly, as has been sometimes said, that she had independent and disinterested advice in the matter.

Independent advice is not, however, essential; and in a case where there was no independent advice, the Court will have to consider the probable effect of such advice, if it had been given, on the mind of the lady.

The rules laid down by the courts of law for assisting them in determining whether a pardanashin lady understood the nature and effect of a document executed by her are rules of prudence rather than of law, and their application depends upon the particular facts of each case.

Documents executed under the influence of fraud or by persons who are ignorant, weak and infirm, such as pardanashin ladies, will not be given effect to unless the courts are first satisfied that the mind accompanied the hand in the act of execution. In the one case the party alleging fraud must prove it, by placing before the court facts from which it can irresistibly be found. In the other the person who wants to take the benefit of the document must prove that the intellectual deficiency was made good by proper explanation given to her. The quantum of proof necessary will depend on the facts of each case.

There may be cases in which, on the admitted facts of the case, the court, taking into consideration the personality of the lady and the circumstances of the case, is satisfied that the onus has been discharged, that there was no actual deficiency to be made up and that the lady did fully understand the transaction in question.

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Satish Chandra Ghose v. *Kali Dasi*(1), *Musammat Barkatunnisa Begum* v. *Debi Bakhsh*(2), *Tara Kumari* v. *Chandra Mauleshwar Prasad Singh*(3), *Kali Bakhsh Singh* v. *Ramgopal Singh*(4), *Sanitibala Debi* v. *Dhara Sundari Debi Chawdhurani*(5), *Ruhulla* v. *Hossainalli Degu Mia*(6), *Kamawati* v. *Digbijai Singh*(7), *Tarubala Dasi* v. *Sourendra Nath Mitra*(8), *Surendra Nath Mitra* v. *Tarubala Dasi*(9), *Neale* v. *Gordon Lennox*(10), *Kamini Dasi* v. *Krishna Chandra Mukherji*(11), *Sheoparsan Singh* v. *Munshi Narsingh Sahay*(12) and *Sourendra Nath Mitra* v. *Tarubala Dasi*(13), reviewed.

The Vivada Chintamani does not seem to support the proposition that a Mithila widow is entitled to get the cost of her husband's *sradh* from those who may have taken his estate. The obligation of the widow to perform the *sradh* would seem to be dependent upon her taking the husband's estate.

Dalel Kunwar v. *Ambika Partap Singh*(14) and *Sunderji Damji* v. *Dahibai*(15), distinguished.

Where a *shebait* does not appoint his successor and where there is no other provision for the appointment of the next *shebait*, the management of the endowed trust would revert to the heir of the founder.

Jagannath Prasad Gupta v. *Ranjit Singh*(16) and *Gossami Sri Gridhariji* v. *Romanlalji Gossami*(17), followed.

Panchanan Banerji v. *Surendranath Mukerjee*(18), distinguished.

(1) (1921) 26 Cal. W. N. 177.
(2) (1927) 31 Cal. W. N. 693, P. C.
(3) (1931) I. L. R. 11 Pat. 227.
(4) (1913) I. L. R. 36 All. 81, P. C.
(5) (1919) I. L. R. 47 Cal. 175, P. C.
(6) (1928) 32 Cal. W. N. 929, P. C.
(7) (1921) I. L. R. 43 All. 525, P. C.
(8) (1924) 41 Cal. L. J. 213.
(9) (1930) I. L. R. 57 Cal. 1311, P. C.
(10) (1902) A. C. 465.
(11) (1912) I. L .R. 39 Cal. 933.
(12) (1932) 13 Pat. L. T. 561.
(13) (1925) 29 Cal. W. N. 832.
(14) (1903) I. L. R. 25 All. 266.
(15) (1904) I. L. R. 29 Bom. 316.
(16) (1897) I. L. R. 25 Cal. 354.
(17) (1889) I. L. R. 17 Cal. 3, P. C.
(18) (1929) 50 Cal. L. J. 382.

The law of the Mithila school is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila school has departed from the law of the Mitakshara.

Sourendra Mohan Sinha v. *Hari Prasad*(1), followed.

Under the Mitakshara, as also under the Mithila school, a woman is by marriage transferred from the father's *gotra* to that of her husband, so much so that a married woman can have no other *gotraja* relations than those of her husband.

Where property is held in co-parcenery by a joint Hindu family, there are ordinarily three rights vested in co-parceners, the right of enjoyment, the right to call for partition and the right to survivorship. The wife's interest in her husband's family property does not under the Mitakshara include two of these three rights of a co-parcener, and though her right to maintenance (which is unquestionable) has sometimes been referred to her position as a co-sharer in a subordinate sense, the contention that she is a co-parcener has been frequently raised but never accepted by the Courts.

Ananda Bibee v. *Nownit Lal*(2). *Jagdamba Koer* v. *Secretary of State*(3). *Punna Bibee* v. *Radha Kissen Das*(4), *Sunder Bahu* v. *Manohur Lal Upadhya*(5) and *Nareganti Achammagaru* v. *Venkatachalapati Nayanivaru*(6), referred to.

Too much stress should not be put on any of the (Mitakshara and other) texts which speak of the ownership of the wife in her husband's property.

Sham Lal v. *Banu*(7), followed.

The wife's interest in the husband's property under the Mithila is even weaker than under the Mitakshara.

Sree Narayan Rai v. *Bhya Jha*(8) and *Chandreshwar Prasad Narain Singh* v. *Biseshwar Pratap Narain Singh*(9), referred to.

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(1) (1925) I. L. R. 5 Pat. 135 (155), P. C.
(2) (1882) I. L. R. 9 Cal. 315.
(3) (1889) I. L. R. 16 Cal. 367.
(4) (1903) I. L. R. 31 Cal. 476.
(5) (1881) 10 Cal. L. R. 79.
(6) (1881) I. L. R. 4 Mad. 250.
(7) (1882) I. L. R. 4 All. 296, F. B.
(8) (1812) 2 Beng. Sel. Rep. 29, 34.
(9) (1926) I. L. R. 5 Pat. 777.

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Under the Mithila school the wife is not a co-parcener of her husband and co-owner of property with him, and she is not regarded as such on the dictum *dampatyor madhyagam dhanam*, which does not appear to have been adopted in any of the leading Mithila authorities on *Vyavahara* or Law proper.

Ganesh Dutt Thakoor v. *Jewach Thakoorain*(1), referred to.

The Vivada Chintamani does not give the Mithila wife the right unconditionally to demand partition, and all that that authority can be said to have laid down is that, as under the Mitakshara, she is to receive a share equal to that of a son when her husband chooses to make an equal division of his self-acquisitions, or chooses or is forced by the sons to divide the ancestral property.

Vachaspati Misra's comment of the Narada's verse as regards prohibition of a gift means, on the *yathasankhya* principle of interpretation among other reasons, that what is necessary to the gift of a son, a wife and *sarvasva* (entire wealth) is the consent, *respectively* of the son, the wife and the like, and the *anvaya* (*putradaranvayanam* or even *putradaradyanvayanam*).

The term *anvaya* does not include the wife and, therefore, her consent is not essential to her husband's bequest of his entire estate (*sarvasva*).

The prohibition of the gift of the entire wealth without the consent of the *anvaya* is nothing more than a moral or religious injunction, and the excess of the limit thus laid down cannot be a ground for holding the gift invalid.

Balwant Singh v. *Rani Kishori*(2) and *Raja Bishen Prakash Narain Singh* v. *Bawa Misser*(3), followed.

The wife's right to maintenance is a different matter from a right to avoid a gift of the entire property made by the husband. This right to maintenance may be reconciled with the *factum valet* view of a gift of his entire property by the husband; the gift may stand and the wife's maintenance charged on the property.

(1) (1903) I. L. R. 31 Cal. 262, P. C.
(2) (1898) I. L. R. 20 All. 267, P. C.
(3) (1873) 12 Beng. L. R. 430.

Jamuna v. *Machul Sahu*(1), followed.

The law of wills and bequests by Hindus is a development of the law of gifts inter vivos, and wills are generally to be regarded as gifts to take effect upon death as to the property which they can transfer.

Tagore v. *Tagore*(2), followed.

When the questions raised are not questions of foreign law, the evidence of translators who have played the part of interpreters is not admissible.

Sri Rajah Venkata Narasinha Appa Row v. *Sri Rajah Rangeyya Appa Row*(3), followed.

Observations on the relative authority of the Vivada Chintamani in the Mithila School.

Surja Kumari v. *Gandhrap Singh*(4) and *Sourendra Mohan Sinha* v. *Hari Prasad*(5), referred to.

A compromise of a disputed claim stands upon a different footing from a transfer of a vested interest. It is an agreement to put an end to disputes and terminate or avoid litigation; and in such cases the consideration which each party receives is not the sacrifice of a right but abandonment of a claim.

Trigge v. *Lavallee*(6), *Steward* v. *Steward*(7), *Miles* v. *New Zealand Alford Estate Company*(8), *Knowles* v. *Roberts*(9), *Stapilton* v. *Stapilton*(10) and *Ram Niranjan Singh* v. *Prayag Singh*(11), followed.

When there is a supposition of right in both parties and the right is a doubtful one, an agreement of compromise entered into by the parties is binding on them irrespective of the fact whether in truth the properties in dispute belonged to one party or to the other.

(1) (1879) I. L. R. 2 All. 315.
(2) (1872) 18 W. R. 359.
(3) (1905) I. L. R. 29 Mad. 437, 452.
(4) (1837) 6 Sel. Rep. 168.
(5) (1925) I. L. R. 5 Pat. 135.
(6) (1862) 15 Moo. P. C. 270.
(7) (1839) 6 Cl. & Fin. 911.
(8) (1886) L. R. 32 Ch. 266.
(9) (1888) L. R. 38 Ch. 263.
(10) (1793) Atk. 2.
(11) (1881) I. L. R. 8 Cal. 138.

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Jagdam Sahay v. *Rupnarain Mahton*(1) and *Gajadhar Prasad* v. *Lachhuman Sahu*(2), followed.

Different considerations arise when the compromise is not between strangers but substantially between members of the same family. A family arrangement may be such as the court will uphold, although there are no rights in dispute, and if sufficient motive for the arrangement is proved, the court will not consider the quantum of the consideration.

Williams v. *Williams*(3), *Helan Dasi* v. *Durga Das Mundal*(4), *Rajunder Narain Rae* v. *Bijai Govind Singh*(5), followed.

Although a family arrangement may be set aside on the ground of mistake, inequality of position, or undue influence, coercion, fraud or any other similar ground, any such allegation must be clearly established.

Satya Kumar Banerjee v. *Satya Kripal Banerjee*(6), referred to.

Under the Indian law, should a grossly unfair compromise come before a court, as, for example, where a helpless person has been induced to agree to an unconscionable bargain, such a compromise would be ignored or relieved against, for the court will be entitled in the circumstances to presume that such a compromise would not have been entered into by the helpless person except under the influence of fraud, coercion, etc., or that it could not have been intelligently entered into; in other words, that the act of physical execution was not accompanied by the necessary mental act.

Sourendranath Mitra v. *Tarubala Dasi*(7) and *Neale* v. *Gordon Lennox*(8), distinguished.

Where the plaintiff, entitled to other reliefs, does not seek them, he is not entitled to a pure declaration. The court will not merely make a declaration of a hypothetical or an abstract right without any reference to its practical

(1) (1924) 5 Pat. L. T. 375.
(2) (1927) 8 Pat. L. T. 759.
(3) (1867) L. R. 2 Ch. 294.
(4) (1906) 4 Cal. L. J. 323.
(5) (1839) 2 Moo. I. A. 181.
(6) (1909) 10 Cal. L. J. 503.
(7) (1930) I. L. R. 57 Cal. 1311, P. C.
(8) (1902) A. C. 465.

utility. But where a fully effective executable decree can be passed, section 42 of the Specific Relief Act, 1877, does not operate as a bar.

If a charge is created by the decree itself, it can be enforced by putting the decree into execution and no fresh suit is necessary for its enforcement.

Raja Braja Sunder Deb v. *Sarat Kumari*(1) and *Tarak Nath Adhikari* v. *Bhubaneshwar Mitra*(2), followed.

Aubhoyessury Dabee v. *Gouri Sunker Panday*(3), *Matangini Dassee* v. *Choonemoney Dassee*(4) and *Gobinda Chandra Pal* v. *Dwarka Nath Pal*(5), distinguished.

In India a compromise attached to a formal decree has the same effect as if it were embodied in the decree itself.

Therefore, as soon as a petition of compromise is adopted as a part of the decree it passes from the domain of mere contracts into that of decrees and the promise of a party to pay is converted into an order of the court to that party to pay.

A court can pass an executable decree for future maintenance, that is, a decree entitling the decree-holder to realise such maintenance in execution proceedings.

Ashutosh Banerjee v. *Lukhimoni Debya*(6) and *Ekradeshwar Singh* v. *Janeshwari Bahusain*(7), followed.

Section 42 of the Specific Relief Act, 1877, is intended to avoid a multiplicity of suits. But there is nothing in law to prevent a plaintiff, after he has brought a suit for all the reliefs, from contenting himself with a pure declaration if that be all that is necessary in the circumstances.

Sarada Prasad Roy Chowdhury v. *Rai Mohan Saha*(8), distinguished.

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(1) (1916) 2 Pat. L. J. 55.
(2) (1914) I. L. R. 42 Cal. 780.
(3) (1895) I. L. R. 22 Cal. 859.
(4) (1895) I. L. R. 22 Cal. 903.
(5) (1908) I. L. R. 35 Cal. 837.
(6) (1891) I. L. R. 19 Cal. 139.
(7) (1914) I. L. R. 42 Cal. 582, P. C.
(8) (1924) 85 Ind. Cas. 629.

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If, therefore, a plaintiff chooses to seek a declaration only for future maintenance for which the cause of action has not accrued, section 42 cannot stand in his way as the words "able to seek further relief" mean "able to seek" it on the date of the suit.

Govinda v. *Perumdevi*(1), followed.

The provision in Order XXIII, rule 3, Code of Civil Procedure, 1908, for an enquiry about the fact and lawfulness of a compromise of a suit in the suit itself is devised as a speedier alternative to a separate suit for specific performance of the contract to compromise the suit on certain terms.

Sourendra Nath Mitra v. *Tarubala Dasi*(2), *Neale* v. *Gordon Lennox*(3), *Hara Sundari Devi* v. *Kumar Dakhineshwar*(4), *Bujodarlub Singh* v. *Ramnath Ghosh*(5), *Ruttonsly Lalji* v. *Poori Bai*(6), *Karuppan* v. *Ramasami*(7) and *Appasami* v. *Manikam*(8), referred to.

But the analogy between an enquiry under Order XXIII, rule 3, and a suit for specific performance of contract does not get over the distinction between specific performance of a contract to compromise a pending suit and specific performance of the undertakings to be carried out by one party or the other after the decree in that suit. The former merely means compelling the party who backs out of the compromise to have the pending suit disposed of by a decree on the terms agreed upon by the parties, but it does not mean the specific performance of obligations arising under the decree.

The analogy between a suit for specific performance of contract and a proceeding under Order XXIII, rule 3, should not be carried too far. One obvious difference between them is that while the Specific Relief Act gives the court discretion to refuse specific performance of a contract and specifies cases in which it cannot be granted, no such exception has been made in Order XXIII, rule 3, under which it is obligatory

(1) (1888) I. L. R. 12 Mad. 136.
(2) (1925) 29 Cal. W. N. 832.
(3) (1902) A. C. 465.
(4) (1885) I. L. R. 11 Cal. 250.
(5) (1897) I. L. R. 24 Cal. 908.
(6) (1882) I. L. R. 7 Bom. 304.
(7) (1885) I. L. R. 8 Mad. 482.
(8) (1885) I. L. R. 9 Mad. 103.

upon the court to record a compromise if the court is satisfied that the parties have settled their disputes by a lawful compromise.

Sourendranath Mitra v. *Tarubala Dasi*(1), *Gokhul Das Ballabh Das Manufacturing Company* v. *James Scott*(2), *Brojodurlabh Sinha* v. *Ramnath Ghosh*(3), *Karuppan* v. *Ramasami*(4) and *Appasami* v. *Manikam*(5), followed.

Ordinarily, when investigating the fact and lawfulness of a compromise under Order XXIII, rule 3, it is irrelevant to examine the strength or weakness of the suit itself.

Neale v. *Gordon Lennox*(6), *Tarubala Dasi* v. *Sourendra Nath Mitra*(7) and *Mahabir Tewary* v. *Chhatu Tewary*(8), referred to.

The word "lawful" in Order XXIII, rule 3, means lawful within the meaning of the Contract Act; that is to say, the rule contemplates an agreement which is legally enforceable, but not necessarily one that is specifically enforceable.

Saiyid Mehdi Ali Khan v. *Chaudhuri Ghamshiam Singh*(9), explained.

While the court is debarred from passing a decree on contest for specific performance of a contract which requires the personal skill of the defendant, such a decree must be passed by consent if that be the way the parties agree to compromise the suit.

Blacket v. *Bates*(10), distinguished.

Where a contract contains several promises, or a promise to do several matters, some of which are illegal, a promise which can be separated from the illegal promise may be valid.

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(1) (1930) I. L. R. 57 Cal. 1311, P. C.
(2) (1891) I. L. R. 16 Bom. 202.
(3) (1897) I. L. R. 24 Cal. 908, F. B.
(4) (1885) I. L. R. 8 Mad. 482.
(5) (1885) I. L. R. 9 Mad. 103.
(6) (1902) A. C. 465.
(7) (1924) 41 Cal. L. J. 213.
(8) (1932) 13 Mat. L. T. 197.
(9) (1927) 46 Cal. L. J. 209, P. C.
(10) (1865) 1 Ch. App. Cas. 117.

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Punnoo Bibi v. *Fyez Bakhsh*(1), followed.

Sarbesh Chandra Basu v. *Khetra Pal Singh*(2), distinguished.

The uncertainty of a term of the contract may be got over by the election of one party to the contract to abandon his rights under that term where the effect of the contract is to give such a right of election.

Where there are two sets of promises, one by the plaintiff to the defendant to let her suit for other claims be dismissed, and the other by the defendant to the plaintiff to let a decree be passed against himself for maintenance, etc., and both of them are to be simultaneously performed, and the plaintiff refuses to perform his part, the defendant can insist on the plaintiff performing it, so long as he is ready and willing to perform his own part simultaneously with the part to be performed by the plaintiff.

Ram Sahae Singh v. *Dhunookdharee Singh*(3), *Bishun Kumar Roy* v. *Maharaj Joy Harish Chandra Dev Roy*(4), *Bayley Worthington and Cohen's Contract*, In re(5) and *British and Beningtons, Limited* v. *North Western Cachar Tea Company, Limited*(6), followed.

Ardeshir Mama v. *Flora Sasoon*(7) and *Subadathy Pillay* v. *Varmahalinga Pillay*(8), distinguished.

It is open to a plaintiff to compromise his suit with some of the defendants only, leaving the others altogether alone, or proceeding with the suit against them.

Abbhayanand Singh v. *Sir Rameshwar Singh*(9), followed.

Where there was an abandonment of a suit by a claimant to the office of *shebait* without any personal gain to herself, in favour of a man who was in possession as a *shebait*, and who would, at any rate, have been entitled to the *shebaitship* after her death even if she had succeeded in the suit.

(1) (1874) 15 Beng. L. R. 5 (App.).
(2) (1910) 11 Cal. L. J. 346.
(3) (1864) 1 W. R. 266.
(4) (1865) 2 W. R. 209.
(5) (1909) L. R. 1 Ch. 648.
(6) (1923) A. C. 48, 63.
(7) (1928) I. L. R. 52 Bom. 597, P. C.
(8) (1914) I. L. R. 38 Mad. 959.
(9) (1929) 12 Pat. L. T. 46.

Held, that the transaction was valid under the Hindu law.

Giris Chandra Saw v. *Upendra Nath Giridas*(1), followed.

Panchanan Banerjee v. *Sourendra Nath Mookerjee*(2), *Rajah Varma* v. *Ravi Varma*(3) and *Nirad Mohini Dasi* v. *Shibdas Pal*(4), referred to.

An executor under a will has power, in the absence of any restriction in the will, to compromise a suit by agreeing to the creation of a charge for maintenance on the estate of the testator.

But assuming he has no such power, the transaction would be not altogether void, but only voidable.

Eastern Mortgage and Agency Company, Limited v. *Rebati Kumar Ray*(5), and *Charu Chandra Pal* v. *Kalidas Chandra*(6), followed.

A petition of compromise asking the court to pass a decree on certain terms does not require registration under section 17 of the Registration Act, 1908.

Bindesri Naik v. *Ganga Saran Sahu*(7), *Pranal Anni* v. *Lakshmi Anni*(8), *Natesa Chetti* v. *Vengu Nachiar*(9), *Appasami* v. *Manikam*(10), *Raghubans Mani Singh* v. *Mahabir Singh*(11), *Hemanta Kumari Debi* v. *Midnapur Zamindari Company*(12), *Charu Chandra Mitra* v. *Sambhu Nath Pandey*(13) and *Vyaran Chetti* v. *Subramanian Chetti*(14), reviewed.

It is a well settled principle of construction that the legislature is presumed to know not only the general principles of law but also the construction which the courts have put upon particular statutes.

(1) (1909) 35 Cal. W. N. 768.
(2) (1929) 50 Cal. L. J. 382.
(3) (1876) 4 I. A. 76.
(4) (1909) I. L. R. 36 Cal. 975.
(5) (1906) 3 Cal. L. J. 260.
(6) (1910) 13 Cal. L. J. 447.
(7) (1897) I. L. R. 20 All. 171, P. C.
(8) (1899) I. L. R. 22 Mad. 508, P. C.
(9) (1909) I. L. R. 33 Mad. 102.
(10) (1885) I. L. R. 9 Mad. 103.
(11) (1905) I. L. R. 28 All. 78.
(12) (1919) I. L. R. 47 Cal. 485, P. C.
(13) (1918) 3 Pat. L. J. 255, F. B.
(14) (1920) I. L. R. 43 Mad. 660, P. C.

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Where a section of an Act which had received a judicial construction is re-enacted in the same words, such re-enactment must be treated as a legislative recognition of that interpretation.

Nagendra Mohan Roy v. *Pyari Mohan Saha*(1), *Mansell* v. *Queen*(2) and *Exparte Campbell*(3), followed.

An appeal lies from an order recording a compromise, but an appeal from the decree following the order is barred under section 96 (3) of the Code.

Srimaty Sabitri Thakurain v. *F. A. Savi*(4) and *Govindaswami Kadavaran* v. *Kaliaperumal Munayathiriyan*(5), followed.

Bengal Coal Company, Limited v. *Apcar Colliery, Limited*(6), not followed.

Where, therefore, an application for leave to appeal in forma pauperis from the decree itself was rejected on the ground that no appeal lay from the decree, and the appeal also was dismissed for non-payment of the court-fee, *held*, that the effect of the order of dismissal was as if no appeal had been preferred and that it did not preclude the court from hearing the appeal against the order recording the compromise.

Appeal by the plaintiff.

This was an appeal against an order of the Subordinate Judge of Monghyr passed under Order XXIII, rule 3, of the Code of Civil Procedure, directing that a compromise in a pending suit said to have been arrived at between the plaintiff (the appellant) on the one hand and defendant no. 1 (Mr. Savi now dead) and defendant no. 2 (Suraj Mohan Thakur) on the other be recorded.

Ugra Mohan Thakur, a wealthy zamindar of Barari in Bhagalpur, died on the 29th of January, 1914. He left considerable properties though at any

(1) (1915) I. L. R. 43 Cal. 103, 112.
(2) (1857) 8 E. & B. 54, 73.
(3) (1870) L. R. 5 Ch. App. 703.
(4) (1928) I. L. R. 8 Pat. 528.
(5) (1920) 66 Ind. Cas. 837.
(6) (1924) 29 Cal. W. N. 928.

rate then burdened with heavy debts. He left surviving him his widow Savitri Thakurain (the appellant), three nephews (the sons of his half-brother Pran Mohan Thakur) and his mother Jugbati Debi. On the 26th of February, 1914, i.e., within a month of his death one Mr. Savi, who was the manager of the deceased's estate, filed an application before the District Court of Bhagalpur for the probate of a will said to have been executed by the deceased on the 10th of May, 1913. It was said that the whole of the will was in the hand-writing of the deceased himself and that he had deposited it personally with the District Sub-Registrar of Bhagalpur under the provisions of the Indian Registration Act. It purported to be attested by the lady Savitri Thakurain herself. The will was not produced in Court but its main provisions were that the estate was to go to one of his nephews (Suraj Mohan Thakur) as a residuary legatee and the widow Savitri Debi was to receive an allowance of Rs. 100 a month. Mr. Savi and one Hem Chandra Mitter were appointed executors. The latter, however, refused to act and the application for probate was made by Mr. Savi alone.

This will was repudiated by the widow, the appellant. She alleged that the deceased had executed another will on the 16th of January, 1914, which was not forthcoming having been either lost or destroyed. But a draft, or, to be more accurate, a copy of the draft was available, on the basis of which she on the 3rd of April, 1914, filed an application before the Original Side of the Calcutta High Court for the Letters of Administration with a copy of the said will annexed. The main provision of this latter will was that the estate was to go to the widow for her life and then to all the nephews. Rs. 400 per month was to be paid to Mr. Savi as life manager. In fact with the exception of the last provision, the estate was to be dealt with almost exactly as provided in the Hindu law. The Calcutta High Court stayed

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the probate suit of Mr. Savi pending before the Bhagalpur Court. Savitri Thakurain's application for Letters of Administration was, however, dismissed after a lengthy trial on the 26th of August, 1914. Her appeal to the Appellate Side of the Calcutta High Court was rejected on the 23rd of March, 1915, on account of her failure to furnish security as ordered by the Court. Leave to appeal to the Judicial Committee was refused. Special leave was, however, granted to her, but the appeal was ultimately dismissed by the Privy Council on the 20th of January, 1921. Thus ended an abortive attempt of the appellant to set up a rival will against the one propounded by Mr. Savi.

In the meantime the probate case for the will propounded by Mr. Savi was taken up and probate was granted on the 13th of November, 1914. An appeal to the High Court was dismissed on the 14th of May, 1915. Leave to appeal was refused by the High Court and a prayer for special leave was also rejected on the 29th of December, 1916.

In December, 1919, while her appeal against the Calcutta High Court decision in her own will case was pending before the Privy Council, the plaintiff commenced a litigation attacking Mr. Savi's will and its validity. It started with a plaint before the Original Side of the Calcutta High Court within whose jurisdiction some of the properties of the deceased were situated. At first she obtained ex parte leave to sue in the High Court; but on the defendant's objection the leave was withdrawn, and ultimately the suit out of which the present appeal arose was instituted in forma pauperis before the Subordinate Judge of Monghyr on the 6th of April, 1920, being suit no. 103 of 1920. Between that date and the 25th of November, 1924, when the suit is said to have been compromised, there were a number of interlocutory orders passed by the Subordinate

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Judge and several of them were taken up to the High Court. In this suit the plaintiff attacked the genuineness of the will and asserted that the probate was obtained by fraud. She further attacked the right of her husband to bequeath the properties to his nephew on the ground that some of the properties covered by the will were her personal properties and that the estate itself was an ancestral one, and under the Mithila School of Hindu law which governed the parties she was co-parcener with her husband and, therefore, her husband had no disposing power over the estate. The fraud alleged was that Tajeshwar Jha and Kishore Jha who were looking after the probate case on her behalf colluded with the defendant and deserted her and did not either look after the case or give proper instructions to the lawyers. She contended that even if the said will was genuine, from what happened since then it had been revoked. It could not under the Mithila School of Hindu law which governed the parties affect the ancestral properties mentioned in schedule *A*. The plaint further said that the deceased was a shebait of the debuttar properties mentioned in schedule *B* to the plaint out of which some (Nos. 7 to 9) were dedicated by Madan Mohan Thakur, an ancestor of the deceased, and others (Nos. 1 to 6) by the deceased himself for the worship of the family deity and for other charitable and religious purposes. These endowed properties being dedicated to the deities could not be dealt with by the deceased by the will which could not have any effect on them. The plaintiff then averred that the properties mentioned in schedule *C* were her personal properties and, therefore, could not be affected by the will. Various allegations were made against the executor, and it was said that he had leased out the main estate to defendants Nos. 5 and 6 for a grossly inadequate consideration and those and other transfers made by him in favour of some of the defendants were repudiated.

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On these facts the plaintiff sought the following reliefs :—

" (*b*) A declaration that she was entitled to the properties mentioned in schedule A by survivorship according to the special law and custom or inheritance, even if the will be held to be genuine and not revoked.

(*c*) A declaration that the transfers of properties of the estate in favour of defendants 5, 6 and 7 were inoperative against the plaintiff.

(*d*) That she be given possession of the estate, the debuttar and personal properties with mesne profits."

The plaintiff further asked that in case she be held not to be entitled to the estate, she be granted :—

" (*e*) a suitable maintenance (she estimated it at one-third of the income of the estate) for life and due provision in the decree for regular payment of this maintenance by the appointment of a receiver or otherwise;

(*f*) a decree for arrears of maintenance allowance;

(*g*) an order that Rs. 1,000 or such suitable sum as the Court thinks fit to be paid annually for the sradh of the deceased;

(*h*) a declaration that she was entitled to reside in the Anand Garh Palace (the chief palace of the estate) and a decree for Rs. 14,625 with Rs. 6,700 as interest for her being deprived of a residence after the death of her husband, on account of her having been turned out from the deceased's Calcutta house where she had been residing. The house was sold to defendant Hurdutti;

(*i*) a decree for moveable mentioned in schedule D or its equivalent value;

(*j*) in any event a declaration in her favour for the life policy of her husband valued at Rs. 10,225 and Rs. 7,200 its interest;

(*k*) a decree in her favour for the properties mentioned in schedule B as their shebait and trustee;

(*l*) a decree for the personal properties mentioned in schedule C to the plaint;

(*m*) in case the properties mentioned in schedules B and C be held to be the part of the estate, then a decree in her favour on the ground of survivorship, custom or law of inheritance;

(*n*) a decree for future and past maintenance to be a charge upon the estate. The decree be so framed that the charge be enforceable by sale in execution of the decree;

(*o*) appointment of a receiver pendente lite;

(*p*) provision for a residence and a suitable maintenance pendente lite;

(*q*) other general reliefs and costs."

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The chief defence to the suit was on behalf of Mr. Savi and the defendant No. 2 (Suraj Mohan Thakur), their defence being almost the same. They asserted the genuineness and validity of the will and urged that the plaintiff was precluded from questioning it and denied the special right of the widow under the Mithila School of Hindu law, raised a special plea about some of the properties claimed by the plaintiff as her personal ones, asserted that the transfers were just and proper and repudiated the charge of mismanagement against Mr. Savi. They disputed the plaintiff's claim to succeed to the shebaitship of the endowed properties. While the plaintiff estimated the estate to be valued at rupees twenty-six lakhs with an income of Rs. 1,30,000, the defendants asserted that it was valued at Rs. 14,16,174-6-0 subject to a debt of Rs. 5,50,000, to which was added Rs. 1,60,000 spent on the litigation. The debt up to the time of the filing of the written statement was to the tune of Rs. 4,89,259. They asserted that under the circumstances the plaintiff was not entitled to a maintenance of one-third of the income of the estate. They further said that they made an offer to the plaintiff to reside at Ganga Nivas, but on the advice of her cousin Ram Krishna Jha she refused and had been unnecessarily prosecuting the litigation. They further said that the costs of the performance of the annual sradh which the plaintiff had put at Rs. 1,000 was too high and that a sum of Rs. 25 was sufficient. They further said that though there was no direction in the will about any particular house for the plaintiff's residence, they were ready to allow her to reside at Ganga Nivas and that her claim to reside at Anand Garh palace was unjustified and unreasonable.

The suit was taken up on the 5th of November, 1924, when three issues, namely, issues Nos. 6(*a*), 6(*b*) and 6(*c*) were added; and the learned Subordinate

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Judge fixed the 21st of November, 1924, for the hearing of issues 6 to 6(*c*) on questions of law only. These issues are as follows:—

"6. Is the plaintiff estopped from questioning the genuineness and validity of the will, dated the 10th of May, 1913, and also her setting up a special plea of custom and law as bar to her husband's power of disposal of his properties by will or otherwise. If so, whether the said will is genuine and valid?

6. (*a*) Whether the alleged will, dated the 10th May, 1913, is operative as to all or any of the properties to the suit. If so, as to which of them it is operative?

6. (*b*) Whether the decree of the probate testamentary suit no. 3 of 1914 was fraudulently obtained as alleged by the plaintiff. If so, does it bind the plaintiff?

6. (*c*) Has the Court jurisdiction to try issues 6(*a*) and 6(*b*) in this Court?"

The plaintiff did not like the hearing of the suit piecemeal and moved the High Court on 18th November, 1924. The Subordinate Judge was called upon to report by the 28th idem why he wanted to try these issues first. The Subordinate Judge submitted an explanation and adjourned the case till the 27th of November, 1924. In the meantime on the 25th of November, 1924, a petition of compromise admittedly signed by the plaintiff, Mr. Savi, and Suraj Mohan Thakur was handed over to the Subordinate Judge at the Monghyr railway station where he then happened to be and where the lady was also admittedly present at the time. He took up the petition in Court on the next day (26th November, 1924) and without passing a formal order for recording the compromise directed that a decree be prepared on its basis.

A rule which was issued in connection with the application of the plaintiff to the High Court against the order of the Subordinate Judge directing issues Nos. 6 to 6(*c*) to be heard first was dismissed for want of prosecution on the 16th of December, 1924. On the 7th of April, 1925, Savitri Thakurain filed an application under section 151 of the Code of Civil Procedure, alleging that the compromise petition did

not contain the terms agreed to by her and that the terms she had agreed to were changed and new terms were fraudulently entered therein. She also raised various objections against the legality of the compromise and prayed a recall of the order passing a decree on the basis of the compromise petition. The case was transferred to another Subordinate Judge, Mr. Ram Chandra Chowdhury, who on the 6th of July, 1925, refused the application, holding that the plaintiff's remedy was by a separate suit. Being dissatisfied with this order the plaintiff moved the High Court and on the 8th of June, 1926, that Court (Jwala Prasad and Bucknill, JJ.) held that the order of the Subordinate Judge, dated the 26th of November, directing preparation of a decree on the basis of the compromise was illegal, as there was no formal order for recording the compromise, and a decree on a compromise could not be drawn up unless the compromise was recorded. The decree was set aside, and the Subordinate Judge was directed to take up the case from the stage at which the compromise was filed. Defendant's attempt to appeal to the Privy Council against this order failed and the Subordinate Judge took up the matter under Order XXIII, rule 3, of the Civil Procedure Code. The defendant put in a formal application praying that the compromise embodied in the petition be recorded. To this the plaintiff raised objections both of law and fact. The Subordinate Judge, however, held against the plaintiff on almost every point and directed the compromise to be recorded and a decree to be prepared on its basis. It was against this order that the present appeal was preferred. No costs had been allowed to the defendants and on this and on some other matters there was a cross-objection on their behalf.

It was contended by the appellant that the compromise could not be recorded under Order XXIII, rule 3, on the following grounds:—

(*1*) That the terms as mentioned in the petition of compromise (Exhibit A) were not agreed to by the lady Savitri Thakurain and that the terms really agreed to were surreptitiously and fraudulently replaced by those given in Exhibit A.

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(2) That even if the lady agreed to these terms she being an illiterate pardanashin lady did not fully understand them. They were not explained to her and she had no independent advice. Advantage was taken of her ignorance and position.

(3) That the compromise was not lawful and its recording was barred under various provisions of law.

Some subsidiary points were also urged. For instance, it was contended that an inquiry into the genuineness and lawfulness of the compromise was barred by *res judicata*. It was argued that the order of this Court passed by Jwala Prasad and Bucknill, JJ. was in effect an order for the trial on the merits of the suit itself, and not for any inquiry into the facts or lawfulness of the compromise and further that the defendants had since waived their rights under the compromise. As a side issue questions of Mithila law were also raised. It was contended that under that law which governs the parties, a wife was a co-parcener with her husband with all the rights of a member of a joint family and could force a partition upon him and that a gift of an entire property by a man having a wife was illegal. The bequest in favour of Suraj Mohan was therefore void, and the plaintiff's suit in which this compromise was said to have taken place was so strong and the lady's claim so indefeasible that it was unlikely that she would have consented to the terms which constituted a confiscation of her estate.

Sir Sultan Ahmed (with him *Syed Hasan Imam*, *L. K. Jha*, *A. C. Roy*, *R. Chowdhry*, *Hari Krishna Chowdhry* and *K. P. Upadhaya*), for the appellant.

P. C. Manuk (with him *L. N. Singh*, *P. R. Das*, *S. C. Bose*, *J. M. Ghosh*, *S. R. Sen Gupta*, *D. L. Nandkeolyar*, *N. C. De* and *Raghunath Jha*), for the respondents.

KHWAJA MOHAMAD NOOR AND DHAVLE, JJ. (after stating the facts set out above and narrating the incidents leading to the compromise, proceeded as follows):

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We have said before that while the suit was pending before the Subordinate Judge of Monghyr, this Court was moved on various occasions by one party or the other against various interlocutory orders passed by that Court. One of them was Civil Revision No. 432 of 1923. It was taken up by Das and Ross, JJ. on 1st April, 1924, but was adjourned to 7th of May to enable the parties to compromise. On that date it was again adjourned to 16th of May. It was ultimately heard on 21st and 22nd of that month, and judgment was pronounced on 4th June. It is alleged that during the course of the hearing on the 21st or 22nd of May the learned Judges suggested that the amount of maintenance should be referred to arbitration, intimating that Rs. 1,000 per month, all arrears and a residence either in Anand Garh or Ganga Nivas would be allowed to her. It is alleged that this incident took place in the presence of Mr. Jayaswal and Mr. Murari Prasad, Advocates for the lady, and that Mr. Murari Prasad conveyed this message to the lady but that she refused this offer and wanted that her claim to the estate should also be referred to the arbitrators and considered by them. Mr. Jayaswal also, it is said, sent a letter to this effect to Mr. Ram Krishna Jha. An attempt was made to prove through Mr. Murari Prasad this alleged letter of Mr. Jayaswal to Mr. Ram Krishna Jha. The learned Subordinate Judge rightly disallowed this. The letter contained nothing but a statement of Mr. Jayaswal as to what according to him transpired before the learned Judges in this Court. If Mr. Murari Prasad was himself a witness, as he says he was, of what transpired on the occasion he could depose for himself, and he has done so; or, if Mr. Jayaswal was a witness of it, he ought to have been examined. If, on the other hand, Mr. Murari Prasad wanted to refresh his memory, the facts which entitled him to do so ought to have been first elicited from him, namely, that he had no clear independent

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recollection but wanted to refresh his memory by seeing the letter and that the letter was written in his presence at about the time when the incident took place and that he had read that letter at that time and found the contents to be correct. Nothing of this sort was done, and as we have said the learned Subordinate Judge rightly refused to take that letter into evidence. On the 14th April, 1932, in the course of his argument Sir Sultan Ahmed moved us by a petition to admit that letter in evidence. We rejected the application and intimated that we would give our reasons in the judgment of the case. Mr. Jayaswal, the writer of the letter, being available, his statement in the letter can in no circumstance be admitted in evidence. Later on the 25th of April, another application was filed asking us to examine Mr. Jayaswal as a Court witness under Order XVI, rule 14, of the Civil Procedure Code. We refused that application also and promised to give our reasons in our judgment. We agree in the observations of Beaman, J. in the case of *R. D. Sethna* v. *Mirza Mahomed Shirazi*(1). In that case an application was made by the defendant to examine Mr. Wadia, an Advocate appearing in that case. The learned Judge said: "Here there is an additional reason why I think it would be improper to have Mr. Wadia's evidence. He has been present in Court throughout, conducting as junior Counsel his client's case with the utmost vigour and diligence. The point to which this evidence is directed is clearly definite. Mr. Wadia heard Mr. Justice Davar's account of the transaction, and he knows perfectly well every detail which Counsel expected to elicit from him..... Counsel for the plaintiff might reasonably say that Mr. Wadia had undue facilities for concentrating his mind upon every point of importance and preparing himself to meet every attack that might be made in cross-examination." In this case what transpired before

(1) (1907) 9 Bom. L. R. 1044, 1046.

Das and Ross, JJ. has to a very large extent been deposed to by Mr. Murari Prasad, has been commented upon by the learned Subordinate Judge and is disputed by the defendant. Taking the evidence of Mr. Jayaswal now would have placed the respondent in a very false position. We do not for a moment suggest that Mr. Jayaswal would not have spoken the truth, but then he would be deposing to an incident which took place eight years back and after the details had been discussed in two Courts. The respondent would have been handicapped in cross-examining him and thus attacking his evidence which he was certainly entitled to do. Mr. Justice Beaman's observations were no doubt on other points dissented from in the Calcutta High Court in the case of *D. Weston* v. *Peary Mohan Dass*(1), but not the observation which I have referred to above. There is another reason why we refused to examine Mr. Jayaswal as a Court witness. The plaintiff had plenty of opportunity to do so. On 21st December, 1926, she applied to examine Mr. Jayaswal on commission. At first the prayer was granted, but later, on the objection of the defendant the Court ordered that it would examine him in Court when he appeared. Mr. Jayaswal was apparently appearing for the lady off and on in the suit. After that no step was taken to examine him. After the argument of the respondent on this topic was finished a third application was filed on the 18th of July, 1932, asking us to examine Mr. Jayaswal as a witness on behalf of the lady. On the grounds stated above and bearing in mind the observations of their Lordships of the Judicial Committee on the principle of taking additional evidence we declined to do so. Apart from this the question of importance is not so much as to what transpired in Court, but whether the suggestion if it was at all made by the learned Judges was communicated to the lady and she refused it. The letter

(1) (1912) I. L. R. 40 Cal. 898.

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purports to have been addressed to Mr. Ram Krishna Jha who has not been examined and there was no proposal to examine him. Mr. Jayaswal was not a witness to this communication and refusal. His evidence would not have been of any value. Mr. Murari Prasad has been examined to prove this.

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(The judgment then dealt with the evidence of the execution of the petition of compromise by the lady and then continued as follows:)

The two pleaders Babu Bhairo Prasad and Babu Hem Chandra Bose say that after the signature and the handing over of the petition of compromise to the Subordinate Judge Mr. Ram Krishna Jha came out of the Waiting Room and these gentlemen congratulated him on the accomplishment of the compromise, and we have no reason to disbelieve them. The defendants have placed all their cards on the table and have examined every person whom they ought to have examined. We wish we could say the same thing about the plaintiff. Leaving aside Durga Nath, the plaintiff has withheld from the witness-box Ram Krishna Jha, Maulvi Saveed-ud-din and Babu Hito Rai. The learned Subordinate Judge has commented upon the conduct of Mr. Ram Krishna Jha and Maulvi Sayeed-ud-din. The explanation for not examining these witnesses was, as we have already observed, that they were required for working in the case. We have also made some reference to it while commenting upon the non-production of Maulvi Sayeed-ud-din. It was held in the case of *D. Weston* v. *Peary Mohan Dass*(1) and *Chandreshwar Prasad Narain Singh* v. *Bisheshwar Pratap Narain Singh*(2) that though it is undesirable that a lawyer should appear in a case in which he knows or has

(1) (1912) I. L. R. 40 Cal. 898.
(2) (1926) I. L. R. 5 Pat. 777.

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reason to believe that he would be an important witness, there is no harm in his giving evidence in a case in which he is appearing. The explanation therefore is unsatisfactory, and we agree with the learned Subordinate Judge that these two gentlemen ought not to have appeared in the case. Mr. Ram Krishna Jha, however, was more a party than an Advocate. The plaintiff was his first cousin, and he had given her financial assistance in the case. If his interest in the case had the better of him than his duty as an Advocate, one may perhaps regard him as a party almost and deal with him as such, but the position of Maulvi Sayeed-ud-din was different. In the application under section 151 of the Civil Procedure Code it was clearly stated that the lady sent Durga Nath to Maulavi Sayeed-ud-din for the preparation of a draft of compromise, but later on she was informed that the draft was not settled by Maulvi Sayeed-ud-din. This information, if there was any, could not have come in the last resort from any one but Maulvi Sayeed-ud-din himself. He was, at any rate, the best person to know whether Durga Nath had got the draft settled by him or not. The point was also one of no small importance. This being the case, Maulvi Sayeed-ud-din should have at once realised that he was likely to be a very important witness in the case and ought therefore not to have agreed to work in it. It may be that he signed the petition without going through its contents, and accepted the vakalatnama without fully knowing the allegations made therein, but later on in the objections filed by the defendants it was clearly mentioned that Maulvi Sayeed-ud-din came to the lady and explained to her the nature of her suit and that the lady mentioned to him the terms on which she had compromised and that afterwards drafts were prepared by Maulvi Sayeed-ud-din. This on the face of it made Maulvi Sayeed-ud-din a very important witness in the case. If the allegation in the petition of objection was true that Maulvi Sayeed-ud-din

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explained to the lady the extent of her claims in the suit and that the lady told him the terms on which she had compromised, there was an end of the plaintiff's case. Maulvi Sayeed-ud-din ought to have withdrawn from the case at least at that stage. This is not all. The defendants examined Babu Bhairo Prasad, pleader, and he definitely stated that Maulvi Sayeed-ud-din explained to the lady the extent of the suit and that the lady told him that she had compromised the suit on accepting Rs. 1,000 as maintenance. A brother pleader of Maulvi Sayeed-ud-din's thus deposed on oath as to a fact directly in contravention of the case set up by the plaintiff. Maulvi Sayeed-ud-din, if he was aware of the progress of the case, as he must have been, ought at least at that stage to have refused to work in the case; but in spite of it we find that he continued working in the case and conducted the cross-examination of witnesses Nos. 6, 12 and 14. In our opinion, Maulvi Sayeed-ud-din would have been well advised if he had refused to work in the case and had not given the plaintiff a mere excuse for not examining him as a witness. However, as we have said on the authority of the two cases referred to above, the fact that Mr. Ram Krishna Jha and Maulvi Sayeed-ud-din were appearing in the case was no ground for not examining them as witnesses.

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We have narrated the facts and analysed the evidence of the incidents which took place at Simaria Ghat, Monghyr, Bhagalpur, Allahabad and Benares. We have read the evidence over and over again very carefully and we feel no hesitation in coming to the conclusion that the finding of the learned Subordinate Judge is perfectly correct and unassailable. We hold that the terms of the compromise as contained in the petition were the terms which were willingly agreed

to by the lady and that no fraud was practised upon her. We will later on deal with how far the defendants have proved the facts necessary to make the compromise binding upon the plaintiff who is a pardanashin lady. But before we leave this part of the case we have to make a general remark about the nature of the evidence adduced on behalf of the parties. The defendant, as we have already stated, has produced all the witnesses whom he could produce. Their evidence on the whole is true and consistent with the ordinary course of human affairs. It may be that here and there some of them have tried to prove too much, but the main story remains unshaken and is perfectly trustworthy. On the other hand, the plaintiff has withheld most important witnesses on excuses which do not appear at all satisfactory, and there is an artistic touch in the evidence of the witnesses who have been produced for her. There is the evidence of the lady describing the incidents which took place from Simaria Ghat to Benares. The witnesses who have been produced to corroborate her are those who come in contact with her story only one at a time and they touch only the fringe of the story. As to what transpired at Simaria Ghat. there is the solitary evidence of Rasdhari Kumar, and he only hears the last part of the conversation between Suraj Mohan and the lady and that was that Suraj Mohan told the lady, " come and take your raj." At Monghyr only one witness Bodh Krishna Jha came near the lady, and that also for a few minutes. There was no business talk between them. There is no other witness to depose as to what happened at the house of Baiju Mandal. Ram Krishna Jha, who also saw the lady though for a few minutes, has of course not been examined. As to what happened at the Monghyr railway station, there is again the evidence of only one witness Bodh Krishna Jha who was in the Waiting Room for a few minutes just to see the payment of the money. Ram Krishna Jha who was there has not been examined, and another witness

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Ram Bahadur did not reach the station in time. As to the happenings at Monghyr there are two witnesses: Bodh Krishna Jha and Ram Bahadur, and curiously enough their stories very seldom come into contact with each other. The one point on which they deposed to the same incident was as to the routes which they took after leaving Monghyr and, as we have said, they have contradicted each other there. As to what transpired at Allahabad, there are two witnesses, but Dharam Narayan was not present when Balbhadra made disclosures to the lady and Sudhakar Jha was not present when the lady mentioned it to Dharam Narayan. About the conversations at Benares, Dharam Narayan is again not a witness of what transpired when Mr. Murari Prasad was there. Dharam Narayan Chaudhury was not called till more than a month after Mr. Murari Prasad was examined, and in between the two six witnesses on other topics were examined. This reminds us of the remarks of Chaudhury, J. of the Calcutta High Court in the case of the will set up by the lady. It will be recalled that she attempted to obtain letters of administration of a will which was said to have been either lost or destroyed, and the basis of her application was a copy of the draft of the will. Therefore there was no necessity of proving the signature of the testator. In the course of the judgment the learned Judge observed as follows: "There is one point which is noticeable in this narrative, namely, that most of the incidents taken separately relate to one person at a time. The dictation is to Rasbehari when no one else is present. Ugrah Mohan's interview with Charu and the appointment made with him on the evening of the 15th January is spoken to by Charu alone. The attestation necessarily takes place in the presence of two, namely, of Sarat and Charu. Rasbehari was not then present. The conversation between the mother and the son takes place in the presence of Suraj Mohan Chaudhury alone. At the time Rasbehari attested none else was present." The same

thing was repeated in this case. The scene is different and the actors are different, but the acting is the same and the stage manager is plainly the same—it is unnecessary to say who.

Has the defendant proved the necessary facts to make the compromise binding upon the plaintiff, a pardanashin lady?

The plaintiff is no doubt a pardanashin lady, but it was conceded that she is intelligent and of business habits. The protection which is given to pardanashin ladies of this country is not peculiar to them. Such protection has always been given by the Courts to persons who are weak, ignorant and infirm, and unable to look after themselves. In such cases generally the person claiming protection has to prove that as a matter of fact he was on account of the weakness of his power of understanding and intellect, liable to be imposed upon by those who would take advantage of his position, and therefore needs protection. In the case of pardanashin ladies, however, the law presumes them, from the very fact that they live in seclusion, to be incapable of protecting themselves and therefore entitled to protection. We do not propose to refer to all the cases placed before us on this point during the course of the arguments. Some of them have been referred to in the judgment of Mookerjee, J. in the case of *Satish Chandra Ghose* v. *Kali Dasi*(1). The principle laid down by a long course of decisions is, however, clear and undisputed and may be thus stated.

The Court when called upon to deal with a deed executed by a pardanashin lady must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorized by her with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is

(1) (1921) 26 Cal. W. N. 177.

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said to have entered; and thirdly, as was held in some of the decisions, that she had independent and disinterested advice in the matter. Independent and competent advice, however, does not mean independent and competent approval. It simply means that the advice should be entirely removed from the suspected atmosphere and should be clear in language and should proceed from an independent person free from any taint of interest, and the party acting should know precisely the nature and consequences of the transaction. This independent advice is not, however, essential; in a case where there was no independent advice, the Court will have to consider the probable effect of such advice, if it had been given, on the mind of the lady. In fact, as was pointed out by Das, J. in this Court in the case of *Rao Bahadur Man Singh* v. *Maharani Nawlakhbati*(1), the rules laid down by the Courts of law for assisting them in determining whether a pardanashin lady understood the nature and effect of a document executed by her are rules of prudence rather than of law, and their application depends upon the particular facts of each case. Each case has facts of its own, and considerations which may arise in one need not necessarily arise in another. This was clearly stated by their Lordships of the Judicial Committee in the case of *Farid-un-nissa* v. *Mukhtar Ahmad*(2). Lord Sumner in delivering the judgment of their Lordships observed as follows:

"The mere declaration by the settlor, subsequently made, that she had not understood what she was doing obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the

(1) (1923) I. L. R. 2 Pat. 607.
(2) (1925) I. L. R. 47 All. 703, P. C.

answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them. Of course fraud, duress and actual undue influence are separate matters."

This was quoted with approval by Sir John Wallis in the case of *Musammat Barkat-un-nissa Begum* v. *Debi Baksh*(1) and applied in the case of *Tara Kumari* v. *Chandra Mauleshwar Prasad Singh*(2). It must be borne in mind that what is given to pardanashin ladies is a protection. They are under no disability, and if transactions entered into by them are lightly interfered with as if they were incapable of freely entering into contracts, it will be dangerous for the ladies themselves. Nobody would in that case ever transact business with them, if he could help it, and the protection will place them under a great disadvantage. In the case of *Kali Bakhsh Singh* v. *Ram Gopal Singh*(3) Lord Shaw in delivering the judgment of their Lordships observed:

" Their Lordships, as already mentioned, have fully in view the fact that the lady was a pardanashin lady, but the evidence as to her strength of will and business capacity, and the fact that the deed as granted is not in the circumstances of her life in any way an unnatural disposition of part of her property, go far, taken together with the evidence in this case, to convince them that the deed was granted by her as the expression of her deliberate mind and apart from any undue influence exerted upon it. In short, their view is that if independent outside advice, which is an essentially different thing from independent outside control, had been obtained, the lady would have acted just as she did. Much as their Lordships support and approve of the protection given by law to a pardanashin lady, they cannot transmute such a legal protection into a legal disability. She might.

(1) (1927) 31 Cal. W. N. 693, P. C.
(2) (1931) I. L. R. 11 Pat. 227.
(3) (1913) I. L. R. 36 All. 81, P. C.

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especially if the outside adviser had been a lawyer, have altered the shape or form of the transaction, but in substance and result she would have carried out the same purpose and will as are expressed by the deed under challenge."

In that case the lady in question had transferred her properties to the legitimate son of her paramour and mukhtar-am from whom she had had two illegitimate daughters. There was no evidence of any independent outside advice, and it was clear that the only person who had access to the lady and was her adviser was the man whose son was the donee. This case was referred to with approval by Lord Sumner in *Farid-un-nissa's*(1) case already referred to. His Lordship observed:

"Independent legal advice is not in itself essential.....After all, advice if given might have been bad advice.....The real point is that the disposition made must be substantially understood and must really be the mental act as its execution is the physical act of the person who makes it."

It will thus appear that each case will have to be decided on its own merits, and that the Court will have to be satisfied whether the act in question was the free act of the lady and whether she fully understood the effects and consequences of it.

In the case of *Sunitibala Debi* v. *Dhara Sundari Debi Chowdhurani*(2) Lord Buckmaster after referring to the terms of the compromise in question, which in his Lordship's opinion was simple and easily understandable, observed as follows:—

"It is not necessary—indeed, it is undesirable—to insist in such cases upon a test which depends upon a clear understanding of each detail of a matter which may be greatly involved in legal technicalities. It is

(1) (1925) I. L. R. 47 All. 703, P. C.
(2) (1919) I. L. R. 47 Cal. 175, P. C.

sufficient that the general result of the compromise should be understood, and that people disinterested and competent to give advice should, with a fair understanding of the whole matter, advise the lady that the deed should be executed."

In the case of *Ruhulla* alias *Hakim Hamad* v. *Hassanalli Degu Mia*(1), the Privy Council held that where the execution of the deed was not questioned, and the disposition of property made by it was so natural that the lady would have had every motive to make it, and it was further proved that she knew and approved of what was being done, the transaction ought to be upheld. They repeated the observation made in *Kali Baksh Singh's*(2) case that the legal protection of pardanashin ladies should not be transmuted into a legal disability.

We have, therefore, to consider the position of the lady, her intellect and power of understanding, and her business capacity, the nature of the transaction and the person with whom she was dealing. The transaction in this case is not the disposition or transfer of any property vested in and in the possession of the lady. It was a compromise of a disputed claim in a pending suit after her two attempts in the two will cases to establish her title to the property and defeat that of Suraj Mohan had failed. The compromise was being effected after ten years of hotly contested litigation. Sir Sultan Ahmed in the course of his able and learned address more than once characterised this compromise as a confiscation of the estate of the lady; more than once he tried to impress upon us that the lady was giving up her estate in lieu of maintenance. We are unable to look upon this compromise as a transaction by which the lady was divesting herself of an estate vested in her. Till then in the eyes of the law and as a matter of fact the estate was

(1) (1928) 32 Cal. W. N. 929, P. C.
(2) (1913) I. L. R. 36 All. 81, P. C.

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vested in the executor Mr. Savi, and after the administration it was to go to the residuary legatee Suraj Mohan.

When we deal with a compromise of a disputed claim in a pending suit, considerations arise rather different from those applicable to the transfer of vested properties. The principle is certainly the same but its application will be different, because the compromise of a disputed claim can be validly brought about even when nobody has a clear notion of the exact rights of either party.

The first thing to be considered is the intellect, business capacity and power of understanding of the lady. There may be a pardanashin lady who is illiterate, who has never come into contact with any stranger and who has never had any occasion to fight a suit or deal with Court business. A compromise by such a lady stands upon a different footing from one by a lady who is highly intelligent, literate and is in the habit of having direct communication with her legal advisers.

Let us now consider the position of the lady before us. In the case of *Barkat-un-nissa Begum* v. *Debi Bukhsh*(1) Sir John Wallis after referring to some incidents in the life of the lady involved in that case observed :

" This certainly suggests that she was a lady of strong personality and not at all likely to have left all her business in the hands of her servants, sign all the documents put before her without explanation and allowed them to do what they liked with the money paid to herself when the deeds were registered."

This remark applies with even greater force to the plaintiff in the present case. At the time of the transaction she was middle aged. Her husband, who was an enlightened gentleman, had given her some education in Bengali, English and Hindi, and she knew these languages to some extent. She admitted

(1) (1927) 31 Cal. W. N. 693, P. C.

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this in her evidence in the Calcutta will case. No doubt she now says that she forgot everything a few years after her husband's death; but several of her Hindi writings are before us and, as we have already stated, they indicate a practised, fluent and well-trained hand. While giving evidence in this case, she would often insist that a question in cross-examination should be put to her in Maithili dialect. On other occasions, when off her guard, she made no difficulties about understanding questions put in Hindustani and actually answered them. Whenever any awkward question was put, she would ask the question to be repeated and make a number of excuses in order to get time to answer it. She was subjected to a lengthy cross-examination in this case, and on each occasion, when in difficulty, she always had some intelligent explanation to offer. If nothing was available to explain some events, her puja and the annoyance of Mr. Ram Krishna Jha and Babu Murari Prasad were promptly mentioned. Her evidence will show that she behaved very well in the examination-in-chief, but as soon as her cross-examination commenced, she began to fence and the burden of her answers to a large number of questions was that she did not know the Court language (Hindi) and spoke the Maithili dialect which is her mother tongue. We will show in a moment that she is fully familiar with the Hindi language in which the petition of compromise has been written—a language in which she has been signing the verifications of the plaints and petitions. Exhibit W-1 is her deposition in the Bhagalpur will case. A reading of this document will show that she fully knew Hindi. In that evidence there are a number of passages which have been recorded in vernacular in her own words, and they show that she could speak good Hindi containing Persian and Arabic words—a language which is used in documents filed in Courts. Of course, there are here and there passages in the Maithil dialect as well. She knew the English dates and the English months.

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When asked about her signature on the will propounded by Mr. Savi, she said that the signature was like hers, but that she was not sure that it was really hers. Surely, this is scarcely consistent with her evidence in this case where she claimed to be unable to read her signature and only able to identify the letters individually. In this deposition she stated that since her husband practised fraud upon her by getting her signature on blank papers for the purpose of a will, she had been careful while signing documents, to specify the purpose for which she was doing so. A number of vakalatnamas from her are on the record, and in almost everyone of them she has clearly indicated the purpose for which she was engaging a lawyer. During her deposition there were occasions when she answered questions put in English before they were interpreted; and when her attention was drawn to this fact, she definitely stated that she knew a little of English. She used to consult lawyers herself from behind the pardah, to hear them, but convey her answers to them through an intermediary. She knows the names of the lawyers who worked for her in Patna, Calcutta and Monghyr.

Such is the lady who is said to have been imposed upon by a young lad who had attained his majority less than a year previously and with whom she had been fighting for many years past. Can it be said with any amount of reason that this youth was in a position to impose upon the lady or dominate her will? The signing of the petition of compromise and the receipt for Rs. 3,000 is admitted by her, but it is said that she signed them without knowing their contents and without their having been read over to her. We have already pointed out that this is not a credible story. We have said that the signature portion on the petition contains a statement that she had read the petition, and the whole of the receipt is in her hand-writing. She herself says that when the petition was brought to her for her signature, she asked whether Rs. 20,000 was paid to Ram Krishna Jha,

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and that she did not sign the petition till the money was actually paid, and it is on the face of it impossible to believe that she signed it without satisfying herself that it contained the terms which she had agreed to.

Now coming to the nature of the transaction, it was, as we have said, not a transfer of any property vested in the lady but a compromise of a disputed claim in a pending suit. It has nowhere been suggested either in the long argument which has been addressed to us or in the petition under section 151 of the Civil Procedure Code or in the evidence of the lady that she did not fully know or understand the scope of her suit. Her own allegations about the terms of compromise clearly show that she knew every little detail of her claim. It will be remembered that according to her the terms were: the estate was to be hers but to be managed during her life by Suraj Mohan; she was to get Rs. 1,000 a month, besides house rent and all her expenses, till the debts were paid; thereafter she was to get the jewellery and gardens and the arrears of maintenance. The very statement shows that she knew that her suit was for the estate and that she had also claimed in it jewellery and gardens. In her evidence she mentions the income of the estate, with a slight exaggeration. Apart from her admitted and indisputable knowledge of the nature and extent of her suit, there is very clear evidence that Maulvi Sayeed-ud-din did explain these things at least to her. Her petition under section 151 of the Civil Procedure Code conveys the impression that she herself heard what Maulvi Sayeed-ud-din said. In her evidence she denied it and stated that she received his message through a servant. That is palpably false. The fact that Maulvi Sayeed-ud-din did explain to her the nature of her suit was, as we have said, in a way admitted when the lady's case was put to the witnesses of the defendant. The only question which now remains is whether she understood what she was getting in return for her giving up her suit. That was simple enough. It was a maintenance of Rs. 1,000 per month, Rs. 17,000 in cash,

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a decree for Rs. 1,00,000 payable in instalments, a suitable house at places of pilgrimage on a monthly rent of Rs. 100 to Rs. 200 and a conveyance. For a lady with the capacity and experience described above there could clearly have been no difficulty in understanding these terms and comprehending what she was actually getting in lieu of the claims which she had made. Once we come to this conclusion, no other thing is really required to be proved. In fact there is a good deal of force in the contention of Mr. Manuk that the onus on the defendant has been discharged by the admitted and undisputed facts of the case if the story of fraud put forward by the plaintiff is disbelieved. It is not her case that she entered into the compromise without understanding it. Her case is essentially either fraud or nothing. No doubt, in her petition under section 151 of the Civil Procedure Code all possible attacks were made on this compromise. There was an allegation of fraud; there was a half-hearted suggestion of misunderstanding; there was an allegation that she was kept in a house surrounded by the people of Suraj Mohan, and there was also a plea of want of explanation and want of independent advice. Her story of being kept under restraint in the house of Baiju Mandal—the story that peons were kept to guard her—can be dismissed at once. It is not mentioned in the petition. For the first time it was introduced in her evidence and (in order to explain this) she said that she heard it later from Bodh Krishna Jha. What sort of restraint it was will be apparent from the fact that she had to admit that she used to go daily in the morning to the river for her bath in the Ganges and that when she wanted to come out of the house to go to the railway station, there was nobody to stop her. The real contest, however, has been that the terms as agreed to by her were fraudulently changed and that she signed the petition of compromise on trust. We have disbelieved this and have held that she agreed to the terms mentioned in the petition. The learned Advocates, who argued her case before us, were certainly under a difficulty in arguing a case based on fraud and fraudulent change

of terms on the footing of a case of a compromise entered into without understanding its effects. To our mind these two cases are somewhat inconsistent. Her allegations amount to this.

> "I did compromise; I knew my suit; I wanted of my own accord to get a particular set of terms; I got them; they were agreed to willingly; but I was made to sign a petition which, without my being aware of it, contained different terms; and that is how I am aggrieved."

If this story goes, and, as we have shewn, it is entirely false, the question of want of explanation and want of advice does not arise. If her story be true, the compromise propounded by the defendant cannot stand. It would not stand, on that footing, even if the person involved was not a pardanashin lady.

For a deed to be binding on a person executing it it is necessary that there should be not only the physical act of execution but also the mental act of intending the execution. In the case of a person who is sui juris and not under any disability, this mental act is presumed if the execution is admitted or proved; a man must be taken to have intended to do what in fact he has done. But documents executed under the influence of fraud or by persons who are ignorant, weak and infirm (pardanashin ladies come in this category) will not be given effect to unless the Courts are first satisfied that the mind accompanied the hand in the act of execution. In both the cases, namely, when a person labouring under some deception caused by fraud executes a document, believing that he is agreeing to one set of terms while the document contains another set of terms, and when a pardanashin lady does so without fully appreciating the full import of the document owing to her pardanashin character, the document is invalid on account of the fact that the physical act of execution is not accompained by the mental act. In one case there is the absence of a mental act corresponding to the physical act, because while the physical act is being performed in respect of one set of facts, the mind has before it quite a different set of facts. In the other

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there is an absence of a corresponding mental act on account of the deficiency in the intellectual capacity caused by the lady's life of seclusion. In the one case the party alleging fraud must prove it, by placing before the Court facts from which it can irresistibly be found. In the other the person who wants to take the benefit of the document must prove that the intellectual deficiency was made good by proper explanation given to her. It will thus be seen that the two cases stand upon two different footings. The case of the appellant was under the first head, but it has also been argued under the second head. We have said that the intellectual deficiency of the lady concerned must be proved to have been made good by proper explanation given to her. What that evidence should be will vary from case to case and from lady to lady. No particular mode or quantum of proof is needed. There may be cases in which on the admitted facts of the case the Court, taking into consideration the personality of the lady and the circumstances of the case, is satisfied that the onus has been discharged, that there was no actual deficiency to be made up and that the lady concerned did fully understand the transaction in question. In our opinion, the present case is of this nature. The case of fraud has hopelessly failed; as we have already shown, the lady herself not only had the capacity to but did actually negotiate, settle and agree to all the terms mentioned in the petition of compromise. She admits that she agreed to certain terms, and it is not her case that she did not understand them. It cannot therefore be argued that she was capable of understanding and appreciating the terms which she says she agreed to but not the terms which have been proved to have been subscribed to by her. We wish to explain ourselves by giving an illustration. Supposing a pardanashin lady has brought a suit for recovery of Rs. 2,000. The defendant puts forward a petition of compromise signed by the lady in which she has

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compromised the suit for Rs. 500. The lady admits that she compromised the suit and signed the petition of compromise but alleges that she compromised the suit for Rs. 1,500. The question will be whether she compromised the suit for Rs. 500 only. Once this is proved beyond all doubt, the compromise is binding upon her, provided that the lady knows sufficient arithmetic to understand the difference between Rs. 2,000, Rs. 1,500 and Rs. 500, and provided further that the compromise was not brought about either by undue influence or fraud or any other invalidating circumstance. Of course, if the compromise be for a grossly inadequate consideration, that may be an element in the proof of fraud or may indicate that she did not fully appreciate the terms. We will deal with this later. In this case the terms alleged by the lady are, if anything, rather more complicated than the terms contained in the petition of compromise. In the terms alleged by her, there is one that Suraj Mohan is to manage the estate all along. It could have been argued that it was necessary to explain to the lady the full import of that appointment and that she ought to have been told what would happen if he mismanaged the estate or did not make over the entire income to her. But the terms in the compromise petition are, as we have said, simple and required no particular explanation. However, it was conceded by the defendant in the lower Court that the onus was upon him to prove that the lady signed the petition of compromise after understanding its full import and Mr. Manuk who has argued the case on his behalf has maintained that he has discharged the onus upon him not only by proving the necessary facts from the admissions and statements of the lady herself but also by the evidence adduced on his behalf; and we desire to deal with the case from that standpoint also. We have held that the lady knew every inch of her case and fully appreciated it. The lady claims to have known that under the Mithila law she was the joint owner of the estate with her husband, and to have been told of it by an eminent barrister.

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She was so firm on this point that on one occasion during cross-examination she resented the estate being called her husband's estate and maintained that it was equally hers. We have also held that Maulvi Sayeed-ud-din did explain to her the nature and extent of her claims in the suit. We have further held that the negotiations for the compromise emanated from her, and that she herself settled the terms partly at Simaria Ghat and partly at Monghyr. It has been proved beyond all doubt that the draft of the petition of compromise which was prepared under her own supervision was read out to her, that Exhibit F is a copy of that draft, and that the petition of compromise is practically an exact copy of Exhibit F with a clause of personal exemption of Mr. Savi added to it and the amount of arrears filled in. The actual amount as alleged by the lady is Rs. 1,20,000, while in the petition of compromise it is Rs. 1,17,000. The difference is comparatively small. We have also held that the lady agreed to this personal exemption of Mr. Savi. In our opinion, therefore, everything required to be proved has been proved. Sir Sultan Ahmed, however, argued that there was no evidence of actual explanation. We definitely asked him what there was in the petition of compromise (assuming that it contains the terms as agreed to by the lady) which required explanation and which she could not have otherwise understood. He pointed out to us three such terms; and urged, first, that it ought to have been definitely explained to her that her other claims were going to be dismissed as mentioned in paragraph 8 of the petition of compromise, as the setting of the paragraph was likely to have misled her; second, that she ought to have been told that she would not be able to enforce the charge created on the estate for her maintenance in the execution department and, third, that she ought to have been told that the term contained in paragraph 6 of the petition to the effect that Suraj Mohan would look after her, would not give her any discomfort and would always be obedient to her,

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was unenforceable. Regarding the first of these contentions, namely, about the dismissal of the rest of her suit, it is clear that if the lady knew her suit and if she also knew what she was getting, she with her capacity and experience could not but have known what she was giving up. It was, therefore, not necessary in the circumstances to give her any further explanation or warning about the rest of the suit. There is an overwhelming mass of satisfactory evidence (in fact this is the evidence of every witness of the defendant) that what was compromised was the entire suit without any reservation. Even the lady does not say that it was not the whole suit that she compromised. The only difference between her case and that of the defendant is as to what she was to get in return for abandoning *all* her claims in the suit. So the question again resolves itself, as we have said more than once, into the terms settled. Once we come to that conclusion, it follows that she knew that the rest of her claim was to be dismissed. As to the second contention, namely, that the charge to be decreed was not enforceable in execution, we will show later on that as a matter of fact the charge can under the law be enforced in execution of the decree which has been passed in this case and that no fresh suit is necessary. But assuming that the contention of learned Counsel is well-founded, even then an explanation of such an intricacy of law was not necessary. It was after all a matter for the lawyers to settle. We have held on the circumstantial evidence in this case that the draft was prepared and settled by Maulvi Sayeed-ud-din. The petition of compromise, moreover, was as a matter of fact signed by Babu Hito Rai. If a person informs his lawyer of the terms on which he has compromised a suit and asks the lawyer to prepare a draft and if that lawyer prepares a draft, that draft would embody his advice. Babu Hito Rai, it is true, had no power to compromise the suit, but he was certainly the lady's legal adviser; and if a draft was seen by him and Maulvi Sayeed-ud-din and approved of by them, and if the lady

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accepted that draft, it cannot be doubted that she left the settlement of the legal forms to the lawyers. Then again it is not the lady's evidence that if she had known that under the law the charge for maintenance could only be enforced by a fresh suit in respect of each month's arrears, she would not have agreed to the compromise, nor can it be said that in the circumstances she would have been at all well-advised in withholding her assent on such a ground. As to the third contention again, it is absurd to suppose that the lady could have been under any misapprehension that the clause about generally looking after her and obedience was a term which could be legally enforced, and it is not her case in the evidence that she would not have compromised, had she known the legal effect of this clause. Supposing this particular thing was not explained to her, is there anything to show or suggest that had it been explained to her that the clause had no value in law she would not have compromised the suit? Therefore in our opinion there was nothing in the compromise which in the circumstances of this case required any particular explanation to be given to the lady. As long as the petition of compromise contains the terms which were agreed to by her, it is immaterial whether the petition of compromise was or was not even read over to her or read by her. But as a matter of fact there is good evidence that the draft was read over to her at least once, if not oftener, in the early stages of its preparation, and that the fair copy was read by her and also read to her by Ram Krishna Jha and again by Baiju Mandal in the presence of the Subordinate Judge. Whatever might be said about the reading of the petition by her or to her by other persons, there is no doubt that it was read over to her by Baiju Mandal and was heard by her—she was within hearing distance and was not really prevented by any noise or any mental disturbance from following it; and its contents were simple enough to be understood by her, and she must have understood them.

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The next point is the question of independent advice. Now, as we have shewn, independent advice is not always essential. As was pointed out by the Judicial Committee, the advice, if given, might have been perverse or might really have been injurious to her interest. Nevertheless though there is no evidence that anybody advised her to compromise on these terms, there is the admission of the lady that her uncle Bidya Jha and her cousin Bodh Krishna Jha did advise her to compromise. These two could have had no motive for benefitting Suraj Mohan, and in fact no such motive has ever been suggested. As to the terms, in our opinion the lady was quite competent to form an opinion of her own whether she should retire from the fight on a maintenance of about Rs. 1,300 per month with a decree for past maintenance amounting to Rs. 1,00,000, and a cash payment of Rs. 17,000. Though, as we have said, there is no evidence that anybody advised her to compromise on these terms, all those persons who could have advised her in this respect were available to her and were present and were in touch with her. It is not the duty of the defendant to prove the actual conversations which took place between the lady and her friends and advisers. Expecting this would be expecting impossibilities. In fact, had any evidence of advice having been given in the presence of the defendant's witnesses been adduced, it would have been very suspicious and unbelievable, firstly, on the ground that such advice is generally given in confidence and not in the presence of the people of the opposite side and, secondly, because such advice, if given in the presence of the adversary or his men, would have been liable to attack as valueless. The defendant could do nothing more than make all her friends and advisers available to the lady. Ram Bahadur (her karpardaz) was there; Bodh Krishna Jha (her cousin) was there; Ram Krishna Jha who was the life and soul of her litigation was there. At least two of them (Bodh Krishna Jha and Ram Krishna Jha) had access to the lady. We do not

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believe that they were indifferent. They must have advised her, and the compromise was certainly with their advice. The lady was also placed by the defendant in touch with Maulvi Sayeed-ud-din. At the time when the compromise petition was filed, her lawyer Babu Hito Rai was present, and whatever might be said against him, the fact remains that even after the compromise he continued to have the confidence of the lady and went on working for her. We fail to understand what else could have been proved by the defendant. We, therefore, hold that in this particular case there was no deficiency in the intelligence of the lady which required to be supplemented by any outside help or advice, but assuming that there was, she had ample opportunity of receiving such help and advice which, it is not satisfactorily shown, was really thrown away by her. The lady was quite capable of understanding the business. She did understand it, and willingly entered into it, and the terms of compromise were fully understood by her, and the terms in the petition were read by her and were also read to her. As we have said it is not necessary to notice the cases relied upon by the appellant. Almost all of them lay down that the burden is on the party, who wishes to enforce a document executed by a pardanashin lady, to prove that she understood and appreciated it. This is not disputed. The decisions are based upon the facts of those cases; for instance, in *Kamawati* v. *Digbijai Singh*(1) where a pardanashin lady who had inherited some properties from her mother's brother under the provisions of the Indian Succession Act, relinquished her claim on acceptance of a monthly allowance of Rs. 50, the transaction was set aside mainly on the ground that the lady did not know the extent of the properties which she had inherited. We have already referred to the case of *Farid-un-nissa* v. *Mukhtar Ahmed*(2). There also the question was whether the onus, which was undoubtedly upon

(1) (1921) I. L. R. 43 All. 525.
(2) (1925) I. L. R. 47 All. 703, P. C.

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the claimant, was sufficiently discharged. Two cases, however, require special notice: one is a decision of the Calcutta High Court in the case of *Tarubala Dasi* v. *Surendra Nath Mitra*(1). There the learned Judges set aside a compromise entered into by Counsel on behalf of a pardanashin lady as being manifestly unjust and unconscionable, relying upon the case of *Neale* v. *Gordon Lennox*(2). When the matter went to the Privy Council, the decision of the High Court was set aside and the case of *Neale* v. *Gordon Lennox*(2) was distinguished—*Surendra Nath Mitra* v. *Tarubala Dasi*(3). It is important to note that their Lordships held that Order XXIII, rule 3, " does not in terms appear to confer a discretion on the Court ". They, however, clearly guarded themselves against being understood themselves to say anything which might prejudge a contention that the Courts retain an inherent power not to allow their proceedings to work substantial injustice—the principle laid down in *Neale* v. *Gordon Lennox*(2). We will revert to this aspect of the case later on, as it was argued that the transaction is so unconscionable and unjust, that the Court in the exercise of its inherent power should not record it. At present we are on the doctrine of pardanashin ladies. Mr. Hasan Imam, who replied on behalf of the lady, drew our attention to the observations of Chaudhury, J. in the case of *Kamini Dasi* v. *Krishna Chandra Mukherji*(4) where the remarks of Farwell, J. in the case of *Powell* v. *Powell*(5) that the duty of a solicitor does not end with the giving of advice to his client and that if the solicitor finds that his advice is not accepted by his client and that the latter is bent upon carrying out an improvident act, it is his duty to refuse to work, were followed. That was, however, a question of the duty of a solicitor towards his client, with which we are not concerned here. There was no solicitor in this

(1) (1924) 41 Cal. L. J. 213.
(2) (1902) A. C. 465, 469.
(3) (1930) I. L. R. 57 Cal. 1311, P. C.
(4) (1912) I. L. R. 39 Cal. 933.
(5) (1901) Ch. 243.

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case, and we will show later that the act of the lady was in no way improvident; rather, in our opinion, it was in every way beneficial to her.

On the other hand, in the recent case of *Sheoparsan Singh* v. *Munshi Narsingh Sahay*(1) on an appeal from this Court, the Judicial Committee upheld a deed against a pardanashin lady, though there was no evidence of the terms having been explained to her. The deed in question was a mukhtarnama which in the widest possible terms gave power to her attorney, *inter alia*, to mortgage the properties of the lady and even to sell them. It was signed in the pen of her father on her behalf in the presence of two witnesses and was presented by her to the Sub-Registrar, and she affixed her thumb-marks to it in his presence. There was no evidence at all that it was read over and explained to her, but there were circumstances, some of them subsequent to the transaction, which showed that she had fully understood it. The lady was accordingly held bound by it. In the present case the lady admitted before the Subordinate Judge having signed the petition of compromise, and it was made over to him in her presence.

Is the compromise manifestly unjust? Was it an unconscionable bargain, and an improvident act on the part of the lady?

It has been very strenuously contended that the compromise is unjust even if the lady agreed to it, and that it was an unconscionable bargain and an improvident act on her part, as she received very inadequate consideration for such an agreement, and in fact got nothing for her personal properties in the suit such as the jewellery, gardens, etc., and got future maintenance and arrears, the house rent and conveyance, only in lieu of the estate of her husband, though she would have been entitled to maintenance in any event; and as even the maintenance given to

(1) (1932) 13 Pat. L. T. 561, P. C.

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her is very disproportionate to the income of the estate. The argument is that under the Mithila School of Hindu law the lady had an indefeasible case for the estate and her suit was bound to be decreed simply on the examination of that law; that even if she had lost her claim to the estate, she would in any event have got her personal properties, i.e. the jewellery, gardens, etc. and would in any case have been allowed a maintenance on a much higher scale; and that the sum of Rs. 100 per month provided in the will was a legacy and would not have disentitled her to maintenance according to the means of the estate irrespective of it. These points have been urged both as an important element in the consideration of the facts of fraud and intelligent execution, and also as a question of law for the exercise of the inherent power of the Court to refuse to record this compromise. It is contended that if we come to the conclusion that the compromise—or at least a part of it—was without consideration or for a very grossly inadequate consideration and involved the surrender of her indefeasible right to the estate, it should be held that she could not have signed the petition of compromise after fully understanding its effect and scope, and that she must have done so either under the influence of fraud or without understanding it. It is further contended that, at any rate, the compromise is so unjust that we should in the exercise of our inherent powers refuse to record it on the basis of the principle enunciated in *Neale* v. *Gordon Lennox*(1), a principle which was applied by the Calcutta High Court in the case of *Tarubala Dasi* v. *Sourendra Nath Mitra*(2) and not dissented from by their Lordships of the Privy Council in appeal from that case. A consideration of these questions involves in a way the trial of the suit itself. Ordinarily, when investigating the fact and lawfulness of a compromise under Order XXIII, rule 3, it is irrelevant to examine the strength or weakness of the suit

(1) (1902) A. C. 465, 469.
(2) (1924) 41 Cal. L. J. 213.

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itself. We agree in the observations of my Lord the Chief Justice of this Court in the case of *Mahabir Tewary* v. *Chhathu Tewary*(1) and are of opinion that when a compromise is in dispute, the party repudiating it, on whatever ground it may be, cannot reasonably ask that the entire suit be re-opened. In the above case the question involved was whether a compromise partition decree should be set aside on the ground of fraud. His Lordship observed: "Sometimes also the Court proceeds to examine whether the plaintiff's claim was well founded in law,—an equally irrelevant enquiry. The proper method for a Court in approaching a case of this kind is to say to the plaintiff in effect 'I will assume for the purposes of this case that the division effected by the compromise constitutes from your point of view a thoroughly bad bargain, otherwise you would not have attempted to get it set aside, but you must proceed to establish, notwithstanding that assumption in your favour, that the compromise was induced by fraud'. The legal procedure for setting aside a compromise is not a procedure for setting aside a hard bargain." Ordinarily, as we have said, in a proceeding under Order XXIII, rule 3, an enquiry into the merits of the suit itself is entirely irrelevant. To hold otherwise will create an absurd position: every party who wants to go back on a compromise lawfully entered into by him would ask, when the compromise is under enquiry, that the entire suit should be tried first before the compromise can be recorded. This will defeat the very object of Order XXIII, rule 3. In this case, however, we are dealing with a pardanashin lady who has set up an issue of fraud; and want of understanding and of appreciation was strenuously argued before us. We are now at a stage when we are examining whether this compromise should or should not be recorded; or to be more explicit, whether the order of the Subordinate Judge for the recording of the compromise should be upheld.

(1) (1932) I. L. R. 11 Pat. 613.

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In our opinion, at this stage it will not be wholly irrelevant to examine in a summary way the points urged by the appellant in order to find out whether there is any prima facie indication in the terms themselves—anything to justify the conclusion—that the lady would not have compromised on these terms unless she was either labouring under fraud or unless she was in complete ignorance of the import of the compromise; or, at any rate, whether it is a case in which in spite of the mandatory provisions of Order XXIII, rule 3, we should exercise our inherent power (if there be any such power in us) and refuse to record the compromise. We propose to take up this point under the following heads:—

(1) What was the financial position of the estate and the extent of its indebtedness at the time when the compromise was effected?

(2) Is the maintenance provided in the compromise grossly inadequate and manifestly unjust to the lady in view of the position of the estate?

(3) Is the absence of provision for the barkhi (sradh) unjust? Was the lady entitled to any such provision?

(4) What were the chances of plaintiff's success in respect of her suit for her alleged personal properties, namely, the jewellery, gardens, etc.?

(5) What were the chances of the plaintiff's success as regards her claim to the shebaitship?

(6) What were the chances of success of the plaintiff's case in respect of the estate?

(7) Is the compromise for no consideration or for a grossly inadequate consideration?

* * * * *

* * * * *

[The findings on points (1) and (2) are based entirely on facts. Their Lordships held, after taking into consideration the income of the estate, its indebtedness, the allowances granted to the ladies of other branches of the family and of families having higher income and the provision made by the lady's husband, that the allowance in the present case was not only fair but liberal.]

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Is the absence of provision for the barkhi unjust? Was the lady entitled to it?

It is contended that a Maithil widow is entitled to get from her husband's estate not only maintenance but also expenses for his annual sradh, and that the absence of such a provision in the present compromise is unjust inasmuch as the plaintiff is bound under the Hindu law to perform her husband's annual sradh and its expenses would be a burden upon her. Reliance has been placed upon some passages of the Vivada Chintamani (Tagore's translation, pages 288, 289 and 290) and on the cases of *Dalel Kunwar* v. *Ambika Partap Singh*(1) and of *Sunderji Damji* v. *Dahibai*(2).

Now the Vivada Chintamani is not a book on ritual but on law proper. The passages relied upon occur in the chapter on 'Succession to the estate of one who leaves no son.' The first passage relied upon runs thus:

"The right of performing funeral obsequies is settled according to the following authority: 'the son, the son of a son and the son of a grandson;' hence their right of inheritance, which is similar to the right to performing funeral obsequies, is likewise established. Therefore in default of a great grandson, the estate devolves on the widow."

Emphasis is laid on the last clause, and it is argued that the widow's right of succession is based upon her right to perform the funeral obsequies. The second passage relied upon, which occurs after it is laid down that a faithful wife should take the wealth of her husband, runs thus:

"Taking his effects, moveable and immoveable, the precious and base metals, the grains, liquids and clothes, let her cause several sradhs to be offered in

(1) (1903) I. L. R. 25 All. 266.
(2) (1904) I. L. R. 29 Bom. 316.

each month, in the sixth month and at the close of the year

* * * * *

"Here by the mention of the Shraddhas that a wife must perform, it is meant that she shall also perform the ten Shraddhas of her husband recently deceased, and also celebrate the obsequies annually, and take the whole estate of her lord. What has been said above is applicable in the case of a husband who has taken his share from his co-heirs."

These passages to our mind do not support the plaintiff's contention that a widow is entitled to get the cost of her husband's annual sradh from those who may have taken his estate. The last clause clearly shows that all the injunctions about the performance of sradh apply only if the husband was separate from his co-heirs. If he was joint with them, the widow does not get anything and in that case no duty seems to be cast upon her by the passage. It would appear to be a duty to be performed by her only if she takes the husband's estate. Therefore it cannot be urged as general proposition on the strength of this passage that in the absence of a grandson the wife is required to perform the sradh in every case.

It is contended on the basis of the passages quoted that the widow's capacity to perform the sradh is the ground for her inheriting the estate. It is however an admitted fact in this case that Tagore's translation of the Vivada Chintamani is full of mistakes. The learned Advocates of both parties conceded this, and the fact of Tagore's inaccuracy has been noticed in several decided cases. The first passage quoted above was the subject of controversy in *Rajrani Debya* v. *Gomati Debya*(1), and it was held that the translation was not correct.

(1) (1928) I. L. R. 7 Pat. 820.

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Fortunately this part of the Vivada Chintamani has been translated by Mr. Setlur in his Collection of Hindu Law Books on Inheritance. His translation of this passage, which was accepted by this Court in the above case, will be found at page 265 (Part II of the book) and runs thus:

"Dying (without issue) without son, grandson or great grandson. The right to perform sraddha being established in the order laid down in the text, 'The son, the grandson, or the great grandson', the right to succeed to the wealth which is similar to it is also settled."

The last sentence "Therefore in default of a great grandson the estate devolves on the widow" as mentioned in Tagore's translation is not to be found in Setlur's translation and is, in the original, a part of the next paragraph without the word "therefore" and this changes the entire complexion of the passage. If "therefore" of Tagore's translation is not there the plaintiff's contention fails.

Similarly Tagore's translation of another passage about sradh quoted above does not tally with that of Setlur's. The latter runs thus: "By the enumeration of sraddhas, it is meant that she shall perform the obsequies, anniversaries, etc., of the deceased. The meaning is that she shall take the entire wealth." If this translation be correct, it seems clear that the obligation to perform the annual sradh is dependent upon taking the wealth. It is not the appellant's case that the question is directly in issue, and as it has not been fully argued before us, we do not propose to pursue this matter further.

In the Allahabad case a widow was held to be entitled to maintenance from the adopted son from the time of the death of her husband and was also allowed the amount spent by her on funeral ceremonies and sradh which the adopted son was bound to perform. This case is of no help to the plaintiff.

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There the question was whether the widow was entitled to get a set off for the amount spent by her on ceremonies which it was the duty of the adopted son to perform. In the Bombay case Chandavarkar, J. held that in the absence of the son, grandson or great grandson, it was the duty of the widow to *get* the ceremonies performed, and that if the son was a minor, it was her duty to see that they are performed. This is quite a different thing from the plaintiff's contention that when the estate is in the possession of the nephew, she can get from him the expenses of the sradh. The defendant, on the other hand, contends that under the Hindu law a widow is not entitled to offer pindas to her husband though she may give charities or feed the Brahmins and the poor on the anniversary of her husband. In fact there is a very serious controversy as to what the lady did at Allahabad. She alleged that she not only performed the *sajjadan* and fed the Brahmins but offered pindas as well. On the other hand, the evidence on behalf of the defendant is that she did not offer the pindas. The evidence on behalf of the lady consists of the depositions of herself and her cousin Sudhakar Jha whose evidence we have already commented upon. Be that as it may, we do not wish to examine in detail the right of the widow to perform the annual sradh. Supposing she is entitled to do so, a sum of Rs. 1,000 need not be spent over it. There is evidence on the record that the expenditure on the annual sradh in the family of the deceased is about Rs. 25 to Rs. 50. That being the case, the amount is too trifling to be considered. Taking the condition and the indebtedness of the estate, which we have already stated, and the provision made by Ugrah Mohan himself in his will, the expenditure of Rs. 1,000 per annum on the annual sradh seems to us to be extravagant and excessive. Therefore, the making of no separate provision for it in the compromise is not in the least unjust.

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What were the chances of plaintiff's success in respect of her suit for her alleged personal properties, namely, jewellery, gardens, etc.?

We repeat once more that we are not called upon to decide the lady's claims in the suit. It is possible that if detailed evidence had been adduced by the parties, the lady might have succeeded, but it is no less possible that she might have lost. The personal properties have been referred to in schedule C of the plaint. They consist of four gardens, jewellery and moveables. The value of the gardens has not been given in the plaint, but from the documents produced in the case it appears that they are worth a few thousand rupees. The value of the jewellery and the moveables is given in the plaint as about Rs. 31,000. As to the title to the gardens, reliance has been placed upon the fact that their title deeds stand in her name. They are Exhibits 10 and 25(*a*). It seems that the gardens were purchased first from Fakir Mandar in the benami name of one Lakhi Prasad Dubey and afterwards transferred in the name of the plaintiff. Exhibit 9 is the wrapper in which the deeds were kept, and on it it is written in the handwriting of Ugrah Mohan Thakur himself that it contained documents relating to the properties of the plaintiff. No doubt this is prima facie evidence in favour of the plaintiff, but it is not unusual for people to acquire properties in the names of their wives as their benamidars. Exhibits N series are accounts of the estate and show that the income from the gardens was entered in them. The lady herself in her deposition in the Calcutta will case stated that her husband sometimes used to give her the income of the gardens and sometimes not. She further said that he purchased the gardens for her. It is obvious, therefore, that the gardens were purchased from the funds of Ugrah Mohan Thakur. Whether he purchased them

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for himself or for the plaintiff is quite a different matter. The evidence is not all available, and it is difficult to judge what would have been the result had the issues been directly tried in the suit itself.

Coming to the jewellery, reliance has been placed upon the list of properties filed by Mr. Savi in the Bhagalpur probate case. There are about half a dozen articles in that list which seem to tally with the articles mentioned in the list given by the plaintiff in one of her schedules to the plaint; and in Mr. Savi's list they are described as belonging to "Mrs. Thakur." Here again, as we have said, the evidence has not all been adduced for the obvious reason that the matter was not directly in issue. From the fact that the articles were mentioned as those of " Mrs. Thakur " one cannot make out anything. No evidence has been adduced that Mr. Savi used to designate the lady as Mrs. Thakur. Some witnesses have referred to her as " Thakurain " and some as " Dai ". Mr. Manuk suggested that " Mrs. Thakur " might refer to Bati Jan, a mistress of the deceased. It may be so. On the other hand, in big estates jewellery is often kept as belonging to the estate, to be used by the ladies of the house for the time being, and thus need not necessarily be the personal property of the ladies. Therefore, it is difficult to say what would have been the decision of a Court if all these matters had been gone into in detail on a definite issue. The total value of the moveable properties claimed cannot, on a liberal estimate, exceed Rs. 40,000 in all. There is nothing to show that the lady would have insisted on getting these things when she got Rs. 17,000 in cash, a decree for one lakh and future maintenance at a rate far in excess of what she would have got in view of the indebtedness of the estate; and we do not consider the compromise to be unjust on this ground .

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What were the chances of success of the plaintiff's suit in respect of her claim to the shebaitship of the dedicated properties?

As we have said before, the dedicated properties are of two kinds; one was dedicated by Madan Mohan Thakur, an ancestor of Ugrah Mohan Thakur, and the other by Ugrah Mohan Thakur himself. It has been contended on behalf of the plaintiff that the will had no effect whatsoever on the shebaitship of the trust properties, that being the heiress of her deceased husband, she was entitled to it and that therefore her suit was bound to succeed in this respect. Reliance was placed on the case of *Panchanan Bannerji* v. *Surrendra Nath Mookerji*(1). On the other hand, it is contended for the respondent that the shebaitship cannot devolve upon the plaintiff. So far as the trust created by Madan Mohan Thakur is concerned, on Ugrah Mohan Thakur's death, it devolved on the available heir of the dedicator (Madan Mohan Thakur). A genealogy of the family will be found in the affidavit of Kishore Mohan Thakur, which is on the record of this case. The deed of dedication is not before us. In the case of *Jagannath Prasad Gupta* v. *Runjit Singh*(2) it was held that where a shebait did not appoint his or her successor and where there was no other provision for the appointment of shebait, the management of the endowed trust would revert to the heir of the founder. A similar view seems to have been taken by the Judicial Committee in the case of *Gossami Sri Gridhariji* v. *Romanlalji Gossami*(3) where it was held that in the absence of any provision to the contrary the shebaitship went to the heir of the founder. The plaintiff can in no sense be said to be the heiress of the founder. No doubt it was held in the case of *Panchanan Bannerji*(1) that in order to succeed to the shebaitship

(1) (1929) 50 Cal. L. J. 382.
(2) (1897) I. L. R. 25 Cal. 354.
(3) (1889) I. L. R. 17 Cal. 8, P. C.

it was not necessary to prove that the claimant was the heir of the founder; it was enough if he proved that he was the heir of the last shebait. But there the question was decided more on the construction of the will of the founder and that of the last shebait. The claim was, however, dismissed on other grounds. We will refer to this case later.

Coming to the question of the shebaitship of the trust created by Ugrah Mohan Thakur himself, the trust deed is before us. There the provision is that the shebaitship would go to his heir (waris). The word "waris" need not necessarily mean an heir entitled to succeed in case of intestacy. In case the deceased had power to dispose of his properties by will and he does so in fact, he nominates the person who is to succeed to his properties. It will be a question whether by making Suraj Mohan Thakur a residuary legatee under the will and providing only maintenance for his wife, Ugrah Mohan Thakur did not constitute the former his testamentary heir, entitled to succeed to all his properties and whether under the circumstances the word "waris" mentioned in the trust deed would not apply to Suraj Mohan Thakur. This will also apply to the trust created by Madan Mohan Thakur if its shebaitship was to go to the heir of Ugrah Mohan Thakur.

We must guard ourselves against being understood to be in any way positively deciding this question. We are not called upon to do so, nor are there complete materials on the record at present to come to definite conclusions on such points. We are simply showing that the contention put forward by the plaintiff, that her right to the shebaitship was indefeasible cannot be sustained. We will have to revert to this question later on when we come to deal with the lawfulness of the compromise. At present it is sufficient to say that the claim of the lady to the shebaitship cannot be said to be so clear as to enable us to say that it was unjust to deprive her of it.

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Again, the shebaitship is nothing but an office, and if it went to Suraj Mohan Thakur, who was to be the legatee of the bulk of the properties and who was to manage the estate, the compromise cannot be said to be unjust or improper on that ground.

What were the chances of success of the plaintiff's case in respect of the estate?

It has been already stated that the plaintiff's claim to the estate was based on the allegation that the will was forged, that the probate was obtained by fraud on account of her two karpardazes, Tajeshwar Jha and Kishori Jha, having colluded with the defendant, and last but not least that the Mithila law made the bequest of the entire property to Suraj Mohan Thakur void: firstly, as under that law she was a co-parcener of her husband with power to force a partition upon him, and secondly, as under that law a gift of the entire property by a man having a wife, or at least without her consent, is void. We have already said that her story about the probate having been obtained by fraud had, on the face of it, very little chance of success as she made her charges against Tajeshwar Jha and Kishori Jha during her deposition for the Bhagalpur case and long before the decision of that case. It was not a case of any fraud having been practised upon the Court nor of a fraud practised upon her, or coming to her knowledge, after the decision. If so, there is very little doubt that the plaintiff would not have been permitted to re-open the facts which were already decided in the probate case.

The main contention before us has been about the effect of the will under the Mithila law. More than half of the arguments of both sides have been devoted to this part of the case. The plaintiff's case, as we have said, is that her right to the estate on the basis of the Mithila law was so very clear that she could not have compromised on the terms which have been put forward by the defendant. Her case

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further is that at any rate those terms practically meant a confiscation of her estate, and that she was denuded of a very valuable estate in lieu of a very inadequate consideration of an insufficient maintenance. She urges that we should therefore not record the compromise. In our opinion an actual decision on the Mithila law is not necessary as we are not now deciding the lady's claim to the estate. So far as the probability of the lady compromising the suit is concerned, it can be judged without such a decision. What is of importance is not what the law actually is, but what the lady believed the law to be. Even if the law be not what is urged on her behalf, if she believed it to be so, the question of the probability of her entering into the compromise comes in. Now the lady had clearly stated that she knew the law and that she was told this by an eminent barrister. If in spite of that she compromised the suit, as we have held she did, the question of the state of the law does not arise. There is, however, no evidence that any eminent barrister told her that the proposition of law set up on her behalf was so very clear that she would not have compromised the suit on terms falling short of giving her the estate itself. The proposition of law urged by her is not supported by any decided case. The law contended for has to be deduced from the original texts—from passages on the meaning of which no two translators agree. Except for the admittedly incorrect and unsatisfactory translation of the Vivada Chintamani by Tagore, the 1863 edition of which is before us, some of the relevant passages are not to be found in any published translation of the book. The parties have produced translations of these passages by translators of their own choice, and these are admittedly not satisfactory, as will be presently seen. Even authentic texts are not available. For instance, the first proposition is sought to be supported by a passage in the Vivada Chintamani, published in Calcutta in the year 1837, of which a copy is an exhibit

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in the case. Another edition of the book published at Bombay in 1898 is more easily available and has been constantly referred to at the bar. It was admitted that the text of the Bombay edition differs from the text of the Bengal edition at places to such an extent that the meaning is changed. The disputed passage has been translated by four translators: two on behalf of the plaintiff, namely, Pandit Ishvari Datta Daurga Datti and Pandit Ram Autar Sharma, and by two on behalf of the defendant, namely, Dr. Ganga Nath Jha and Pandit Bhagwat Kumar Shastri. These translations are unsatisfactory. Not only does one set of translators for one party differ from another set produced by the other party, but the two translators of one party sometimes differ from one another. Not only this, but the translators when under cross-examination admitted a number of mistakes and at times took up a position which was manifestly untenable. No party relied upon Tagore's translation as it was admittedly unreliable. A portion of the book, as we have said, has been translated by Mr. Setlur in his 'Collection of Hindu Law Books on Inheritance'. But unfortunately an important passage relied upon in this case has not been translated by him. The materials placed before us, therefore, are uncertain texts and inconsistent translations prepared for the parties by translators who at places admitted their mistakes. There is no reported decision on the point in question, nor any evidence to the effect that there was any instance in which such law was ever recognised by any Court or acted upon by anybody. One should therefore not be surprised that this topic of the Hindu law was argued by the parties for a very large number of days. Can such a proposition of law be said to be so clear and so certain that the legal advice received by the lady would have made it altogether improbable for her to compromise the case by abandoning her suit on getting a decent maintenance, or for her friends and lawyers to advise her to compromise, or again, so clear and certain

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that we should treat this compromise as a confiscation of the lady's estate? After all, the lady even if successful in the suit, would only have got a life estate, and at least half of the estate would have gone to Suraj Mohan if he survived her, for he and his brother Naresh Mohan were now Ugrah Mohan's nearest reversioners. At most, it is an arguable point which may or may not have been accepted by Courts. The lower Court has not accepted it. Can it be said that the lady would rather have run the risks involved in fighting the case up to the highest Court than compromise it on a decent maintenance? We would have left the point at this stage and would not have proceeded to give a decision on the Mithila law itself. But both parties have spent a considerable amount of time and money over researches and translations, and have argued the points before us at great length and in great detail; and they have both asked us to give our decisions on them. We therefore proceed to do so, especially as the learned Subordinate Judge allowed the lady to adduce evidence by examining translators, and his order was upheld by this Court: (*vide* the order passed by Das and Adami, JJ. on the 17th of December, 1926, in Civil Revision Cases Nos. 634 and 635 of 1926).

Ugrah Mohan Thakur was a Maithil Brahmin and was governed by the law of the Mithila School which, as their Lordships of the Judicial Committee observed in *Sourendra Mohan Sinha* v. *Hari Prasad*(1) " is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila School has departed from the law of the Mitakshara ".

It has been contended on behalf of the appellant that, according to the law of the Mithila School, the wife is a co-parcener of the husband, and co-owner (with him) of his property, and that it is not competent to the husband to alienate his entire

(1) (1925) I. L. R. 5 Pat. 135.

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property without the consent of his wife among other relatives.

This contention is rested almost wholly on Vachaspati Misra's Vivada-Chintamani, a fifteenth-century digest of undoubted authority in Mithila. Reference has also been made to Chandesvara Thakur's Vivada-Ratnakara, an earlier Mithila digest, and the Dvaita-Parisishta of Keshava Misra (grandson of Vachaspati Misra), or rather, that version of it which we owe to his pupil Kalyana Misra under the designation of Suslishta-Parisishta, Keshava Misra's own compilation being said to be unavailable. None of these works is self-contained; and it is an essential part of the appellant's argument that the Mithila School does proceed on such Mitakshara doctrines as that the son takes an interest in the family property by birth and that partition implies a pre-existing title, though it is not claimed that these doctrines are noticed in the authorities referred to. It is, therefore, desirable to consider the position of the wife under the Mitakshara before turning to the Mithila authorities.

Now, under the Mitakshara, a woman is by marriage transferred from her father's *gotra* to that of her husband, so much so that a married woman can have no other *gotraja* relations than those of husband—(*see* Banerjee's Hindu Law of Marriage and Sridhana, 5th edition, page 506). By her marriage, she becomes one with the husband, as is shown, among other things, by certain *sutra's* (aphorisms) of Apastamba, which are, most if not all of them, referred to by most of the commentators including Vijnanesvara and Vachaspati Misra.

Dr. Buhler has rendered these aphorisms in Volume II of Max Muller's Sacred Books of the East Series at pages 136-137 (Prasna II, Patala VI, Khanda XIV), as follows:—

> " 16 No division takes place between husband and wife.

" 17 For, from the time of marriage, they are united in religious ceremonies,

" 18 Likewise also as regards the rewards for works by which spiritual merit is acquired.

" 19 And with respect to the acquisition of property.

" 20 For they declare that it is not a theft if a wife expends money on occasions (of necessity) during her husband's absence ".

These aphorisms point not merely to the union of husband and wife in religious matters but also to some dominion on the wife's part in the husband's property. As wife or widow, a woman is under the Mitakshara entitled to residence in the family house, and also to maintenance, this last right being generally founded on a verse of Yajnavalkya, II-142, which will be found translated in Colebrooke's Mitakshara II. 10. 14, and which has been adopted by the commentators of all the schools. (The editions of the Mitakshara now in use number the first verse in the Daya-Vibhaga chapter as 114, while Colebrooke's copy made it 115, and the discrepancy continues throughout the chapter with its thirty-six verses.)

Yajnavalkya further excepts debts contracted for family purposes from the category of the debts incurred by a wife which her husband is under no obligation to pay off—[*see* page 73 of Gharpure's Mitakshara (English Translation) in his " Collections of Hindu Law Texts "]; and this obligation to pay debts contracted by the wife for family purposes is somewhat similar to the obligation of co-parceners to pay debts contracted by one another for family purposes, which is laid down by Yajnavalkya in the preceding verse, II. 45. This may, however, rightly be regarded as a question not so much of the wife's.

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interest in the husband's property as of her implied agency. The wife's interest in the husband's property is also shown by the fact that when a father divides his property equally among his sons, he is required to give equal shares to his wives, if no separate property should have been given to them by him or his father (*see* Yajnavalkya II.115, a verse which will be found translated in Colebrooke's Mitakshara I.2.8). Should the sons divide the family property among themselves after the death of the father, the mother is also entitled to an equal share under another verse of Yajnavalkya, II.123 (*see* Colebrooke, I.7.1).

Although the wife thus does take an interest in her husband's property, it is held in the Mitakshara Schools, other than the Mithila School, that her ownership is not of an independent character, the Viramitrodaya (which is a special authority in the Benares School) going so far as to say expressly that " her right is only fictional but not a real one ", to adopt Mr. Golap Chandra Sarkar's translation at page 165 (Chapter III, Part I, section 13).

We have to examine the position of the wife in the Mithila School, but in the other Mitakshara Schools it is settled that she is not a co-parcener of her husband. " When we speak ", says Mr. Mayne in his Hindu Law section 269, " of a Hindu joint family as constituting a coparcenary, we refer not to the entire number of persons who can trace from a common ancestor, and amongst whom no partition has ever taken place; we include only those persons, who by virtue of relationship have the right to enjoy and hold the joint property, to restrain the acts of each other in respect of it, to burthen it with their debts, and at their pleasure to enforce its partition. Outside this body there is a fringe of persons who possess inferior rights such as that of maintenance ". Mr. Mayne definitely includes the wife in this fringe of persons with inferior rights, and we have not been referred to any writer who includes her among the co-parceners.

The wife has no right to call for partition, as is shown by Vijnanesvara in the concluding portion of his commentary on Yajnavalkya, II.52, where he says " Therefore a wife also may have a share at the option of the husband, and not at her own will. As the author (himself) says further on, " if he makes the allotments equal, his wife should be given equal shares ". (Gharpure's Mitakshara, page 84.) The text quoted in this extract is Yajnavalkya II.115, which has been already referred to.) The position of the Mitakshara wife as regards the right to call for a partition was expressly considered in *Sunder Bahu* v. *Monohur Lal Upadhya*(1), where Mitter and Maclean, JJ. held that " no doubt a wife under the Hindu Law is entitled to a share when a partition takes place, but she has no right to take the initiative herself and demand partition, although when a partition does take place she is allowed a share ". It is also settled that a Mitakshara wife takes not by survivorship but by inheritance. Yajnavalkya's well-known verses about the order of succession " the wife, and the daughters also, both parents....." (Yajnavalkya II.135-6)—are taken by Vijnanesvara to refer to the estate of a man who, being separated from his co-heirs and not subsequently reunited with them, dies leaving no male issue (Colebrooke's Mitakshara II.39), while the son, the grandson and the great grandson, take the estate in virtue of their right by birth. Colebrooke introduced the term " co-parcener " to indicate such numbers of a joint Hindu family, and the term is now fully established in Hindu law, though its inaccuracy from the point of view of English law has received judicial notice in such decisions as *Baijnath Prasad Singh* v. *Tej Bali Singh*(2). " Where property is held in co-parcenary by a joint Hindu family, there are ordinarily three rights vested in co-parceners—the right of enjoyment,

(1) (1881) 10 Cal. L. R. 79.
(2) (1921) I. L. R. 43 All. 228, 243.

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the right to call for partition, and the right to survivorship"—*see Naraganti Achammagary* v. *Venkatachalapati Nayanivaru*(1). It is clear that the wife's interest in the family property does not under the Mitakshara include two of these three rights of a co-parcener, and that though her right to maintenance (which is unquestionable) has sometimes been referred to her position as a cosharer in a subordinate sense, the contention that she is a co-parcener has been frequently raised but never accepted by the Courts—*see* such decisions as *Ananda Bibee* v. *Nownit Lal*(2), *Jagdamba Koer* v. *Secretary of State*(3), *Punna Bibee* v. *Radha Kissen Das*(4).

It has been urged on behalf of the appellant that under the Mithila law the wife is entitled not only to receive a share when a partition does take place at the instance of others, but also to demand a partition herself; and reliance is placed in support of this contention primarily on a certain sentence from Vachaspati Misra's Vivada Chintamani, which is thus rendered by Tagore (page 313):—"It is said in the Ratnakara: That division of property may take place between husband and wife, appears from the following text: 'Wives should be made equal sharers.'"

Mr. J. C. Ghose in Volume II of his Principles of Hindu Law, 1911, reproduces Tagore's translation of the Chapter on Inheritance, (like those of Colebrooke and Borradaile), with hardly any material change, on the ground that the translation has become authoritative, though he claims to have revised it and to have given the correct translation of those few passages where Tagore was wrong (see page xix of the book).

(1) (1881) I. L. R. 4 Mad. 250.
(2) (1882) I. L. R. 9 Cal. 315.
(3) (1889) I. L. R. 16 Cal. 367.
(4) (1903) I. L. R. 31 Cal. 476.

Mr. Setlur in his Complete Collection of Hindu Law Books on Inheritance, 1911, gives a closer rendering of this Chapter of the Vivada-Chintamani, but leaves out the section on the Ascertainment of Partition which occurs at the end of the chapter and which contains the sentence in question (*see* pages 243-274 of Setlur, Part II).

The following is a close translation of the sentence, words not occurring in the original but necessarily implied being shown in brackets:

" $\frac{\text{(There is)}}{\text{(There may be)}}$ partition, however, between husband and wife by reason of the text ' Wives $\frac{\text{(shall)}}{\text{(should)}}$ be made equal sharers'—so (says) the Ratnakara ".

The alternatives shown above and below the line in the brackets represent the contentions of the appellant and the respondent respectively. Tagore's rendering substantially agrees with what the respondent has contended for in this Court.

According to the appellant's contentions, the sentence makes partition between husband and wife unconditional, and the text referred to, which is the second quarter of a verse of Yajnavalkya's, II.115, is also taken to lay down an unconditional obligation to make wives equal sharers. But the original has no verb expressed for the subject ' partition ', and the context alone can show whether it was meant to be ' is ' or ' may be '. The predicate of ' wives ' in the quotation from Yajnavalkya is also similarly capable of being rendered by ' shall be made ' or ' should be made ', the ambiguity being due to the employment of a participle of the same kind as was noticed in *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalekshamma*(1), where Lord Hobhouse had occasion to comment on the unfortunate fact that in translating a law-book like the Mitakshara Colebrooke had translated the words नदेयः " *na deyah* ", occurring in three successive sentences, by " should

(1) (1899) I. L. R. 21 All. 460, P. C.

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not be given " in the first and third and by " must not be given " in the second sentence. It has also not been seriously contended by Mr. Jha that the original sentence is so framed as to begin by giving the view of the Vivada Chintamani and then to add that that is also the view of the Ratnakara. The only possible way, *grammatically*, of construing the sentence is to take it as *expressing* only that which Vachaspati Misra thinks is the view of the Ratnakara. The form of the sentence does not indicate whether Vachaspati Misra adopts that view as his own. It may be that the implication from the context is not so restricted, but it is equally possible, prima facie, that the particle ' *tu* ', which has been rendered by ' however ', actually indicates a view contrary to that of Vachaspati Misra.

It is necessary for these reasons to examine closely what it is really that Vachaspati Misra himself held on the point. In doing so, we are at the outset confronted with the inherent improbability that Vachaspati Misra—or, for the matter of that, any other mediæval authority on Hindu law—should have held what the appellant's interpretation of the passage comes to, viz. that wives must unconditionally be divided in estate from their husbands. Reference has also been made at the bar to the settled doctrine that the Hindu law contains in itself the principles of its own exposition, and also to a principle of construction, well-known in Hindu Law,—the principle of आकांक्षा (*akanksha*) or expectancy which Vachaspati Misra has himself applied when developing a certain view, peculiar to Mithila, in connexion with Stridhan. This occurs in a passage at page 140 of the Calcutta edition of the Vivada Chintamani, which is very imperfectly rendered by Tagore as follows :—" The texts of Katyayana do not refer to the peculiar property of woman. The inconsistency owing to this is removed by the similarity of meaning " (*see* page 262). It is also not very closely

rendered by Setlur, who says " Otherwise the question as to how it should be determined will remain unanswered " (*see* pages 256-57). It will, however, be found fully translated and explained by Mr. Golap Chandra Sarkar in Chapter XII of his Hindu Law, 6th edition, at pages 643 et seq. The Vivada Ratnakara also adopts the same principle in the same context (*see* the translation by Sarkar and D. Chatterjee, Chapter VIII, paragraph 8 at pages 34-5).

The " expectancy " in connection with the sentence under discussion would be regarding the circumstances in which, according to Vachaspati Misra, there is to be partition between husband and wife, and regarding those in which wives are to be made equal sharers. There would also arise an expectancy regarding the persons with whom wives are to have equal shares or whether the text means that the wives are to be equal sharers inter se.

It thus seems essential, in order to ascertain Vachaspati Misra's meaning, to consider the context in which the sentence occurs, his treatment elsewhere of the verse of Yajnavalkya regarding wives being made equal sharers, what the Ratnakara has actually said on the point, and, further, Vachaspati Misra's treatment of *Daya Vibhaga* (partition of heritage or inheritance) generally. Whether other works of authority in the Mithila school do or do not take the same view, and if they should take a different view, which view ought to prevail, will also be matters for consideration.

Tagore's translation of the Section on the Ascertainment of Partition and of other passages from the Vivada Chintamani is unfortunately so inadequate in places that both the parties have had translations specially prepared by pandits who were examined before commissioners. The evidence of these pandits runs to over 230 pages of the printed paper-books. This large volume is due in part, and only in part,

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to the fact that the witnesses were examined not in Court but before commissioners. It is also due in part to the fact that the witnesses, not always unwillingly, played the role not of mere translators but also of interpreters, and that too with not a few limitations which are apparent on the face of the record.

Pandit Ishwari Dutta Daurgadatti, Shastri, appellant's first translator, was Principal of the Dharma Samaj Sanskrit College. He has to admit that he has made no special study of the subject, so much so that he is unable to say if the Vivada Ratnakara is earlier than the Vivada Chintamani; the latter refers to the Ratnakara in the opening verses, but the pandit's learning does not enable him to say whether that Ratnakara is the same as the Vivada Ratnakara or whether they are different Mithila commentaries on Hindu Law. At more than one place he appeals to Sanskrit literature at large, and to the Dharmashastras in particular, but his acquaintance with these studies is not such as to save him from translating कुटुम्बाविरोधेन *kutumba-virodhena* in Yajnavalkya II.175 as " not against will of his members of the family (sic) "; it is not pretended that any commentator has taken it in any other sense than that of " without detriment to the family "—compare पितृद्रव्याविरोधेन (*pitridravya-virodhena*) ' without detriment to the father's estate ', in Colebrooke's Mitakshara I.4.1. His knowledge of the Mitakshara comes out in his translation of Yajnavalkya II.175 (last quarter) by " what has been promised to another should be given "—(*see* page 493 of the evidence). The text means the exact opposite (*see* Gharpure, pages 311-2; on the latter page the verse-number is wrongly printed as 176); and when the attention of the witness was drawn to this by a leading question in re-examination, he gave what he calls " the more accurate and literal translation "—" what has been promised to another should not be given ". It may be that the pandit was asked

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to translate the disputed passages merely because he was supposed to know Sanskrit grammar; but if so, the evidence shows that he is prepared to accept or justify such obvious misprints or inaccurate readings as तदनुमत सद्देयाम् (*tadanumata saddeyam*) on page 37 and पत्न्यनमत्यपेक्षा (*patnyanamatyapeksha*) on page 38 of the Calcutta edition of the Chintamani. while making many difficulties about a reading of Katyayana's verse beginning with सर्वस्व (*sarvasva*). on page 37, which he and Professor Sharma call unmeaning or almost so, but which several commentators and translators—and the witness himself, in another context, in an unguarded moment (notwithstanding his unsatisfactory statements about it at page 489 of the evidence)—have found not incapable of a reasonable translation. The knowledge of Sanskrit grammar that he shows at page 500 and other places of his evidence is far from impressive; his view leads to the manifest absurdity of requiring the consent of the donor to a voluntary gift, and when it is put to him whether he can conceive of such a gift without the donor's consent, his answer is " I think as a layman I don't think myself quite competent to answer such question ". As a layman he further claims to see little or no difference between the expressions ' without their consent ' and ' contrary to their consent ',—he thinks he has used ' without ' in the sense of ' contrary '—though the correctness of his rendering of an important disputed passage turns on an appreciation of this and the connected point whether विमति (*vimati*) is used by Vachaspati Misra in the sense of disagreement among certain persons or disagreement of another with them. These limitations do not, however, prevent the pandit from maintaining that Colebrooke, Jolly, Golap Chandra Sarkar Sastri and Mr. (afterwards Mr. Justice) Digambar Chatterjie, Gharpure and other translators of standing are all wrong because, forsooth, their renderings differ from what the witness, on an apparently *ad hoc* study of a few passages from the

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Vivada Chintamani, takes to be the view of Vachaspati Misra.

Professor Ramantar Sharma, Sahityacharya, of the Patna College is the other translator put forward for the appellant. He is even more emphatic that all other translators, whatever their standing, are wrong, where they differ from him (*see* pages 422-4 of the evidence), but while claiming (as he says, among other things) " to catch every straw to emphasize the difference between a pandit and a scholar and its effect on culture and practical life ", takes care to avoid admitting how much of the translation certified by him is based on the translation of another scholar (who was not examined in the case) or of Pandit Ishwari Dutta Daurgadatti, whose English he calls " incomprehensible ". It did not apparently strike him that nothing could be more unlike a pandit or a scholar than the way in which he avoided admitting on recall what has been found as a fact by the learned Subordinate Judge and is no longer disputed, viz., that in his previous cross-examination he had agreed that the words तेषाम् त्रयाणाम् (*tesham trayanam*) on page 36 of the Chintamani referred to the son, the wife and the अन्वय (*anvaya*), the last a term about which there has been so much controversy, grammatical as well as philological. On this occasion, he actually spoke of his previous deposition as a *vyavestha*, meaning an opinion or decision such as is now-a-days given by pandits of recognized authority on matters not of Hindu law, but of Hindu ritual and penance; and he declined to admit that there was any inconsistency in his translation unless he restudied the whole of it—a heavy task, he claimed, for which he must be paid an expert's fee in advance. Other scholars, according to him, give to the word अन्वय (*anvaya*) too narrow a meaning by making it equivalent to issue, offspring or progeny; of his own wide outlook and ' Sanskrit scholarship ' (as he calls it at page 435) we have evidence in his translation of पुत्राः *putrah* by " children (of different kinds) " in the heading of a

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section of the Chintamani (*see* Tagore page 728) which deals with the twelve kinds of sons to the exclusion of daughters. His ready admission that हेतुवन्निगद० *hetuvannigada*,—on page 36 of the Chintamani ought to be हेतुमन्निगद० *hetumannigada*—leads one to wonder how far he had made himself really familiar with this branch of Sanskrit learning so as to be aware of the fact that Raghunandana, the "Smartta Bhattacharyya" of Bengal, demonstrated the correctness of the former reading of Jaimini's *adhikarana* long ago (*see* Dr. Priyanath Sen's Interpretation of Negative Precepts in Hindu Law in the notes portion of IV Calcutta Law Journal, at page 65n). The Professor has no hesitation in emphasizing that the term अदेय *adeya* imports that of which the gift is void, but when asked if he knows that 'void' is a legal term, he answers "may be; I am not a lawyer".

The appellant's case on Hindu Law was argued before us by Mr. L. K. Jha, Advocate, who is himself a Maithil Brahmin and whose knowledge of Sanskrit and of the Mithila authorities has been at the disposal of this Court in a number of reported Mithila decisions, out of which it will perhaps be sufficient to refer to *Hitendra Singh* v. *Sir Rameswar Singh*(1). Mr. Jha was unable on one disputed point after another to support the translations of the appellant's pandits or to maintain that the two translations were consistent with each other. He was, however, prevented by express instructions from conceding anything in connexion with these translations. This is why it became necessary to refer in some detail to the appellant's translators' qualifications, and their limitations as indicated by the manner in which they have acquitted themselves in making and supporting the translations. It was urged that we should proceed on these translations after correcting the mistakes elicited by cross-examination; but it is difficult to follow this course in view of the regrettable fact that

(1) (1925) I. L. R. 4 Pat. 510, 555.

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the translations are often vitiated on disputed points by mere dogmatism, to say the least.

For the respondent Suraj Mohan, the passages were also translated by two pandits, Dr. Bhagabat Kumar Goswami, Shastri, senior Professor of Sanskrit, Hooghly College, and Dr. Ganganath Jha, at one time Professor of Sanskrit at Allahabad and Principal of the Sanskrit College at Benares, and now Vice-Chancellor of the Allahabad University. Mr. L. N. Singh, an Advocate no less well-known for his knowledge of Sanskrit than Mr. Jha, who argued this part of the case for the respondent, has urged that we should proceed on Dr. Jha's translations after correction in the light of the admissions made by him in cross-examination. But in the first place Dr. Jha's translations are not always complete—see, for example, the end of the third paragraph of his translation of the passage from *Vibhaga-Nirnaya*. The witness has, moreover, sometimes at any rate failed to do himself justice; his rendering of the heading *Vibhaga-Nirnaya* by 'Ascertainment of the fact of partition' was correct enough, if somewhat diffuse, but he readily gave it up for the rendering 'Law of Partition' which was put to him in cross-examination and which, notwithstanding Professor Sharma's pedantry at page 426 of the evidence, is entirely unsuitable in the context, as may be seen on a glance at the opening verse and the entire contents of the Section so headed. Dr. Jha's published volumes on the Manu-Smriti with Medhatithi's commentary—a work undertaken by him for the Calcutta University—afforded much material for cross-examination, and he had to maintain that the publication was inaccurate at place after place, on some ground or other, rather than admit that his departures from it in cross-examination were biased (*see* pages 137-8 of his evidence). "No human work", says the witness, "is perfect, and if I were asked to revise the work, I myself would find thousands of places in 7 or 8 volumes of the translation where it could be improved; the worst of all there is the

printer's devil at work..... My knowledge of English is far from perfect, and as I have already said that in many places the translation could be improved even by myself". We do not think that it will be fair to the appellant to proceed on Dr. Jha's translations.

The translators were undoubtedly placed at some disadvantage by the uncertainties and imperfections of the texts. So far as is known, there are only two published editions of the Vivada Chintamani—one being the Calcutta edition of 1837, which was apparently used by Tagore and J. C. Ghose and in large measure also by Setlur, and the other a Bombay edition of 1898 printed and published by the proprietor of the Sri-Venkatesvara Press. Both these are unscholarly editions; neither gives any apparatus criticus, nor any variae lectiones. Both moreover, contain palpable misprints or inaccuracies. The Calcutta edition, for instance, has स्थावरेऽपीतिः "*sthavare'-pitih*" and तदनुमत "*tadtnumata*" instead of स्थावरेऽपीति "*sthavare'-piti*" and तदनुमतम् "*tadanumatam*" on page 37, and पत्न्यनमत्यपेक्षा "*patnyanamatyapeksha*" and भाग्यान्तरानुमत्यपेक्षा "*bhagyántaranumatyapeksha*" instead of पत्न्यनुमत्यपेक्षा "*patnyanumatyapeksha*" and भाग्यन्तरानुमत्यपेक्षा "*bhagyantaranumatyapeksha*" on page 38. Similar inaccuracies of an obvious kind also occur in the Bombay edition, but it is unnecessary to give examples, because the appellant has relied on the Calcutta edition and, as the book is now rare, has put in a copy as an exhibit in the case. An example of an inaccuracy of another kind is furnished by the omission of the word "*vimatau*" after the expression "*putradaradyanvayanam*" on page 56 of the Bombay edition; the context and a comparison with the corresponding passage at page 36 of the Calcutta edition leave no doubt that the word must be supplied. On page 55 the Bombay edition has "*putradaradisarvasprátisruteshu*" in a context which makes it clear that the '*adi*' in the middle of the compound word

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ought to have been left out; for though there is a dispute between the parties about whether or not the word '*adi*' should be read between *putradara* and *anvaya* in the passage about *vimati* on the next page (corresponding to page 36 of the Calcutta edition) there is no question of giving away not the son and the wife only but also other individuals indicated by the '*adi*'. We shall have occasion to refer to this mistake in the text again when dealing with the question of consent. Katyayana's verse on page 37 of the Calcutta edition beginning with सर्वस्व० "*sarvasva*" affords an example of another kind; it is found in a different form in the Bombay edition (page 57) which agrees with the Ratnakara (page 129), and the translators have assumed the role of interpreters in selecting one of the two readings. But the questions raised are not questions of foreign law, and as was observed in *Sri Rajah Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya Appa Row*(1) there does not seem to be any provision in the Evidence Act or other law which renders such evidence admissible in a case like the present.

The fact is that much of the work done and evidence given by these translators would have been really valuable as an argument from one side or the other, and it has in fact been so used by the Bar and will be so referred to in this judgment, the names of the translators being, however, given for the sake of facility in tracing and appreciating the basis of each particular argument.

Apart from the technical objection to expert evidence on Hindu Law, the cross-examination of the translators erred sometimes in going too far and sometimes in going not far enough. As an example of the latter, we have Dr. Jha's reference to certain passages in the Vivada Chintamani where the term *anvaya* does not include the wife; it was not noticed by any translator nor put to Dr. Jha—if indeed the cross-examiner himself realized it—that in those contexts where a woman's अन्वय *anvaya* is spoken of, the wife must necessarily be excluded.

(1) (1905) I. L. R. 29 Mad. 437, 452.

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A detailed treatment of the translators' evidence would take too long, especially as the record is very defective, owing to various reasons. According to the judgment of the lower Court, Dr. Anant Prasad Banarji, Shastri, was a third translator examined for the appellant. It is common ground before us that this is a mistake; but it must be observed that the evidence recorded by the commissioners is such that it would indeed be very difficult to follow it without assistance from some one with an adequate knowledge of Sanskrit. Confusion was also bound to result from the existence of so many discordant translations on the record. Further, though the evidence before the commissioners covers Misaru Misra's Vivada Chandra, we are informed by the Advocates that this digest of Mithila law was not properly before the Court, as it was only published for the first time in 1931 by Mr. Priyanath Mitra, one of the mufassil Advocates in the case, and as the original manuscript from the library of the Asiatic Society of Bengal, an extract from which will be found printed at page 441 in the second volume of Part III of the record (with translations at pages 424, 438, 444 and 459), was neither admitted by the defence nor proved by the plaintiff.

In these circumstances it was thought best to prepare a fresh translation with the co-operation of the bar, making use of such materials as were available. This was intended to be no more than a translation and to adhere as closely as possible to the original in the Calcutta edition, while avoiding the pitfalls brought out in the cross-examination of the four pandits. It was also one of the objects to bring out, as clearly as may be, those points on which the parties finally found it impossible to agree, some points having naturally been found during the arguments to be quite untenable, and therefore given up. Both the parties were invited to scrutinize the translation, and their criticism has been of no small help, much of it being adopted and the rest being left

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to be dealt with in this judgment. Our thanks are due to the learned Advocates for their co-operation.

Now, the sentence under discussion concludes Vachaspati Misra's comment on Yajnavalkya II.52, a verse which may be translated as follows :—

" Suretyship, debt (and) bearing witness—(this is) not ordained among brothers, and between husband and wife, as also between father and son, while (the estate is) undivided ".

(The reference in this translation to the estate is inserted on the basis of the Mitakshara—see Gharpure, page 82.)

The first part of Vachaspati Misra's comment on this verse is as follows :—

" The meaning is that before partition (there can be) no legal transaction such as suretyship, etc. between these. If (it be said) that, because of Apastamba's text. ' There is no partition between husband and wife ', there cannot at all arise the contingency of a partition between them; (the reply is) because of their being authorized jointly to set up the (sacrificial) fire in accordance with such texts as(1) " wife and husband should set up the fire "; as also because of such vedic texts as ' with the cincture (the priest) initiates (in sacrifices) the sacrificer; with the sacrificial thong, the wedded wife,(2) and also ' The wedded wife (2) watches the sacrificial offering ', (and) ' The sacrificer is tying the bundle of *kusha* grass ', there is joint right of the two in Vedic rites performable in the fire brought into being on those (various) occasions; and because of such Smriti texts as ' A rite laid down in the Smritis (is to be performed) in the nuptial fire ', (there is joint right of the two) in the Smriti rites, (and ?) the *avasathya* and *agnihotra* sacrifices, such as are performable in the nuptial fire which is to be set up by both wife and

(1) There is a pronoun ' tau ' (meaning ' those two ') here in the Calcutta edition, which is apparently superfluous.

(2) *Patni*.

husband. In the very same way there is their joint right in the fruits borne of merit or sin because of the occurrence in that very section of a Vedic text like ' In heaven (the two) would commence an undying glory '; not, however, in such sacrifices on the regular altar and pious works of utility to others as are performable without such fires.

" There is certainly no possibility of the sentence meaning that there is no partition of property between them, because the text of Apastamba occurs in the section dealing with sacrificial performances and also because it is followed(1) by the words ' From the nuptials indeed (is ordained their) association in rites; as also in the fruits of merit and demerit."

This comment begins with the statement that the meaning is that before partition there can be no legal transactions such as suretyship, etc. between brothers, husband and wife and father and son. Vachaspati Misra then deals, in the manner usual in such commentaries and digests, with a supposed objection that so far as husband and wife are concerned, there can never be any question of partition since Apastamba has laid down that " There is no partition between husband and wife ". He meets the objection by citing various texts and pointing out that Apastamba's text only deals with sacrificial performances. He further points out that the aphorism " There is no partition between husband and wife " is followed by the aphorisms " From the nuptials indeed (is ordained their) association in rites; As also in the fruits of merit and demerit ". Up to this point Vachaspati Misra's treatment of Apastamba's text is essentially similar to Vijnanesvara's comment on Yajnavalkya's 52nd verse—*see* Gharpure, pages 82—4. It has, however, been urged for the appellant that the Mitakshara does not stop with Apastamba's aphorism about the association of husband and wife in the

(1) The original speaks of वाक्यशेष ' *Vakya-sesha* ', which literally means ' the rest of the sentence '.

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fruits of merit and demerit, but proceeds to cite the next two aphorisms, a translation of which by Buhler has been already quoted, namely—

"19 And with respect to the acquisition of property.

"20 For they declare that it is not a theft if a wife expends money on occasions (of necessity) during her husband's absence."

The argument for the appellant is that Vachaspati Misra, unlike Vijnanesvara, chose not to take notice of these two aphorisms and thus, unlike him, restricted Apastamba's text to religious ceremonies. But though Vijnanesvara alone did proceed to take notice here of Apastamba's 19th and 20th aphorisms which refer to property, it has to be observed that he did not use these additional aphorisms for negativing partition between husband and wife. On the contrary, these aphorisms lead him expressly to say that the further text "has indicated the ownership of the wife over wealth, and not the *absence* of a division".

It is therefore impossible to accept the contention of the appellant that the Mitakshara negatives partition between husband and wife by taking all the five aphorisms of Apastamba's down to no. 20, while Vachaspati Misra holds that there can be partition between husband and wife by restricting the quotations from Apastamba to the first three aphorisms (from the 16th to the 18th) and interpreting them to be confined to sacrificial performances.

Another point that Mr. Jha has endeavoured to make on this part of Vachaspati Misra's comment is that because Vachaspati Misra says that there is no possibility of Apastamba's text meaning that there is no partition of property between husband and wife, therefore according to that Mithila authority Apastamba himself provides for such partition between them. This contention must plainly be rejected; Vachaspati Misra has said nothing of the kind, and it is one thing for a text not to forbid a

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partition and quite another positively to permit it. Pandit Ishwari Dutta Daurgadatti was apparently unable to see this elementary distinction, and reminds one of the way in which he treated the English expression 'without their consent' as no different from the expression 'contrary to their consent'. His rendering of the sentence is that ' there is not the least doubt about the text meaning that there is partition of wealth between husband and wife '; and though it was on this and Professor Sharma's translation that Mr. Jha based the argument under notice, it is plain that the pandit is wrong if his rendering, which as a matter of English is perhaps not altogether free from ambiguity. was intended to convey that according to Vachaspati Misra the text means that there is partition between husband and wife. The original is put in such a form as to raise the question whether the text means that there is *no* partition between them, and to furnish the reply that there is not the least apprehension even—or, as Dr. Jha puts it for clearness, no possibility—of that being the meaning. Professor Sharma's certified translation is decidedly confusing. After what, according to him, is a mistake which he did not care to correct about " the merit of sacred rites stored up in heaven when such rites are not performable in fire for तदग्न्यसाध्येष्विष्टापूर्तेषु *tadagnyasadhyeshvishtapurteshu*,—an amazing mistake for a pandit or a scholar to commit or tolerate—we have in his translation—

" That there is no partition even in property between the two (viz. husband and wife) "—this interpretation is altogether impossible ".

And this is followed by

" There is the right of partition of wealth between husband and wife—as to this being the meaning of the text there is no doubt."

Both these appear to be renderings of one and the same sentence धनविभागस्तु तयोर्नास्तीति वाक्यार्थस्य शंकापिनास्ति

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They differ from each other substantially, and when questioned in this connection, the witness for once thought that there was some discrepancy in his answer, and said that the whole thing would have to be studied before he could answer the question what corresponded to the second piece above. This was at the end of a long day, and after studying the text the witness said the next day that the first piece was intended to be the marginal note but had been wrongly transposed by the press to the main body of the translation, and that the second piece was the actual translation of the Sanskrit sentence given above (*see* his evidence at page 429). This answer is even more amazing for a pandit or a scholar, whichever of these the Professor claimed to be. The doubt or apprehension that is emphatically denied in the original is about the text meaning that there is *no* partition between them (धनविभागस्तुतयोर्नास्ति *dhanavibhagastu tayor nasti*). Professor Sharma's translation would, moreover, make the rest of the comment (which will be immediately dealt with) entirely unnecessary and unintelligible, though this does not seem to have been put to him or to have struck him when he considered his translation as a whole. This is decisive of Mr. Jha's contention which was based on the maxim अप्रतिषिद्धं परमतमनुमतम् " the opinion of another (book of authority) is accepted where it is not contradicted " (*see* Ghose's Hindu Law, page 1033); Vachaspati Misra himself clearly did not apply the maxim here.

Vachaspati Misra's further comment on Yajnavalkya II.52, up to the concluding sentence "$\frac{\text{(There is)}}{\text{(There may be)}}$ partition, however, between husband and wife by reason of the text Wives $\frac{\text{(shall)}}{\text{(should)}}$ be made equal sharers—so (says) the Ratnakara ". may be thus rendered :—

" If (again it be said) that in the Section on the wedded wife, there is (shown) the ownership of such wife also in wealth and consequently there would be

partition even by her(1) from her husband if there be no textual prohibition of it, (the reply is, it is) not so. Know that the reason is that she is said to be incapable of holding property in such texts as " Property-less indeed are these three—the wife, the slave and the son ". As for the Section on the wedded wife, it is concerned with showing who are jointly entitled in regard to sacrificial performances only, but there is in the Section no overriding the text laying down that woman is propertyless, since being ratiocinative, it cannot override a text ".

There has been much controversy about the exact import of this passage. It is, however, necessary first to make some remarks bearing on the translation itself.

What has been rendered by the expression " the wedded wife " (or in one place, such wife) following a common practice, is the word पत्नि (*patni*), which is formed from पति (*pati* meaning the husband), by a special modification under an express rule of Panini's IV. 1.33, पत्युर्नो यज्ञसंयोगे *patyur no yajnasanyoge*, to indicate her association with the husband in religious rites. Such a wife does occupy a special position in Smriti literature—*see*, for example, Colebrooke's Mitakshara, II—1.5 and Dayabhaga, XI.1.48, and Sarkar's Tagore Law Lectures on Adoption, Chapter II. pages 49 et seq. Mr. Jha was, however, unable finally to press the contention that the change of terms from *patni* to *jaya*, *bharya* or *yoshit* was of any consequence in this context, after he was referred to a number of verses from Manu where these and other words are used to indicate a wife of as high a standing as the *patni* (*see* Manu IX.45, IX.8, IX.46, IX.6.7 and 9, V 156 read with IX.3, and 153). As will be seen later, the Dyaita Parsishta modifies the objection on this ground, but the difference does not seem to be of any importance for appellant's purposes.

(1) The case in the original is the genitive which often connotes agency.

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The words तस्य न्यायत्वेन वचनाबाधकत्वात् *tasya nyayatvena vachanabadhakatvat*, which have been rendered "since being ratiocinative, it cannot override a text", following Dr. Ganganath Jha have been rendered as follows by the appellant's translators :—

(*1*) "It does not go against the abovementioned text on the ground of propriety"—Pandit Ishwari Dutta Daurgadatti, and (*2*) "It is so on the ground of the natural sense of the context and the absence of prohibitory texts"—Professor Ramautar Sharma. At page 430 of his evidence Professor Sharma says that "The translation of the word *Nyayatvena* would be 'as it is a current saying', that his translation is free and not quite literal, and that in the context it could not be right to translate *nyaya* as "logical reasoning"; and the literal translation of the whole clause would, according to him, be "being a current saying, it could not supersede the text". There is, however, no reference at all in the context to any current saying; what the author is dealing with is the पत्न्यधिकरण *patnyadhikarana*, Jaimini's discourse on the wedded wife, and the text that according to Vachaspati Misra cannot be superseded or overridden by it is the quotation which he has himself given us in part here, and fully as from Narada in the Chapter on Non-payment of Wages, though Tagore's translation at page 92 fails to make it clear that the quotation from Narada really extends up to the point where Devala is mentioned. Pandit Ishwari Dutta Daurgadatti's rendering seems to make even less sense than Professor Sharma's; the question was one of an apparent conflict between Jaimini's *patnyadhikarana* and Narada's text, and to say that the former does not go against the latter "on the ground of propriety" is not to reconcile them at all.

The initial sentence in the Sanskrit passage is that "in the section on the wedded wife there is (shown) the ownership of such wife also in wealth". The Calcutta edition clearly makes the sentence part

of this and not of the preceding comment. It is common ground before us that the पत्न्यधिकरण (*patnyadhikarana*), "the section on the wedded wife", referred to, is from Jaimini's Mimansa (with Sabara-bhashya), VI. 1. iii. 6 to 21, which will be found in an English garb in Dr. (now Mr. Justice) Dwarka Nath Mitter's Thesis on the Position of Women in Hindu Law at pages 63—90. This section is also referred to in the *uttara-paksha* or author's reply in the comment; and Mr. Jha has not been able to point to anything in Vachaspati Misra's earlier comment on Yajnavalkya II. 52 which can be logically connected with the reference to Jaimini's *patnyadhikarana*, even though it is a fact that the respondent's pandits have taken the sentence to be a part of that earlier comment. It may also be noted that the Calcutta edition is much more frugal in the use of vertical bars to indicate the end of sentences than the Bombay edition which has sometimes used them quite wrongly—*see*, for example, line 4 on page 254 near the beginning of Vachaspati Misra's comment on Yajnavalkya II. 52.

As has been already observed, there has been much controversy about the exact import of this comment. Professor Sharma takes the passage to mean that the *purva-paksha*—the 'objection' that with the wife's ownership in the husband's wealth there would have been partition by the wife from the husband, had there been no express prohibition is at first simply denied, and that the *purva-pakshi* (supposed objector) then quotes the line from Narada, whereupon Vachaspati Misra replies that the *patnyadhikarana* lays down "no prohibitory text against women's capacity of holding wealth", and then concludes that there is of course partition between husband and wife by virtue of the text "wives shall be made equal sharers", adding that this is the view of the Ratanakara. This interpretation is so untenable on the face of it that Mr. Jha, with all his respect for his old teacher the Professor who is now dead, was unable to support

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it. How could anybody ever be imagined to suggest that the *patnyadhikarana* lays down a prohibitory text against woman's capacity of holding wealth, as the Professor's rendering would require us to do? The objector, moreover, expressly asserted in the beginning that the *patnyadhikarana* laid down the wife's ownership in wealth, so that it is impossible to conceive of Vachaspati Misra pointing out to him that it lays down no prohibitory text, etc. The Professor's interpretation has the disadvantage also of ignoring the supposed objection based on the text of Narada. His rendering is further defective and irreconcilable with the structure of Vachaspati Misra's concluding sentence, in so far as it suggests, intentionally or otherwise, that it *expresses* the view of Vachaspati Misra himself. As has been already observed, none of this comment of Vachaspati Misra's can be justified or even understood if the Professor's rendering of the earlier comment relating to Apastamba's text be correct. It is doubtful how far the Professor troubled to see that his renderings of the two comments were intelligible and not inconsistent with each other.

The comment undoubtedly begins, as usual in such discussions, with a supposed objection which may be conveniently divided into three parts—(*1*) the premise, on the authority of the *patnyadhikarana*, that the wife also has ownership over wealth; (*2*) the conclusion that there would be partition by her from the husband; and (*3*) a condition or proviso that there be no textual prohibition of it. This last is easily intelligible if it is taken to refer to Vachaspati Misra's previous treatment of Apastamba's text and his conclusion that that text has no bearing on wealth as a subject of partition. The "objection" would then come to this: "According to you, Apastamba's text relates to sacrificial performances only and does not prohibit partition of property between husband and wife. Very well, then, do you mean to say, would you agree, that there would be partition between them since the wife also is entitled to the property according to the *patnyadhikaraṇa*"? Vachaspati Misra

begins his reply by saying " not so "; but if the way in which the objection has been interpreted above be correct, this denial could not be a denial of the condition or proviso—which should on this footing be really called a concession, as Vachaspati Misra has already shown that Apastamba's text is no bar—but could only be a denial, not necessarily in toto, of the premise or the conclusion or both. It is not impossible that the denial was primarily intended to refer to the premise, for Vachaspati Misra gives as his reason the text of Narada and proceeds to point out that the *patnyadhikarana* which is the basis of the premise has no bearing on the incapacity of women to hold property on her own account, which incapacity is based on a text that. he points out, cannot be shaken by mere logic. If this be the right way of interpreting the comment, it would appear that by completely demolishing the premise of the supposed objector, Vachaspati Misra was inclined, on the authority of Narada, to take the view that there can be no partition between husband and wife, notwithstanding the limitation of Apastamba's text to sacrificial performances and notwithstanding the *patnyadhikarana*. Such a view was in fact taken by Aparaka in his commentary on Yajnavalkya II. 52 (see pages 654-55 of Vol. XLVI in the Poona Anandasrama Sanskrit series), though on other grounds. This well known commentator on Yajnavalkya says that the word अविभक्ते *avibhakte* "while (the estate is) undivided" in the verse does not refer to husband and wife since there can be no division of wealth between them; for the wife as wife has ownership in the husband's wealth, so that it is impossible to divide the wealth that is common to them. He adds that Apastamba has for this very reason laid down that 'there is no partition between husband and wife; for from the time of marriage they are united in religious ceremonies, likewise also as regards the rewards for works for which spiritual merit is acquired, and with respect to the acquisition of property.

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अत्राविभक्त ग्रहणं.....न जायापति विषयम् । नहि तयोर्धन-विभागोऽस्ति, पीतधने हि जाया स्वामिनी जायात्वादेव । अतो दंपत्योः साधारणं धनमशक्यं विभक्तुम् । अतराचाऽऽपस्तम्बः

"जायापत्योर्न विभागो विद्यते पाणि ग्रहणादि सहत्वं कर्मसु । तथा पुण्यफलेषु द्रव्य परिग्रहेषु च" इति ।

If this be the view of Vachaspati Misra, his concluding sentence, on which the appellant's case rests, will have to be construed as follows:

The Ratnakara, however, holds that there may be partition between husband and wife on the basis of the text "wives should be made equal sharers". The second word in this concluding sentence is the particle '*tu*' which, according to a wellknown Sanskrit lexicon called the Medini, has no less than eight meanings:

तु पादपूरणे भेदे समुच्चये ऽवधारणे ।
पक्षान्तरे नियोगे च प्रशंसायां विनिग्रहे ॥

The fifth of these meanings is *pakshantare*, for indicating an alternative or a contrary position, and this meaning has been pressed upon us by Mr. Jha in several places where the Vivada Chintamani gives the views of the Smriti-Sara or other works with this particle '*tu*'. The force of this particle as an adversative conjunction is familiar particularly in this kind of literature, and it may be that Vachaspati Misra had it in mind when he employed the particle in his concluding sentence.

This interpretation of Vachaspati Misra's somewhat obscure comment is, however, unsatisfactory, since it does not explain the *avibhakte* in the verse of Yajnavalkya commented upon. The disputed sentence is, moreover, printed in the Calcutta edition as an integral part of the reply to the second objection. That of course is far from decisive but so far as it goes, it does suggest that Vachaspati Misra's own view is to be found in that sentence, notwithstanding the use of the particle *tu* which does not always carry an adversative sense. It is also to be observed that Vachaspati Misra, though he has mentioned the

Ratnakara as among the works that he carefully looked into before composing his Vivada Chintamani, has not hesitated to *express* his disagreement with that Mithila authority when necessary. As an example, reference may be made to a passage at page 128 of the Calcutta edition (corresponding to page 199 of the Bombay edition) where Apastamba (II. 6. 13. 13) is commented upon. Tagore's translation of this passage at page 233 is wholly inadequate, but Setlur's rendering (at page 246) is close enough. " The Ratnakara reads ' while living '; but that is incorrect; for the fact of his being alive being evident from his making the partition, the word is superfluous ". A conflict between the Ratnakara and the Vivada Chintamani need not, therefore, be assumed where this can be avoided, and it does not require a strained interpretation to construe Vachaspati Misra's reply in the comment under consideration without a conflict between him and the Mithila minister of Justice and commentator Chandeswar Thakur who wrote the Ratnakara. On this footing, the concluding sentence, though in form an expression of what was taken by Vachaspati Misra to be the view of the Ratnakara, would in effect be a statement of Vachaspati Misra's own position. His reference to the text from Narada would in that case be confined to showing that the premise from which the *purva-pakshi* started was entirely untenable; and Vachaspati Misra's conclusion would be not a negation in toto of the *purva-pakshi's* conclusion but an admission of it sub-modo. From this point of view the entire discussion on the verse about suretyship may be fairly summarised as follows :—

Yajnavalkya's verse (II-52) lays down that there cannot be suretyship etc., between husband and wife, *inter alia*, before partition. If this implies the possibility of a partition between husband and wife. Apastamba's text is not really opposed to it because it is confined to sacrificial performances. The *patnyadhikarana* (of Jaimini) shows that the wife has ownership over the husband's property, but this

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cannot give her a right to partition and prevail over a text (of Narada's) which lays down that the wife—like the son and the slave—is not entitled to hold property on her own account. Even so, as the Ratnakara has shown, partition of wealth is possible between husband and wife under the text (of Yajnavalkya) about wives being made equal sharers.

It may be added that neither Mr. Jha, with all his remarkable ingenuity, nor Mr. L. N. Singh with his long experience of such disquisitions has been able to suggest any other construction which would make Vachaspati Misra's comment intelligible.

Now, does the reasoning summarised above require that wives shall always be divided in estate from their husbands? The only point discussed by Vachaspati Misra on Yajnavalkya's verse about suretyship is the application of the word अविभक्ते (*avibhakte*), "while (the estate is) undivided", to husband and wife: can they ever be divided? It is unlikely on the face of it that such a question would have been raised at all if Vachaspati Misra's answer to it was intended to be that they must always be divided; and as already indicated, such an answer is scarcely conceivable from any mediæval Hindu commentator with his training not only in the *Vyavahara* (Jurisprudence or Litigation) but also in the *Achara* (Religious and Moral observances) and the *Prayaschitta* (Penance) branches of Hindu Law. To the question whether husband and wife can ever be divided, it was obviously a sufficient answer to say that they may sometimes be divided, as laid down by a (Smriti) text and as shown by a predecessor of standing in Mithila; this would at once remove whatever difficulty may have appeared at first sight—in view of such texts as those of Apastamba and Narada—in applying the word *avibhakte* to husband and wife, and would suffice to make the verse not unintelligible. Vachaspati Misra is a writer of standing in Mithila, a province "celebrated as a seat of learning from ancient times" (*see* page ii of Sarkar and Chatterjee's

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introduction to their translation of the Vivada Ratnakara); and it is impossible to imagine that he would have failed to see what as a matter of ordinary logic was a sufficient answer to the question discussed by him. In giving his answer he does not seem to have considered it necessary—nor could it be regarded as essential—to quote his authority in full. He does not even name that authority—Yajnavalkya—probably because not only was the text so well known, but Yajnavalkya's full text on the point had also been already dealt with earlier in the same chapter of the Vivada Chintamani.

For Vachaspati Misra's discussion of this full text, we must turn to his section on जीवत्पितृकविभाग (*Jivat-pitrika-vibhaga*), partition during the lifetime of the Father—*see* pages 228—230 of Tagore's translation. He there first deals with Yajnavalkya II.114: "when the father makes a partition, let him separate his sons (from himself) at his pleasure, and either (dismiss) the eldest with the largest share, or (if he choose) all may be equal sharers" (Colebrooke's Mitakshara I.2.1). His comment on this is that the father's "pleasure"—the स्वेच्छा (*svechcha*) of the verse—is in respect of his self-acquisitions. He goes on to quote from Vishnu, Manu and Brihaspati (*see* Setlur, page 245; Tagore has failed to identify the last); and extends the father's pleasure to what Colebrooke called "ancestral" property recovered by the father by his own ability. He then repeats the verse, Yajnavalkya II.114, and says—in the words of Tagore at page 230—that it "relates to property over which the father has full dominion, for it occurs under the subject of self-acquired property". Setlur has rendered this passage much more accurately by saying that the text—the whole verse—applies only to wealth over which a father has independent power—तद्वचनस्य पितुस्वातन्त्र्यविषयमेवधनमधिकृत्य प्रवृत्तत्वात् (page 127 of the Calcutta edition). Vachaspati Misra then introduces the next verse by saying that Yajnavalkya

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himself adds a special rule— अत्रैव: *atraiva* in this very context i.e. when the father chooses to divide his self-acquisitions— समांश-करणपक्षे, i.e. in the case where equal shares are given (to the sons) viz. " If he makes the allotments equal, his wives, to whom no separate property has been given by the husband or the father-in-law, must be rendered partakers of like portions " (Colebrooke I.2.8). His comment on this verse is not fully translated by Tagore but may be seen in Setlur. On the word समांशिकाः *samansikah* (equal sharers), Vachaspati Misra says that where stridhan has been given to some wives, other wives should have equal wealth given to them (तत्समधनवत्यः कार्याः) by the father, but that when the father takes the larger portion for himself and gives the sons only a little, then he must give the wives as much wealth (तावध्यनम्) out of his own portion. " Hence alone it is that separate allotment is ordained only in case he makes the shares equal, by the text : " If he makes the shares equal "—(Setlur, p. 245).

Thus Vachaspati Misra's interpretation of the verse in which Yajnavalkya lays down that wives shall/should be made equal sharers appears to be as follows :—

In the first place, the father is under no obligation to divide his self-acquisitions. He may, however, choose to divide them. If he does so, he is further under no obligation to divide them into equal shares. In the event of his choosing to divide them into equal shares for his sons, he is required to make his wives equal sharers. But even in this last case, there is the proviso or qualification that the wives to be made equal sharers have not received as much stridhan from the father or from the father-in-law. If, as has been urged for the appellant, the word कार्याः *'Karyah'* imports a विधि ' vidhi ' or positive obligation, it is only when the husband *chooses*

to divide his self-acquisitions with his sons, and further to divide them equally, that the obligation arises, and even then it is not an unqualified obligation, for wives need not still be given the same shares as sons if they should already have received some stridhan. Clearly, this falls far short of recognizing the wives' right unconditionally to demand a partition from the husband. What is recognized is a much-conditioned obligation of the father which, according to the commentator, is restricted to his self-acquisitions. The obligation such as it is, may be taken to import a corresponding right, but the right to receive a share in certain conditions cannot be looked upon as a right to demand a share where, as here, the conditions are not such as can be brought about by the demandant. A co-parcener's right to demand partition, which is what the appellant seeks to establish from Yajnavalkya's quarter-verse (which Mr. Jha would read as " wives shall be made equal sharers "), is manifestly a far higher right than Vachaspati Misra can be at all said to have read into Yajnavalkya II.115.

Mr. Jha has argued that this treatment of Yajnavalkya's verse relates only to partition made during the lifetime of the *father* and that in such a context the *wives'* rights could only be discussed incidentally, while in the later Section on *Vibhaga-nirnaya* Vachaspati Misra had occasion to give his view of the full rights of the wife, as he has done by taking the second quarter of Yajnavalkya II.115 only and ignoring the conditions laid down in the preceding verse and the preceding quarter of this verse. Mr. Jha recalls the observation of the Judicial Committee in *Bhyah Ram Singh* v. *Bhayah Ugar Singh*(1) that these digests subordinate the language of the texts to custom and approved usage. He also urges, upon well-known authority, that it is not open to the Courts administering Hindu law to inquire

(1) (1870) 13 Moo., I. A. 373.

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whether a disputed doctrine is fairly deducible from the earliest authorities. We are not, however, considering whether under the text of Yajnavalkya the wife has a right to demand a partition from the husband. The question before us is what exactly was meant by Vachaspati Misra when he quoted Yajnavalkya's quarter-verse in his comment on Yajnavalkya's suretyship verse II.52. It has been already shown that this *Vibhaga-nirnaya* context does not make an unqualified right to demand partition at all necessary. As Vachaspati Misra has actually commented so fully on Yajanavalkya II.114-15 in the earlier *Jivat-pitrika-vibhaga* Section, his quotation of the quarter-verse alone in the later *Vibhaga-nirnaya* Section cannot be put down to a desire to subordinate the language of the text to custom and usage, to say nothing of the fact that it is not easy to conceive of a Hindu custom requiring a husband unconditionally to divide his wife and thus impliedly giving the wife an unqualified right to demand partition from him. It is true that in a discussion on partition during the lifetime of the *father*, the *wife* comes in only incidentally, but is that a good reason for holding that Vachaspati Misra with all his reputation for acuteness saw no inconsistency at all in giving her a very limited right in the earlier discussion and freeing that right, quietly and unnecessarily, from the conditions then recognized on that very text when he came to deal with the topic of *Vibhaga-nirnaya* or merely how to determine whether or not a partition has been already effected? Vachaspati Misra's high standing as a commentator must itself make such a construction of his comment impossible. Nor can it really be seriously maintained that the very word समांशिकाः '*samansikah*' equal sharers, does not involve a reference to other parts of Yajnavalkya's verse. As the earlier discussion shows, the wives' *equality* of shares was there taken by Vachaspati Misra to mean that (subject to allowance for stridhan already received from the husband or the father-in-law) each

wife was to get the same share as each of the sons. Taken by itself, the quarter-verse may mean that each wife was to have the same share as the husband, irrespective even of the existence of any sons, but this was not Yajnavalkya's meaning, nor is there any reason to think that it was taken to be so by Vachaspati Misra. Another possible meaning of the quarter-verse, if taken by itself, is that wives should have equal shares inter se, but this could not possibly have been intended in a context which has nothing to do with preference among wives. The very expression 'equal sharers' in Vibhaga-nirnava thus involves a reference to other parts of the Vivada Chintamani, and cannot, without some definite reason, be so interpreted as to produce a conflict that no commentator of standing would have tolerated. The wife may thus sometimes get a share of her husband's self-acquisitions, according to Vachaspati Misra.

The property in suit is mostly ancestral, and it has therefore been also argued that though Vachaspati Misra has not expressly dealt with the matter, the Mithila law, while giving the son, in agreement with the Mitakshara, a right to demand a partition of ancestral property in the hands of the father, goes further than the Mitakshara by allowing the same right to wives—the right to demand a partition of ancestral property in the hands of the husband. *Vibhaga*, partition, under the Hindu law, it is urged, implies an antecedent title, and the very form of the expression employed by Vachaspati Misra विभागस्तु-दम्पत्योः(*Vibhagastudampatyoh*), "[there is / may be] partition, however, between husband and wife",—Mr. Jha contends, places the wife on a par with the husband and thus gives her a coordinate right to the ancestral property in his hands. It is not pretended that the Vivada Chintamani contains anything specifically to show that *vibhaga*, a word which etymologically means a division or distribution irrespective of any question of right, implies an antecedent

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title; but reliance is placed on Vijnanesvara's discussion of the question " Whether property arises from partition, or the division be of an existent right "—Colebrooke, I.1.17. Vijnanesvara negatived the position that property arises from partition, but this did not prevent him from holding in his comment on Yajnavalkya II.52 (which has already been referred to) that though the wife has " ownership " over wealth (*dravya-Svamitva*), she is not entitled to partition (*dravya-vibhaga*) at her own will, but (may receive a share) at the option of the husband on the strength of Yajnavalkya's later verse "if he makes the allotments equal, his wives should be made equal sharers (or as Gharpure puts it, 'should be given equal shares')". As was observed by a Full Bench of the Allahabad High Court in *Sham Lal* v. *Bannu*(1), " too much stress should not be put on any of the (Mitakshara and other) texts which speak of the ownership of the wife in her husband's property ". She is a co-owner in a subordinate sense, and though she is entitled to a share in certain circumstances and may thus be a necessary party to a suit for partition of the family property, she has no such interest as will enable her to maintain such a suit. Mr. Jha lays stress on the fact that while commenting on Yajnavalkya II.52 Vijnanesvara, unlike Vachaspati Misra, expressly says that the wife has no right to claim partition from her husband but may have *vibhaya*—may be given a share—as laid down in a later verse of Yajnavalkya's. This, however, is not a substantial difference. Vijnanesvara deals with Yajnavalkya's verses in the order shown by their numbers, and has thus to explain the word अविभक्ते: *avibhakte* in the suretyship verse (II.52) before coming to *Daya Vibhaga* which begins with II.114. Vachaspati Misra deals with II.114 and 115 long before he comes to the suretyship verse in the last Section of his Chapter on *Daya Vibhaga*. His exposition of II.115,

(1) (1882) I. L. R. 4 All. 296, F. B.

like Vijnanesvara's, gives the wife a share in the conditions laid down by Yajnavalkya, and no more; and his concluding sentence on the suretyship verse is merely a summary reference to that exposition, coupled with a reference to the identical view of the Ratnakara. Mr. Jha has, moreover, not referred us to any passage in the Vivada Chintamani showing that according to this Mithila authority the wife has (as under the Mitakshara) ownership in the property of the husband : on the contrary we are asked to believe that Vachaspati Misra deliberately stopped short of quoting the 19th *sutra* from Apastamba II.6.14, though this *sutra* would have made the wife an associate of the husband with respect to the acquisition of property and not merely to religious acts and their fruit as laid down in the two previous *sutras*. Assuming, however, that Vachaspati Misra did, like Vijnanesvara, consider that the wife has ownership in the husband's property,—Mr. Jha's reference to a maxim from the Sraddha Viveka regarding wealth being common to the married pair will be dealt with later—the only right to a share that he definitely recognizes for the wife—and it is a share in property within Apastamba's 19th *sutra*—is not absolute but subject to the conditions found in Yajnavalkya II.114-5, and on the face of it, does not amount to such an interest as will entitle her to demand partition irrespective of whether the husband has made any division or not. If the Mitakshara conception of *Vibhaga* as implying an antecedent title is also to be read into the Vivada Chintamani, the Mitakshara itself, it must be remembered, was not prevented by that conception from holding that the wife's antecedent title—*dravya-svamitva*—was not sufficient to confer upon her the right to demand partition from her husband. Nor is the wife the only person who, inspite of a definitely recognized antecedent title स्वामित्वः *svamitva* ownership—in her husband's property, is held by the Mitakshara to be disentitled to claim partition; the son also takes an interest by birth in the paternal

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(as well as the ancestral) property—(Colebrooke I.1.27 and I.5.10), but that does not entitle him to claim a partition of the paternal property if the father be unwilling and the mother not past child-bearing. An antecedent title—स्वामित्व *svamitva*, स्वाम्य *svamya*, स्वत्व *svatva* are all among Mitakshara ways of describing it—does not therefore under the Mitakshara necessarily give a right to obtain partition. There is a palpable fallacy in the argument for the appellant that the wife's *vibhaga* implies her antecedent title, which in its turn implies her right to claim a partition. If you take the antecedent title from the Mitakshara conception of *vibhaga*, it must plainly not be overlooked that the Mitakshara does not regard such a title as importing an unconditional right to claim partition. The title to be inferred from the use of the word *vibhaga* is merely a right to receive a share in the conditions laid down, and not an unqualified right of partition. The appellant is not, in our opinion, entitled, even with the assistance of the Mitakshara, so to read Vachaspati Msira's concluding sentence as to get rid of the conditions recognized by him, no less than by Vijnanesvara, in the comment on Yajnavalkya II.114 and 115.

As regards the form विभागस्तु दम्पत्योः it is a necessity of language in speaking of a partition between two parties, to mention them together, and it is obvious that such mention does not necessarily imply that they had co-ordinate rights. It is in fact because the wife's right under the Mitakshara is not co-ordinate with that of the husband that though she may on occasion be given a share, she is not entitled to claim partition; her *dravya-vibhaga* does not, in spite of the use of the genitive, mean partition of wealth *by* her, in the Mitakshara on the suretyship verse II.52, nor necessarily in ordinary parlance. Has Vachaspati Misra said anything to show that the wife's position in this respect in Mithila is at all different from her position under the Mitakshara? Mr. Jha has not been able to place his finger on any

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express statement in the Vivada Chintamani, nor is it pretended that his contention is supported by any judicial decision. He has, however, urged that Vachaspati Misra deliberately adopted a different treatment of Yajnavalkya from Vijnanesvara as regards the rights of sons and wives to claim partition, and had so little respect for that authority as to refer to his commentary only once throughout the Vivada Chintamani and that, too, in a very casual manner in the Chapter on Abuse, by saying " The Mitakshara also (is) to the same effect ", or as Tagore puts it at page 138, " The Mitakshara also confirms it ". But is there any real difference between the treatment of Yajnavalkya by Vijnanesvara and Vachaspati Misra on the point in question? In the first place, there is no direct provision in Yajnavalkya for the son's right to demand a partition from his father. His verse II.121, laying down that " the ownership of father and son is the same in land which was acquired by the grandfather ", etc. (Colebrooke's Mitakshara I.5.3), taken with the son's right by birth which Vijnanesvara has already deduced (Colebrooke I.1.27) by an elaborate discussion of the question " whether property arise from partition, or the division be of an existent right " (Colebrooke, I.1.17), enables that authoritative commentator to hold that " a distribution of the grandfather's estate does nevertheless take place by the will of the son", even when the father does not desire partition—(Colebrooke, I.5.8), or as he puts it again a little later, that " the father, however, reluctant, must divide with his sons, at their pleasure, the effects acquired by the paternal grandfather "—(Colebrooke, I.5.11). In the event of the sons exercising this right of obtaining a partition of the ancestral property, Vijnanesvara has already held in his comment on Yajnavalkya II.115 that " if the wealth descended to him from his father, an unequal partition at his pleasure is not proper; for equal ownership will be declared "—(Colebrooke, I.2.6). Thus according to the Mitakshara, the ancestral property may be divided not only

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at the father's pleasure—that was apparently beyond question—but also on the son's demand, and in either case the division must be into equal shares. Regarding the mother's share at such a partition, there is not much to be found in the Mitakshara. Vijnanesvara's introduction to Yajnavalkya II.115 speaks of division at the pleasure of the father only, and this prevents the direct application of that verse to partition at the instance of the sons so as to entitle the mother to an equal share at such a partition. The principle, can, however, be applied in such cases, as Mr. Jha concedes, under the doctrine of अतिदेश *atidesa*, extension by analogy, and this in substance is what was done in *Laljeet Singh* v. *Rajcoomar Singh*(1). Another indication in the same direction is furnished by Vijnanesvara's comment on the first half of Yajnavalkya II.121, where he interprets the word "*vibhagabhak*" as importing allotments to both parents when the sons divide from the father: "(*Vibhagabhak*) what is distributed, is a distribution. The distribution is of (sic) the allotments of the father and mother. He shares that and so he is a *vibhagabhak* (who is entitled to a share in the distribution). In other words, he obtains, after (the demise of) his parents, both their portions", as Gharpure puts it at page 199, rendering the original more closely than Colebrooke I.6.2. This points to the allotment of a share to the mother even when the sons enforce a partition of the ancestral property against the father, and was the basis of the decision in *Sumrun Thakur* v. *Chunder Nam Misser*(2). But after what Vijnanesvara says on Yajnavalkya II.52, there could be no provision, whether express or implied, in his Chapter on Inheritance, enabling the wife to demand partition from the husband, either in respect of his self-acquisitions or in respect of the ancestral property. Such is the position of the son and the wife under the Mitakshara.

(1) (1873) 12 Beng. L. R. 373.
(2) (1881) I. L. R. 8 Cal. 17.

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In the Vivada Chintamani, Mr. Jha cannot point to any discussion about whether property arises from partition or whether partition pre-supposes a right of property which (as the Mitakshara holds) accrues to the son by birth both in the paternal and in the "ancestral" wealth—(Colebrooke I.1.27). Yajnavalkya II.121 is also not referred to in the Vivada Chintamani. There are, however, frequent references in this Mithila digest to the difference in the father's position vis-a-vis the sons according as the property in question is self-acquired or otherwise. We have already quoted a passage where the father's independent power, स्वातन्त्र्य (*svatantrya*), over his self-acquisitions is spoken of. A little earlier, just before the quotation from Manu (IX. 209), we have अनीशताप्यत्रैवापुत्राणाम् 'and the powerlessness of the sons is also only in respect of such property' (Setlur, page 245), as the conclusion of a comment on Vishnu which begins: "*Svayamupattam*"—self-acquired. Similarly, also, as to property recovered, conformably to the text of Manu. There, the fact of the non-injury to the paternal wealth is material. But the wealth acquired by using the paternal wealth is certainly *common* "*sadharana.*"—(Setlur, page 244). Ancestral property and property acquired by using it is thus, according to the Vivada Chintamani as according to the Mitakshara, common to father and son, while over his self-acquisitions the father has *svatantrya* or independent power. Vachaspati Misra has a small section on "Property not subject to partition"—(Tagore, page 249), which, as Mr. Jha has pointed out, also indicates the son's interest by birth in the ancestral property. When Vachaspati Misra comes to Yajnavalkya II.122 in his section on "the participation of sons born after a partition"—(Tagore page 275), he does not, unlike Vijnanesvara, say anything, suggesting the allotment of a share to the mother; in fact he makes no comment on the word *vibhagabhak* except that it means "is worthy of a share"—(Setlur page 261) or, perhaps more

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accurately, " is entitled to a share ". But this does not affect the right of a son to claim partition of ancestral property, and it may be assumed that Vachaspati Misra did not differ from the Mitakshara as regards that right. If so, the line of reasoning adopted in *Laljeet Singh's*(1) case would be applicable, and the wife could, under the Vivada Chintamani also, be held entitled to a share in the event of her husband either choosing, or being compelled by the sons, to make a partition of the ancestral property, even though, like Vijnanesvara, Vachaspati Misra takes Yajnavalkya II.115 to apply to a division of the father's self-acquisitions only into equal shares. The son's right to claim a partition of the ancestral property and the wife's right to a share on such a partition has not, we are informed by Mr. Jha, been disputed in any Mithila case, and seems to have been freely conceded in *Krishna Lal Jha* v. *Nandeshwar Jha*(2). But does this go beyond showing that the Mithila wife is entitled to receive a share when the sons obtain equal shares from the father—as they can in ancestral property, whether the father be agreeable or not—and subject to the further proviso or qualifications contained in the second half of Yajnavalkya II.115, namely, " to whom no stridhan has been given by the father or by the father-in-law " ? The appellant desires to establish that unlike the Mitakshara the Mithila law entitles the wife to claim a partition of the ancestral property. Vachaspati Misra's full treatment of Yajnavalkya II.115 confines that verse to the self-acquisitions of the father and does not give his wife the right to claim a partition even of that kind of property, as we have already shown. Mr. Jha cannot point to any passage in the Vivada Chintamani really dealing with the wife's right against the husband in respect of ancestral property. He has urged that Vachaspati Misra's concluding sentence on Yajnavalkya's suretyship verse is not confined to self-acquired property. It seems to us, how-

(1) (1873) 12 Beng. L. R. 373.
(2) (1918) 4 Pat. L. J. 38.

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ever, that that sentence merely bears on the possibility or otherwise of a separation in estate between husband and wife, irrespective entirely of whether the property is ancestral or self-acquired. The question of such a possibility of a separation merely arose on the word अविभक्ते *avibhakte* in Yajnavalkya's verse and the Section on Vibhaga Nirnaya was primarily meant for a discussion of the wholly different question of how to determine whether or not a disputed partition has in fact been effected. The wife's right to the ancestral property is admittedly not dealt with in the Section on Partition during the lifetime of the father. Mr. Jha has urged that this was only to be expected from the title of the Section. But it is to be borne in mind that it is in this Section that such right as the wife has to a share in her husband's self-acquisitions is discussed, and that in spite of the title the Section also contains discussions on topics treated in the Ratnakara, in Chapters III and IV, under the titles "Partition *after* the father's death" and "Partition among brothers by different mothers". It will be seen later that the right to demand a partition of the ancestral property from the husband, which Mr. Jha claims for the Mithila wife, is not reflected in the Stridhan Section of the Vivada Chintamani, even though that Section is not confined to woman's peculium but extends to भर्तृदत्त *bhartidaya*, a word interpreted by Vachaspati Misra not in the ordinary sense of "husband's heritage" but in the wider sense of भर्तृधन "husband's wealth", whether devolving on the wife by inheritance, or coming to her by gift inter vivos. When Mr. Jha could not find any passage in the Vivada Chintamani dealing with the wife's right in the husband's lifetime to a share in the ancestral property, and could not point to any substantial difference in respect of such a right between the treatment of Yajnavalkya's verses by Vachaspati Misra and Vijnanesvara, he laid stress on the fact that the wife is said as a result of the marriage to be born into the husband's *gotra*, and on the further fact that Narada's verse in Vachaspati

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Misra's comment on Yajnavalkya's suretyship verse places the wife on the same footing as the son. Vachaspati Misra, however, is not alone in introducing such a text, for in his comment on Yajnavalkya II.49, Vijnanesvara notices the corresponding verse from Manu, VIII.416, making the following comment on it—" Likewise the text referred to above does not lay down the incapacity of women and others to hold property; inasmuch as the object of the text is to argue their dependence alone. Moreover this will be made clear in the Chapter on partition "—(Gharpure page 75). The second half of the verse of Narada or Manu says that what they (the wife, the slave and the son) earn is (acquired) for him to whom they belong (Dr. Buhler, page 326). Texts of this kind have plainly little or no bearing on the respective rights of the son and the wife to claim partition: the son's right to claim partition is traceable to his right by birth, which is impliedly recognized by Vachaspati Misra, but that is not the case with the wife, in spite of her fictional birth on marriage in the family of her husband. Nor is it under the Mithila law alone that marriage is taken to imply the birth of the wife into the *gotra* of the husband. The Mitakshara was also apparently of the same view (the dispute really being about her *gotra* after death), but is not prevented by that doctrine of the wife's fictional birth from holding expressly that the wife has no right to claim a partition, while basing the son's right to claim a partition of ancestral property in the hands of the father on his right by birth. Mr. Jha has not referred us to any passage in the Vivada Chintamani from which it can be inferred that Vachaspati Misra took the view that by her fictional birth into the husband's *gotra* the wife acquires such a right or interest in his ancestral property as will enable her to claim any partition from him. Her right to maintenance is a different matter, and may, as Mr. Jha himself has contended, be asserted against the husband's property, whether self-acquired or ancestral. Her so-called right to a *vibhaga* of his self-acquisitions must, on

Vachaspati Misra's discussion in the *Jivat-pitrika-vibhaga*, be taken to be subject to the conditions in Yajnavalkya II.114-5. It seems to us that Vachaspati Misra's concluding sentence in the comment on Yajnavalkya II.52 contemplates no *vibhaga* for her except what is based on Yajnavalkya II.115, and that a right to claim partition of ancestral property in the husband's hands cannot be read into it on any of the many grounds so earnestly urged by Mr. Jha. We see no reason why the wife's apparently unquestioned right to a share in the ancestral property when a son obtains partition from the father should not be derived by अतिदेश *atidesa*, analogy, from the provisions of Yajnavalkya II.114-115 under the Vivada Chintamani as under the Mitakshara in *Laljeet's*(1) case. The wife's position in respect of ancestral property under the Vibhaga Nirnaya passage of Vachaspati Misra does not seem to us any better than under the Mitakshara.

Vachaspati Misra's concluding sentence in the comment on Yajnavalkya's suretyship verse, as has been already observed, is in form a statement of what he took to be the view of the Ratnakara, another leading authority in the Mithila school. The view actually taken in the Ratnakara is specially important in this connection because the appellant, as has been already indicated, can only take advantage of Vachaspati Misra's sentence on the footing that his view was the same as that of the Ratnakara. Sarkar and Chatterjee have rendered the relevant part of the comment of the Ratnakara on Yajnavalkya's suretyship verse as follows :—

"Although Apastamba says that there is no partition between husband and wife, still, because in some case, partition between husband and wife is shown by Yajnavalkya in the passage—"if the shares are made equal, wives should be made equal sharers"—this text of Yajnavalkya is to be understood to intend such partition : thus there is no conflict "—(Chapter XXXVI. 4 at page 92). Chandesvara

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Thakur thus did not adopt the familiar device of reconciling the apparent discrepancy between the text of Apastamba and the implication from the suretyship verse of Yajnavalkya by confining the former, in the manner adopted by Vachaspati Misra, to sacrificial performances. What he did was to give preference to Yajnavalkya's text which he took to provide for partition *kvapi*, " in some case ", as Sarkar and Chatterjee put it, or perhaps better still, " on some occasions ". Vachaspati Misra does not reproduce the comment of the Ratnakara in full, but merely gives a summary of it by saying in effect that the Ratnakara recognises partition between husband and wife on the basis of the text about wives being made equal sharers. The Ratnakara does not in fact restrict the quotation from Yajnavalkya to the second-quarter of the verse II.115, but gives the first-quarter as well, यदि कुर्यात्समानंशान् : which may be literally rendered " if (he) should make equal shares..... ". It is thus clear that the Ratnakara did not lay down an unconditional partition between husband and wife, and as from the context it is clear that Vachaspati Misra merely followed the Ratnakara, we cannot assume that he intended to be taken to have read the Ratnakara in any other sense. It is, indeed, unlikely to a degree that one of the leading authorities of the Mithila school should have represented another well-known authority of the same school as laying down unconditionally what the latter had clearly indicated to be subject to conditions by saying *kvapi* and actually quoting the first quarter of Yajnavalkya II.115.

We now come to Vachaspati Misra's treatment of Daya Vibhaga (partition of heritage, or inheritance) generally. The learned Advocates have taken us practically into the whole of the chapter in the Vivada Chintamani, but it is necessary to deal with a few references only. At more than one place Vachaspati Misra makes it clear that in his view the wife of a deceased brother is not entitled to a share of the

family property, and there is no dispute that that is the Mithila law, as it is also the law in the other Mitakshara schools. Vachaspati Misra has, perhaps, put this most pointedly not in the Section on Partition during the Lifetime of the Father, though he has occasion to mention it more than once in this Section (*see* Tagore, pages 232 and 239), but in the section on Succession in default of a Son, where immediately after quoting Balarupa on the text of Harita, he comments—"When the husband dies without partition with his co-heirs, he has no share at all: what then could his wife receive? It cannot be argued that she is entitled to a share like her husband, because there is no authority for this; nor should it be argued that the preceding texts are authority for her receiving a share, because they merely allude to the separate property of her husband"—(Tagore, page 291).

Mr. Jha has argued that this does not affect the position contended for by him that the wife is a co-owner with the husband. The interest he contends for to meet the point under discussion is the interest of the wife while she continues to be a wife, an interest which ceases on the death of the husband. This is not unintelligible. but such an interest is only a hypothetical or fictional interest, and Mr. Jha has really assumed it not from anything that he has found and referred us to in the Vivada Chintamani, but from discussions in other Hindu law books, which also do not give the Hindu wife or widow a right in virtue of such interest to demand partition. The fact is that Mr. Jha has endeavoured to read this theoretical (*aupapattika*) interest into Vachaspati Misra's comment on Yajnavalkya's suretyship verse, but has had to limit it to ancestral property on failing, after the most earnest and elaborate efforts, to find a way out of Vachaspati Misra's treatment of Yajnavalkya II.115 in the Section on Partition during the lifetime of the husband, and has further had to limit it to the lifetime of the husband on coming to those passages in the Vivada Chintamani where it is shown that the

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wife of an undivided deceased brother is not entitled to a share at a partition of the family property. The case, moreover, so elaborately sought to be made out for the appellant—that the Vibhaga Nirnaya gives the wife a right to claim partition, that the chapter on Resumption of Gifts makes the wife's consent essential to a gift of his entire property (*sarvasva*) by the husband, and that taking these special Mithila propositions together, the appellant was a co-parcener of her husband's—is argued for a *widow* who desires to have her husband's *bequest* of the *bulk* of the property to a nephew under a will purporting to bear her signature set aside. This aspect of the matter was not always borne in mind when the Mithila wife's rights as a wife were argued. If they do not entitle her to take the husband's property by survivorship,—and this cannot be disputed on the passages at pages 232, 239 and 291 of Tagore's book,—it does not seem that in the circumstances of this case the appellant stands to gain anything by establishing her alleged rights as a wife if they came to an end on her husband's death. Nor has Mr. Jha seriously attempted to show that Vachaspati Misra or any other commentator has actually recognized for the wife a co-parcener's right limited to the lifetime of the husband.

Turning now to the Section on the Separate Property of Women we find Vachaspati Misra giving his own classification of stridhan—(*see* Banerjee's Marriage and Stridhan, pages 336-38), and then dealing with a woman's rights not only over stridhan, moveable or immoveable, but also over her husband's property which becomes hers on the death of the husband in default of other heirs—(Setlur, page 256). He quotes a verse which is thus rendered by Tagore (page 261):

"Katyayana says, that a woman, on the death of her husband may enjoy his estate according to her pleasure; but in his lifetime she should carefully

preserve it. If he leave no estate, let her remain with his family." Setlur's translation of the same verse (page 256) is :—" Whatever was given by the husband, a woman may enjoy as she pleases, when he is dead; but when he is alive, let her preserve it or reside in the family (of the husband)." The discrepancy in these translations is partly due to the fact that the original for Tagore's ' his (i.e., the husband's) estate ' and Setlur's ' whatever was given by the husband ' is भर्तृदाय *bhartri-daya*, which Vachaspati Misra expressly interprets as the husband's wealth, whether devolving on the wife, on his death, in default of other heirs, or whether becoming her property with his permission, or as Tagore has put it. " enjoyed " by her with his consent, in his lifetime. If these be the only kinds of the husband's wealth that come to the hands of the wife, it would not appear that according to Vachaspati Misra a wife was entitled to claim partition from the husband. The share obtained by a wife from the husband in virtue of her alleged *right* to partition, and obtained against his will, could hardly be included in the class of property which the wife takes with his permission. Mr. Jha has endeavoured to meet this by suggesting that Vachaspati Misra's classification of *bhartri-daya* was not intended to be exhaustive, and that in this context he was only dealing with the peculiar property of woman. But Vachaspati Misra himself gives a reason—the *akanksha* or expectancy already referred to—why, while on the topic of the *Saudayika* (stridhan), he considers it necessary to deal with property inherited by a woman from her husband. Nor can the classification of *bhartri-daya* be regarded as other than exhaustive on the ground suggested by Mr. Jha, viz., that it does not include the share that the wife is entitled to in the husband's self-acquisitions under Yajnavalkya II.115. That share is after all given by the husband, and the conditions in which it must be given, as we have already observed, are not such as can be brought about by her, but depend entirely on

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his own volition. There is, therefore, no reason why it should not come within Vachaspati Misra's second class of *bhartri-daya*. A share obtained by the wife on a partition forced by her as a matter of right upon the husband would be on an entirely different footing, and seems to be so foreign to the spirit of Hindu law that we need not be surprised if it does not fit very well into and is not noticed in Vachaspati Misra's scheme.

It is also significant that in this Section on Stridhan Vachaspati Misra quotes Yajnavalkya II. 148 and explains " By the husband marrying a second wife, his first wife becomes superseded. What is given to her by the husband at the time of separation is called money given for the supersession (*adhivedanikam*)" (Sethur page 255). Mr. L. N. Singh for the respondent has argued that if the Mithila wife really had a right to obtain partition of ancestral property from her husband, one of the most natural occasions for her exercising that right would have been her supersession by a second wife when the text requires her to be compensated with the *adhivedanika* fee. There is, however, no trace of any such right in Vachaspati's entire treatment of stridhan. The respondent's argument is of course negative. While, therefore, too much stress must not be laid on it, we may observe that the comment on the word *avibhakte* in Yajnavalkya's suretyship verse is plainly much less suitable an occasion for dealing with the wife's right contended for on behalf of the appellant than is furnished, though not availed of, by Vachaspati Misra's treatment of the *adhivedanika* and *bhartri-daya* in the Section on stridhan.

How is the matter regarded by the other Mithila authorities placed before us? It has been shown already that the comment of the Ratnakara on the suretyship verse leaves no doubt that Chandesvara Thakur read no more into the word *avibhakte* than is to be found in Yajnavalkya II.115, that is to say,

that he did not consider that the wife was unconditionally entitled to claim partition herself from the husband. The Dvaita Parisishta, as edited by Keshava Misra's pupil Kalyana Misra, deals with the suretyship verse on page 39. This author also propounds the question how there can be any partition at all between husband and wife in the face of Apastamba's text that there is no partition between them. His answer is that that and other texts (which are also found in Vachaspati Misra's comment) only mean that there is no partition between husband and wife in sacrificial performances or their fruit, and he adds the significant word *dhanavat*, 'like wealth',—*gayachchhayam ntaphale* (an obvious misprint, for *ijyayam tatphale*) *vatayor na vibhago dhanavat*. He proceeds to say that there can be partition of wealth (between them) under the text of Yajnavalkya, quoting the first half and not merely the second quarter, of Yajnavalkya II.115. It is interesting to observe that he then deals with and negatives a contention based on Jaimini's discourse on the wedded wife. The contention is as a matter of fact slightly different from that dealt with by Vachaspati Misra, because a distinction is made between the *patni* and other wives. But Keshava Misra's reply to the contention is exactly the same as that of Vachaspati Misra up to but not including the concluding sentence which has been the subject of so much argument before us. If he leaves out Vachaspati Misra's concluding sentence, the reason plainly is that he had already stated that position before turning to the objection based on the *patnyadhikarana*. The Mitakshara which is also an authority in Mithila denies to the wife any right to demand partition from the husband.

The position thus is that out of four Mithila authorities, the Mitakshara is expressly against the appellant; the Ratnakara, by necessary implication from the express statement that the wife *sometimes* gets a share in accordance with the first half of Yajnavalkya II.115, is also against the contention of the

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appellant that a Mithila wife is entitled to demand partition at her discretion, the Dvaita Parisishta also does not give her any partition or share from the husband except in accordance with the first half of Yajnavalkya II.115; and the Vivada Chintamani is also against the appellant's contention, though his omission to quote the first quarter of Yajnavalkya II.115, or like the Ratnakara to say *kvapi*, or to refer to his previous treatment of the verse has led to this elaborate controversy.

In this state of the authorities it is plainly impossible to accept the appellant's contention that a wife in the Mithila school is entitled as a matter of right to demand partition from her husband at her own discretion.

The other passages from the Vivada Chintamani relied on by the appellant occur in the Chapter on " Subtraction of what has been given "—(Tagore, page 72). The dispute between the parties will be rendered clearer if the whole context is considered. Vachaspati Misra begins the chapter by quoting three verses of Narada, IV. 1 to 3, which have been translated by Dr. Jolly in Max Muller's Sacred Books of the East, Volume XXXIII, at page 128 as follows :—

" Where a man wishes to resume what he has given, because it has been unduly given by him, it is called Resumption of Gift, a title of law.

" What may be given(*a*) and what not,(*b*) valid gifts(*c*) and invalid gifts;(*d*) thus the law of gift is declared fourfold in judicial affairs.

" Again, what may not be given(*b*) is eightfold; what may be given(*a*) is of one kind only; of valid gifts(*c*) there are seven species, and sixteen sorts of invalid gifts ".(*d*)

(*a*) Corresponding to ' Deya '; (*b*) ' Adeya ';
(*c*) ' Datta '; and (*d*) ' Adatta ', respectively in the original Sanskrit.

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Vachaspati Misra's comment on these verses is—

" The ' undue ' character of a gift (may arise) either from its being the gift of property which may not be given, or from the mode of gift being improper, or from some mistake regarding the donee and the like, or from the absence of the consent of the father and others, or from various conditions of the donor himself such as his being very old ".

The chapter being thus divided into four sections Adeya, Deya, Datta and Adatta—Vachaspati Misra proceeds first to deal with the eightfold Adeya, what may not be given, by quoting the following verse of Brihaspati XV.2:

" That which may not be given is declared to be of eight sorts, joint property, a son, a wife, a pledge, one's entire wealth, a deposit, what has been borrowed for use, and what has been promised to another "—(Translation by Dr. Jolly, loc. cit., page 342).

He makes the following comment on the verse :--

' Joint property ' is that which is owned by several persons; there,(1) in regard to joint property, a son and a wife, the gift fails of accomplishment by reason of (the donor's) want of independence. And want of independence (arises) in regard to joint property from the fitness of things: in regard to a son and a wife, who do not consent, (it arises) from the authority of texts: in regard to the entire wealth of one who has (any) *anvaya* and to a thing (that has been) promised by any person at all (to another), (it arises) only from the authority of texts; thus a gift is precluded by want of ownership in the case of a pledge, a deposit and what has been borrowed for use, and only by the authority of texts, inspite of (the donor's) independence, in the case of all those four (things)—a son, a wife, the entire wealth and what has been promised . . . . . "

(1) This word, तत्र ' *tatra* ' in the original, occurs in the Calcutta edition and seems superfluous. The Bombay edition leaves out the clause.

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Pausing here for a minute, it is safe to say that this part of the comment is corrupt. Not only is the word *tatra*, " there ", in the middle of the first sentence superfluous and inappropriate in the context, but the want of independence in regard to a son and a wife affirmed in that sentence conflicts with the concluding portion of the above comment where a son and a wife are expressly included among the four things that may not be given inspite of the donor's independence with regard to them. In the first part of the second sentence a distinction is made between a son and a wife on the one hand and सर्वस्व *sarvasva*, " the entire wealth, and प्रतिश्रुत *pratisruta*, " what has been promised ", on the other, which, however, is ignored in the summary at the end and is perhaps not very clear, but seems to imply that apart from the texts the donor is independent (स्वतन्त्र *svatantra*) in regard to the *sarvasva* and the *pratisruta* only, but that as regards the son and the wife, their consent is a factor to be taken into account. The summary also leaves out one of the eight *adeyas* given in the verse, namely joint property which is dealt with in the beginning. The Bombay reading of this passage is only a little better, but contains a palpable mistake, पुत्रदारादि सर्वस्वप्रतिश्रुतेषु *putradaradi sarvasva pratisruteshu*, instead of पुत्रदार सर्वस्वप्रतिश्रुतेषु *putradar, sarvasva pratisruteshu*, which has been already referred to and which will have to be referred to again.

The word अन्वय *anvaya* has been left untranslated in the above passage; it has been the subject of much dispute, as will be seen later. Briefly, the appellant would take it to mean " heirs including the wife ", while the contention of the respondent is that it means " issue " or " offspring " and can in no case include the wife.

Vachaspati Misra's comment on Brihaspati's verse concludes with the following sentence :—

" In the opinion of the Smritisara, however, a gift of one's entire property does take effect, for the

reason that it is made by an independent owner, but the donor incurs sin for doing a forbidden act ".

The commentator does not say whether or not this is his view also. According to the appellant the use of the word "however", corresponding to '*tu*' in the original, indicates that this was not the view of Vachaspati Misra himself. The point is arguable, but it will be remembered that it would have been destructive of the appellant's case on Vachaspati Misra's concluding sentence in his comment on Yajnavalkya II. 52 if the same word occurring in that sentence had been construed in the way now contended for. Reference has already been made to the number of senses in which the particle '*tu*' can be used in Sanskrit; its precise significance in any particular sentence must depend on one's interpretation of the whole context. It will be seen later that Vachaspati Misra not only holds that the entire wealth may be given with the consent of the *anvaya*, a term usually taken to mean issue or descendants, but also shows that consent is only necessary when what is given is *madhyaya*, joint property.

Vachaspati Misra then quotes two verses of Narada, IV.4 and 5, which have been translated by Dr Jolly as follows:—

" An *Anvahita*(1) deposit, a *yakita*(1) a pledge, joint property, a deposit, a son, a wife, the whole property of one who has offspring,

"And what has been promised to another man; these have been declared by the spiritual guides to be inalienable by one in the worst plight even".

(What Dr. Jolly has called "inalienable " in this translation is *adeya* in the original) Having quoted

(1) Dr. Jolly in his footnote refers to II.14 for the meaning of these technical terms and says that the prohibition of such gifts as would leave the family destitute appears to relate principally to charitable donations and religious endowments. Pandit Ishwari Dutta could not have been aware of this footnote when he said Dr. Jolly did not understand the first two words.

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near the beginning of the chapter a verse of Narada's in which it was said that what may not be given is eightfold, Vachaspati Misra's first comment on these verses is directed to showing that though the things mentioned in these verses in fact seem to number nine, the number must be taken to be eight. The comment is—

"Son and wife are here included in one compound and thus form one single predicable; (and) from this unity (of the two) the eightfold character (of things that may not be given still remains)".

Then comes the following comment, including a quotation from Katyayana :—

"The meaning is that even in a time of distress, a son, a wife, and the entire estate may not be given without the consent of the *anvayas*, namely, the son, the wife and the like, and the *anvaya*.

(But) Katyayana says that with their consent (the former) may be given :—

"(These) should not be subjected either to a sale or to a gift, (if they be) unwilling—a wife and a son; as to (*a*) the entire estate, it should be applied to one's own use only.

"In a time of distress, however, a gift or a sale may certainly be made, one should not act otherwise. This is the decision of the law codes".

In the absence of the consent of those three, these three should be enjoyed by one's own self; with the consent of these,(*b*) however, (there may be) a gift of them(*b*)—this is the meaning.

Others, however, (hold) that the entire wealth may not be given even with the consent of the *anvaya*, as gift is prohibited because of the mere existence of it (i.e. *anvaya*)"

(*a*) To express the effect of '*tu*' in the original.
(*b*) Sic. in the Calcutta edition.

This is the comment that has given rise to much discussion. In the first paragraph the appellant's interpretation of the compound पुत्रदाराधन्वयानाम् *putradaradyanvayanam* has been shown above that of the respondent.

Some light will be thrown on the matter in controversy by the following continuation of Vachaspati Misra's comment above :—

"As to the son's consent itself, Vasishta (says) 'Man formed of uterine blood and virile seed proceeds from his mother and his father (as an effect) from its cause. (Therefore) the father and the mother have power to give, to sell and to abandon their son(a).

" Here too, the case of an only son being special, he himself lays down :—

'But let him not give or receive (in adoption) an only son; For he (must remain) to continue the line of the ancestors. Let a woman neither give nor receive a son except with her husband's permission'(a).

"An only son, though (he be) agreed to the gift, may not be given, since the text provides a reason, as it were, by laying down "For he (must remain) to continue etc. ... ..."

The dispute between the parties is regarding whether under the Mithila law the consent of the wife is essential to a husband's bequest of his entire estate. The texts do not deal with bequests, but the law of wills and bequests by Hindus has been held to be a development of the law of gifts inter vivos, and wills are generally to be regarded as gifts to take effect upon death as to the property which they can transfer [*Tagore* v. *Tagore*(1)]. The three Smriti texts quoted do not specifically refer to the wife's or any other relative's consent in connexion with the gift of the *sarvasva* (the entire estate), but one of them—Narada's

(a) Translation by Dr. Buhler in Max Muller's Sacred Books of the East, Vol. XIV, page 75.

(1) (1872) 18 W. R. 359.

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—does refer to the existence of *anvaya*. The primary question thus is whether Vachaspati Misra has in fact interpreted the texts to mean that the wife's consent is essential and taken that to be the law in Mithila notwithstanding what he states to be the view of the Smritisara.

It will be observed that Brihaspati, who is first quoted in the Adeya Section, mentions *sarvasva sans* phrase among the eight things that may not be given. In the earlier part of his comment on Brihaspati's verse Vachaspati Misra introduces the qualification that *sarvasva* is not to be given by one who has any *anvaya*. The next text quoted by Vachaspati Misra is Narada's which lays down that *sarvasva* may not be given if there be any *anvaya*; Dr. Jolly has rendered this by saying that " the whole property of one who has offspring is inalienable ". Vachaspati Misra says that the meaning of Narada's verses is that even in a time of distress a son, a wife, and the entire estate may not be given without the consent of certain persons,—who these are is in controversy—and he at once proceeds to quote Katyayana for the purpose of showing that with the consent of those persons, a son, a wife and the entire estate may be given. Whether Katyayana's verses quoted by Vachaspati Misra do or do not altogether support that position is a different matter; but after quoting them, Vachaspati Misra says that the meaning is that in the absence of the consent of " those three ", " these three " should be enjoyed by one's own self, but that with the consent of " these " there may be a gift of " them ". He concludes this portion of the comment with the observation " others, however, hold that the entire wealth may not be given even with the consent of the *anvaya*, as gift is prohibited because of the more existence of it (i.e., *anvaya*) ". Regarding the identity of " these " three things (if we may call them so for convenience) whose alienability or otherwise is discussed there is no dispute; they are a son, a wife, and the entire wealth, though in Katyayana's first

verse the wife is placed before the son. It also seems clear that Vachaspati Misra's view, as expressed in this part of his comment, was that these three things may not be given even at a time of distress without the consent of certain persons but may be given with their consent. It has indeed been argued, in this Court, for the appellant that Vachaspati Misra's concluding statement of the opinion of " others " on Katyayana's verses—that the mere existence of *anvaya* bars a gift of the *sarvasva*—represents his own view; but that was not the appellant's case below. It is true that these Sanskrit commentators do sometimes indicate their own views in this peculiar form; but, as pointed out in *Dayaldas Laldas* v. *Savitribai*(1), that course is adopted by commentators swayed by modesty and considerable deference to the views of other distinguished commentators already quoted Vachaspati Misra, as has been already shown, does not feel any hesitation in directly expressing his dissent from such a work of special authority in Mithila as the Ratnakara, or (according to the appellant) in referring even to the Mitakshara without a semblance of much respect. Nor has Mr. Jha been able to show from the context from what recognized predecessor Vachaspati Misra was differing on the present occasion, if in an unusual access of humility he decided to express his own view in this peculiar, indirect form. Vachaspati Misra could, of course, put his own gloss on Katyayana or Narada or Brihaspati, and reconcile in his own way such conflicts as he chose to notice in those Smritis or others. But it was out of the question for him to differ from any of them. Katyayana, as a matter of fact, says nothing about the *anvaya*, but Vachaspati Misra himself has already introduced *anvaya* in his comment on Brihaspati, in view (doubtless) of the text of Narada and possibly other Smritis (e.g., Yajnavalkya II.175), and in the comment on Narada he adopted the interpretation that the *consent* of the *anvaya* is

(1) (1909) I. L. R. 34 Bom. 385.

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necessary. Mr. Jha's contention on this point must therefore be rejected; it is entirely inconsistent with the view so emphatically expressed just before and just after the quotation from Katyayana.

We thus come to the question—who, according to Vachaspati Misra, are the persons, with whose consent a son, a wife and the entire estate may be given, but without whose consent they may not be given? It is to be noticed in the first place that Vachaspati Misra's comment just before and after the quotation from Katyayana makes it clear that he used the expressions *vimatau*, " without (their) consent ", and *sammatau* (or *anumatau*) ", with (their) consent ", as contradictory and not merely contrary to each other, so as to have a complete dichotomy, and that there is no reasonable ground for the interpretation suggested by the appellant's translators that the words तेषां त्रयाणाम् *tesham trayanam* indicate disagreement *among* three persons including the donor himself. Vachaspati Misra first speaks of the son and wife being *vimata*, non-consenting, when commenting on Brihaspati's verse. He again refers to the *vimati* of certain persons before coming to the verses of Katyayana, and this also (like the first) in a sentence which does not include the donor among the parties whose *vimati* is mentioned. It will be seen later that in the corresponding passage the Ratnakara speaks of the *ananumati*, non-consent, of the *anvaya* as distinguished from its *sammati*, consent. These terms make the dichotomy quite clear. Vachaspati Misra evidently used the word *vimati* for *ananumati*, and the context shows that when he spoke of the *vimati* of three persons (or bodies of persons) he did not mean disagreement among them but only their non-consent—the absence of their consent—to the donor's acts.

In order, however, to appreciate the point in issue clearly, it is desirable first to deal with Katyayana's verses which intervene between the two parts of Vachaspati Misra's comment. These verses

do not expressly speak of any consent at all. All that they appear to do is to forbid, except in a time of distress, the sale or gift of a wife, and a son, if they be unwilling, and of the *sarvasva*. It may be observed in passing that this is not a mere repetition of the comment on Narada that even in a time of distress the son, wife and *sarvasva* may not be given without the consent of certain persons (whose identity falls to be determined). Now, the predicate in Katyayana's first sentence (न) नेयाः (*na*) *neyah* " should (not) be brought ", like the adjective, *anichchavah* (unwilling) is masculine and plural. दाराः *darah*, the word used for " a wife ", is in Sanskrit a masculine plural, पुत्र *putrah*, a son, being masculine and singular; and both are in the nominative case, while सर्वस्वम् *sarvasvam* is neuter and singular, and in the nominative or the accusative case. There is an elementary rule of concord between Substantive and Adjective in Sanskrit grammar which requires that an adjective, whether used attributively or predicatively, should agree in gender and number with the substantive to which it refers. But when the substantive qualified includes words of several genders, the rule is that the adjective must agree with them in their combined number, and that as regards gender, the adjective must be masculine if the words qualified be some of them masculine and some feminine, and neuter if they be some of them masculine or feminine and the rest neuter. In accordance with this rule, the first predicate (*na*) *neyah* will go with the wife and the son as the subject of the first sentence. It is, however, possible as a matter of Sanskrit grammar to read the predicate (*na*) *neyah* with the word *sarvasvam*—taking it as in the nominative case—by the *linga-viparinama* process (*see* for easy reference Apte's Sanskrit Guide SS. 21-22). But the adjective *anichchavah* cannot even with a not impossible modification of gender and number, be read with *sarvasva* because in the nature of things there can be no question of the consent or want of consent of *sarvasva* to its sale or gift.

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In his digest of Hindu Law (Book II, Chapter IV, section 1, verse 7) Colebrooke gives the following rendering of Katyayana's verse :—

" A wife or a son, or the whole of a man's estate, shall not be given away or sold without the assent of the persons interested; he must keep them himself ".

It is not clear what version of Katyayana's verse Colebrooke had before him. In the verse before us the only word that could at all correspond to Colebrooke's translation " without the assent of the persons interested " is *anichchavah*. In the first sentence of the comment of Jagannath as rendered by him, Colebrooke shows parenthetically that the persons interested are the son, wife, kinsmen and so forth, and this points to a different original than the one before us. In a footnote on this sentence he says that he has omitted Jagannath's " grammatical disquisition justifying the use of the masculine gender in the instance of a participle governed by unconnected words of the three genders ". But this would apparently refer to the predicative participle *neyah*; and Mr. Jha with his knowledge of Panini has not been able to suggest how any rules of grammar could make the attributive adjective *anichchavah*, unwilling, applicable to dead matter like *sarvasva*, an entire estate.

Pandit Ishwari Dutt, who has translated *anichchavah* by " without their assent ", actually gives a footnote to say that the persons referred to there are the wife, the son and the donor; but it does not appear from his evidence or otherwise how the word *anichchavah* could at all be construed with the donor who is not classed by Katyayana with the nouns *dara* and *putra*—the adjective qualifies the subject of the sentence, viz., the things that are not to be given or sold, and it seems impossible to include the donor among them. Professor Ramantar Sharma has taken the adjective *anichchavah* to refer to the wife and the son, while extending the predicate *neyah* to the

sarvasva as well. A more literal rendering of the verse is, however, possible, and Mr. Jha has not suggested that the rendering we have adopted on the basis of Dr. Bhagwat Kumar Shastri's translation departs in any respect from the words of the original. As the verse does not mention *anvaya* at all, and as, on the question of consent, it refers to the wife and the son only through the adjective *anichchavah*, what Vachaspati Misra says immediately after the quotation from Katyayana must obviously be taken not merely as his comment on Katyayana but also as a continuation of his comment on Narada which indeed led to the quotation from Katyayana. The first part of this later comment is that in the absence of the consent of *those three*, *these three* should be enjoyed by one's own self. The demonstrative pronouns " those " and " these " in Sanskrit, as in English and other languages (such as Persian), refer to objects regarded as distant or near respectively. " These three ", it is common ground, are the wife, the son and the *sarvasva*; and they are mentioned one after another in the second half of Katyayana's first verse. One would, therefore, naturally look for " those three " to something earlier in the passage. The first half of the verse mentions no persons at all, and it would thus appear that the reference was to the *putradaradyanvayanam* found near the beginning of Vachaspati Misra's comment on the *adeya* character of *putradarasarvasva*. The appellant would take " those three " to mean the wife, the son and the donor himself, or, according to the looser order adopted by Professor Sharma " one self (i.e. donor), wife and son ". But the donor himself is only mentioned in the last quarter of Katyayana's first verse, in the locative form *atmani*, (literally " in oneself "), while the wife, the son and the *sarvasva* occur in a different case or cases in the third quarter of that verse. The appellant's interpretation has thus the disadvantage of including in " those three " the *atma* mentioned not before but after " these three ". Sufficient attention does not appear to have been paid to this aspect of the

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matter by the appellant's pandits. It must, however, be observed that too much stress ought not to be laid on Vachaspati Misra's pronouns, if reliance is to be placed on the Calcutta edition or even on the Bombay edition of the Chintamani, for the Calcutta edition in the second clause of the sentence speaks of the consent of " these " to the gift of " those ", this last pronoun being also found in the Bombay edition. Apart, however, from the use of the pronouns employed in the comment, the interpretation contended for by Mr. Jha suffers from a double disadvantage in including the *atma* (oneself) among " those three " whose consent or otherwise is being considered, for this word (as already observed) does not occur in Katyayana's verse in the same (nominative) case as the wife and the son, and further it seems idle to require the consent of the donor himself to a voluntary gift. There is also the difficulty, already referred to, in construing the word *vimatau* in the comment after the quotation from Katyayana as meaning a disagreement between the wife or son on one hand and the donor himself on the other, when in the comment after the eightfold character of things that may not be given, Vachaspati Misra (according to the appellant) makes the son, the wife and the *sarvasva* inalienable without the consent—*vimatau* again—of the " *anvayas* " including the son and the wife—there being no possibility here, even according to the appellant's interpretation, of the donor himself being among the persons whose *vimati* is in question. " Those three " cannot, therefore, be taken to be the son, the wife, and the donor. The pronoun must refer to something earlier than Katyayana's verses, and we must therefore go back to the comment before them.

Now Vachaspati Misra begins that comment by saying that the son, the wife and the *sarvasva* must not be given even in a time of distress without the consent of certain persons or bodies of persons *putradaradyanvayanam*, but may be given with the

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consent. In support of the latter position he cites Katyayana, and then continues that without the consent of " those three " " these three " should be enjoyed by one's own self, but that with their consent, there may be a gift. According to the appellant the expression *putradaradyanvayanam* means " of the *anvayas*, namely, the son, the wife and the like " : the compound (*samasa*) being the appositional *karmadharaya*, and not the copulative *dvandva*, and *anvaya*, the last member of the compound being qualified by the adjectival *putradaradi* which itself would be taken as a *bahuvrihi*. (*Adi* means the beginning, and *putradaradi*, construed as a *bahuvrihi*, would mean ' at the beginning of which are the son and the wife ', ' headed by the son and wife '. The *karmadharaya* would thus mean ' the *anvayas* headed by the son and wife ', but Mr. Jha prefers the rendering ' the *anvayas*, namely the son; the wife and the like '). According to the respondent, however, the word *putradaradyanvayanam* is probably a misprint or an inaccuracy in the manuscript used for the Calcutta edition. It cannot be said that this is not plausible; the Vivada Chandra printed at page 441 of Volume II of Part III of the paper-book wrongly reads *putradaradi* instead of *putradaradhi* in Brihaspati's verse, and the Bombay edition wrongly reads *putradaradi*, instead of *putradara*, before *sarvasvapratisruteshu* in the comment on that verse, showing how one is liable to add a wrong *adi* to *putra-dara*. The same word—*putradaradyanvayanam*—is, however, found in the Bombay edition, and we have not been referred to any other editions or to any original manuscripts. The appellant has also filed a copy of the Vivadarnavasetu published at Bombay by the Sri Venkatesvara Press in 1888, which at page 148 gives the same reading. This last work is, however, plainly unreliable to a degree. The Publisher has solemnly prefixed a Sanskrit introduction called Request to the Learned, in which he says that the work was compiled by a number of pandits under the orders of Ranjit

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Singh, the Lion of the Punjab. The names of the pandits are mentioned and agree almost entirely with the pandits who are mentioned at the end of the manuscript of the Vivadarnvasetu (the digest of Hindu law prepared in 1773 under the directions of Warren Hastings and given to English readers under the name of Halhed's Gentoo Code) in the library of the Asiatic Society of Bengal, as ascertained by Mr. J. C. Ghose (see the footnote on page xviii of Vol. II of his Principles of Hindu Law). (Mr. Ghose, however, speaks of an edition printed and published at Benares in 1888, while the book before us was printed and published in Bombay in the very same year). This book itself, moreover, says that the view on Narada's verses that even in a time of distress the son, the wife and the *sarvasva* may not be given without the consent *putradaradyanvayanam* is also the view of the Vivada Chintamani, the Vivada Ratnakara and other works; this is plainly wrong so far as the Vivada Ratnakara is concerned, as will be seen presently. It is also significant that this Vivadarnavasetu uses *putradaranavayanam*, and not *putradaradyanvayanam*, in commenting on Katyayana, and like the Vivada Chintamani speaks of the existence, as distinguished from the consent or otherwise, of the *anvaya* alone, in connexion with the gift of the *sarvasva* in several places. Wrong manuscripts and unscholarly editions have frequently to be corrected according to grammar and sense, but it is a recognized principle that efforts ought to be made to interpret the texts as far as possible according to the readings actually found, and that caution should be exercised in correcting such readings. It is convenient, however, to deal first with the emendation adopted by the respondent's pandits. They would read the word as *putradaranvyanam;* and if that be the correct reading, it is beyond question that the sentence would mean that the son, wife and *sarvasva* are, even in a time of distress, not to be given away without the consent, respectively, of the son, the wife and the relations included in the term *anvaya*.

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It is true that whether or not we leave the word *adi* out of the compound *putradaradyanvayanam*, there would be nothing in the sentence directly to show that it is the consent or want of consent of the three entities—*putra* the son, *dara* the wife, and the *anvaya—respectively* that bears on the gift of the son, the wife and the *sarvasva*. But " it is a rule that things named in order should be referred respectively to the terms placed in similar order; as in the example, he cuts a *Dhava*, and a *C'hadira* tree, with a bill and an axe "—see Colebrooke's Digest, Book II, Chap. IV, Sec. II, verse 28, para. 14 of Jagannath's comment, at page 433, Volume 1 of Higginbotham's edition of 1874. This principle of interpretation is familiar to students of ordinary Sanskrit literature under the name of *yathasankhya* and is also found applied by Jaimini himself at least in one place—see his *sutra* IX.3.33 अपि वा द्विसमवायोऽर्थान्यत्वे यथा संख्यं प्रयोगः स्यात् *api va dvisamavayorthanyatve yathasankhyam prayogah syat;* and an exact parallel is furnished by the Arabic لف و نشر مرتب *laff o nashr murattab*. Vachaspati Misra in the section on *Deya* quotes Brihaspati, XV.6 (translated by Dr. Jolly at pages 342-3) which contains an example of the *respective* consent of *stri* (wife), *jnati* (kinsmen) and *svami* (supreme ruler) joined together in a *dvandva* compound, and which must plainly be understood on the *yatha-sankhya* principle. The importance of this principle is that it at once leads one to take the compound as a *dvandva*: *putrah* + *darah* + *anvayah* = *putradaranvayah*. Such a compound as a whole would be in the plural number, even though *anvaya*, the last member of it, be, as usual in literature, used in the singular number. Other reasons for adopting this reading would be that in his comment on Brihaspati's verse Vachaspati Misra refers to the *vimati* of the son and wife only in connection with their gift, so that the *anvaya* as such would have nothing to do with it, that in the comment after Katyayana's verses he refers to an

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opinion of others according to which *sarvasva* is not to be given even with the consent of the *anvaya*, so that except in so far as the son and the wife may be included in the term *anvaya*, their consent would appear to have no bearing on a gift of the *sarvasva*, and further that in dealing with the quotations from Vasistha he says that an only son may not be given even if *he* be agreed to the gift, which again suggests that what was thought essential to the gift of a son was *his* consent and not that of any others included in the expression *putradaranvayah* or even *putradaradyanvayah* as the Calcutta edition has it. The Vivada Ratnakara also (*see* pages 128-29 of the edition in the Bibliotheca Indica, 1887) makes the following comment on the two verses of Katyayana:

"Here as in the former text(1) as regards son and wife, gift and the like even in dire distress is prohibited, and as regards *sarvasva*, when there is *anvaya*, the same is prohibited even in dire distress, by the text 'in a time of distress (gift and the like), however, may certainly be made", gift and the like should be understood to be, in the case of the wife and son, with their consent, and in the case of *sarvasva*, with the consent(2) of the *anvaya;* there can be no gift and the like of unwilling wife and son, nor of the *sarvasva* without the consent of the *anvaya*(3)—thus there is no inconsistency". This also, as far as it goes, shows that it was the consent of the *anvaya* only that was considered essential to the gift of the *sarvasva*, and that to the gift of the son and wife their consent only was considered essential.

Much the same considerations would apply even if the correct reading of the compound be taken to be *putradaradyanvayanam*. According to the respondent's contentions, even on this reading the compound would be a *dvandva* and it would be the consent of the son that would be essential to the gift of the son, the

(1) This apparently refers to a quotation from Daksha, which however omits the son. Narada IV. 4 & 5 and Yajnavalkya II.175 are quoted before Daksha.

(2) Sammatimadaya. (3) Ananumatya.

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consent of *daradi* to the gift of the wife, and the consent of the *anvaya* to the gift of the *sarvasva*. This construction was resisted below on the ground that a *bahuvrihi* ending in *adi* is adjectival and cannot be compounded with nouns like *putra* and *anvaya* into a *dvandva*. No definite grammatical bar was, however, indicated, and Mr. Jha after being referred to about a dozen compounds, in which one of the members was a *bahuvrihi* ending in *adi* and used as a noun, which were found on a random inspection of about ten pages of the Viramitrodaya, (Sarkar's edition from page 55 onwards), gave up the contention that on account of the *adi* in the middle, *putradaradyanvayanam* could not be a *dvandva*, as suggested by the respondent, but must be a *karmadharaya*. It was after this that the respondent found an unquestionable *dvandva* of this character—*putrapatnyadisansrishtinam*—in the Mitakshara, II.10.1, which is thus rendered by Colebrooke: " of the son, the wife and other heirs, as well as the reunited parcener "; the son in this rendering is the *putra* of the original, " the widow and other heirs," the *patnyadi*, and the reunited parcener, the *sansrishti* (in the singular). The appellant also objected to the interpretation of the compound as a *dvandva* on the ground that the addition of *adi* to the *dara* made that term indefinite; but there is little substance in this because, in whatever way the compound may be dissolved—and apart from the context it could, as shown by Dr. Jha, be even dissolved as a *tatpurusha*, with the meaning ' of the *anvayas* of the son, wife and others'—the indefiniteness introduced by the word ' *adi* ' must remain, and all that would happen if the appellant's *karmadharaya* way of dissolving the compound were adopted would be that the observation of Vachaspati Misra would be indefinite not merely in connection with the gift of the wife but also in connection with the gift of the son and the *sarvasva*. The presence of the *adi* is therefore not a sufficient reason for taking the compound to be a *karmadharaya* rather than a *dvandva*;

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and there is authority for preferring a *dvandva* to a *karmdharaya* where possible—*see* for instance maxim no. 40 at page 365 of Sarkar's Mimansa Rules of Interpretation— घटपटन्याय—and the judgment of Nanabhai Haridas, J. at pages 465-466 in *Moro Vishvanath* v. *Ganesh Vithal*(1). It was faintly suggested for the appellant that with the *adi* the *yathasankhya* rule would be difficult to apply. But the difficulty suggested only was that the *dvandva* way of dissolving the compound involved a tautology on the ground that a son must in any view of the matter be included in the *anvaya*. There is, however, no substance in this; if the consent of three bodies of persons be required to the gift of three things respectively, it is by no means necessary in logic that the three bodies should be mutually exclusive. As has been already observed in dealing with the reading that the respondent's pandits would prefer, there are other passages in Vachaspati Misra's comments, both before and after the disputed expression *putradaradyanvayanam*, which suggest that the consent of the three—the *putra*, an individual, and *daradi* (if that be the correct reading) and *anvaya*, two bodies of persons—to be taken distributively in regard to the gift or sale of the son, the wife and the *sarvasva*.

The appellant's reason for pressing the view that the disputed compound is a *karmadharaya* and not a *dvandva* is the difficulty of otherwise establishing the inclusion of the wife in the *anvaya*. Neither of the appellant's pandits was able to cite one instance either from classical Sanskrit literature or from Smriti literature where the word *anvaya* has been so used as clearly to include the wife. The word is derived, according to the evidence, from the prefix *anu* and the root " *i* " or " *ay* " meaning " to go ". The prefix is usually taken to mean " after ", but as pointed out by Professor Sharma, it also means " on ", " along with " etc. The word thus means, succession; association, connection; race, lineage, descendants. We

(1) (1873) 10 Bom. H. C. R. 444.

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have been referred to V. S. Apte's Sanskrit-English dictionary, which is so useful for its citations, to the Dictionaries of MacDonell and Monier Williams, and also to the monumental Sanskrit-Worterbuch of Bohtlingk and Roth (St Petersberg, 1855). There is really nothing in them to show that the word अन्वय *anvaya* is ever used in a sense which would include the wife. It is true that they mention ' family ' as one of the equivalents, but this is only in association with such words as race, lineage and geschlecht, and the only dictionary sense applicable in the present context is clearly descendants, progeny, nachkommenschft all used collectively. We also observe that according to the Dictionaries the word is not used to denote an individual relative; as will be seen later, the plural form of the compound is hardly explicable on the *karmadharaya* basis if the word *anvaya* in the singular signifies descendants or issue collectively, and not an individual relative. In the अमरकोश Amarakosa, a lexicon of recognised standing in connection with the current senses of Sanskrit words, the word *anvaya* is mentioned, along with *santati*, *gotra*, *kula*, *vansa*, *santana* etc. in the sense of वंश *vansa* meaning " race, family, dynasty, lineage ". It should not really be necessary to observe that the Amarakosa does not mean that the word *anvaya* in all its senses is equal to the word *vansa* in all its senses—it cannot for instance mean a bamboo which is one of the meanings of *vansa*; but much stress has been laid on behalf of the appellant on *gotra* as a synonym of *anvaya* according to the Amarakosa, the argument being that as the wife is born on marriage into the husband's *gotra* she is therefore part of his *anvaya*, if not an *anvaya* herself. This, however, overlooks such facts as that according to a passage from Medhatithi's commentary on Manu VIII. 46 (Gharpura's number is 47) which was put to Dr. Jha by one of appellant's advocates below, *kula* which is given in the Amarakosa as a synonym along with *gotra* of *vansa* and *anvaya* means a part of the *gotra*, that there is a controversy regarding the fictional *gotra* of the wife

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after her death—*see* the Mitakshara on Yajnavalkya I.254,—and that the fictional birth of the wife into her husband's *gotra* does not seem to have taken by any *vyavahara* authority to place her on the same footing as her husband's *santati*, another synonym for *vansa*. In his commentary on Kalidasa's Raghuvansa I.4 Mallinatha defines *vansa* as जन्मनेऽलक्षणः संतानो वंशः i.e. a line of descendants—संतान *santana*—marked by unity on account of birth; and Stenzler in his Latin translation of that classical work of Kalidasa (published by John Murray, London, 1832) renders the word vansa by stirps. This may be compared with the *Sabdakalpadruma*, a well-known Sanskrit lexicon prepared at the instance of Raja Radha Kant Deb of Calcutta towards the end of the last century, in which the word *anvaya* is said to mean वंशजाता पुत्रपौत्रादयः the son, the grandson and others born in the *vansa*. In Raghu I. 9 the poet speaks of the *anvaya* of the Raghus, and the word *anvaya* is translated as stirps by Stenzler, being rendered in the same way on Raghuvansa III.27. In Raghu. I.12 the poet speaks of Dilipa being born in the *anvaya* of Manu, and Stenzler renders this by saying "*in ejus*..... *progenie natus est*.....*Dilipa*"; the same expression in Raghu VI. 41 is rendered "*in ejus prosapia natus*.....". In Raghu XII. 33 Surpanakha is said to have mentioned her *anvaya* to Sita, and Stenzler renders this by "originem suum..... narrans". This gives an idea of the meaning of the word *anvaya* as equivalent to *vansa*. When the word occurs in a compound indicating an individual, the compound is usually dissolved in such a way as to bring out the fact that it means his descent, pedigree or stock. Thus in Raghu VI. 46 Kalidas speaks of a certain king as *Nipanvaya*, and Mallinatha interprets it as नीपानामन्वयोऽस्येति नीपान्वयो नीपवंशजः 'born in the *vansa* of the Nipas', the compound a *bahuvrihi* meaning that he was 'of the *anavaya* of the Nipas'; Stenzler renders it by the expression "a Nipa descendit". In Raghu IX. 3 we have similarly *Manudandadharanvayam*,

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" a Manue regè oriundun "; according to Stenzler, and " he whose *anvaya* or root (कूटस्थ *Kutastha*) was the king known as Manu " again a *bahuvrihi*, according to Mallinatha. Mr. Jha has, however, after a protracted search, brought to our notice two places where the word *anvaya* has been used in a different manner. On Sisupulavadham III. 26 the word—*Somanvaya* is interpreted by Mallinatha as ' Soma's *anvaya*, that is santana ', clearly meaning an individual desendant. In Sriharsha's Naishadhiyacharitam (yet another of the five classical Mahakavyas). XII. 13, the poet calls Rituparna Manu's *anvaya*, and the commentator Narayana accordingly interprets the word to mean " born in the *vansa* of Manu ". In this last context, however, metrical exigencies may possibly account for the use of the word *anvaya* to denote not the *vansa* but an individual born in it, such use being permitted by the doctrine of *upalakshana* referred to by one of the witnesses and briefly explained (for law purposes) in paragraphs 380—382 of Ganapathi Iyer's Hindu Law, 1915, and relied on by Mr. L. N. Singh for the respondent; this will be again referred to later on. In the last two examples, a given descendant has been called an *anvaya*, but this will not make the word *anvaya* before us quite intelligible if it is to consist of or denote the son, the wife and others of a like character. Even with her change of *gotra*, the wife is not placed on the same footing as a son; it would be absurd to regard her as a descendant of the husband. In Kalidasu's Sakuntala, Dushyanta, a descendant of Puru, refers to a child as belonging to the same *anvaya* as himself on hearing that the boy was a descendant of Puru. Without elaborating the point any further, it seems safe on these references including the dictionaries, to say that the word *anvaya* is not usually employed to denote an individual and that its ordinary meaning is race or lineage, or also as subsequent quotations will show, the body of relatives called descendants, issue, progeny. In the

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context before us, the word is plainly used not in the abstract sense of *vansa*, but in the sense of descendants which is derived from it by a natural transition and is found in the dictionaries as a matter of actual usage. The question then is whether in the sentence about the *adeya* character of the *sarvasva* the word *anvaya* was taken by Vachaspati Misra to include the wife, even if it cannot be shown that it is ordinarily so used. The wife's natural descent is of course different from that of her husband and cannot be altogether obliterated—*see* for example Yajnavalkya I.53 and 254—but does her connection by marriage bring her within the denotation of her husband's *anvaya*. The only Smriti quoted by Yachaspati Misra in this connection which mentions the *anvaya* with the *sarvasva* is Narada, and Dr. Jolly has translated *sarvasvam chanvaye sati* in the verse as " the whole property of one who has offspring "; this translation of course excludes the wife. The Smriti-Chandrika, which is an exhibit in the case, plainly takes the word in this very context to mean सन्तान *santana* which clearly excludes the wife (see the last line on page 442, and Raghu I.24 where Stenzler renders सन्तानार्थाय by ' prolis caussa '), though we are not dealing with a woman's *anvaya*. Yajnavalkya in II.175 says *Nanvaye sati sarvasvam* which Gharpure translates " Nor, when there is progeny, his entire property "; Vijnanesvara's comment on the word *anvaya* is *putra-pautradih* which, being a *bahuvrihi*, means " headed by the son and the grandson " or as usually rendered " the son, the grandson, and the like, or so on ". The word *adi* is used on the ejusdem generis principle, and we are not impressed by, nor can we give effect to, Professor Sharma's suggestion that the *anvaya* in Yajnavalkya II.175 *ought to* include the wife; Hemadri also in the Chaturvarya—Chintamani renders the word *anvaya* in this verse by सन्ताने *santane*, which would clearly exclude the wife. Vijnanesvara's interpretation is distinctly against Professor Sharma's suggestion, for he explains the condition अन्वयेसति *anvaye sati* by referring

to the text " having begotten sons, he should duly initiate them and provide for the maintenance of those ". The Mitakshara which does not seem to have impressed the Professor's philological sense (see page 423 of his evidence) is after all not without authority even in Mithila; and it is not open to the Courts by a novel interpretation of the not uncommon word *anvaya* to include the wife in its denotation on little more than philological and etymological grounds. The word *anvaya* is also found in Yajnavalkya II.117 ताभ्य ऋतेऽन्वय: *tabhya ritenvayah*, which Colebrooke has rendered by " and the issue succeeds in their default "—*see* Colebrooke's Mitakshara. I.3.12. This was in answer to the question " who takes the residue of the mother's goods if there be no daughter". The Mitakshara here explains *anvaya* by *putradih* which Colebrooke takes to mean " the son or other male offspring ". Visvarupa makes it sons only (see Ghose, Vol. II. page 21). The context of course excludes the possibility of the word *anvaya* including the wife, but such interpretation are in accordance with Amarasinha's synonym सन्तति *santati*, or संतान *santana*. This verse is also quoted by Vachaspati Misra in his Section on Succession to a woman's Separate Property, and his comment on the word *anvaya*, which comment is ignored by Tagore altogether, though he translates the word by " issue " (see page 268), is that it means the grand-daughter and the grandsons, according to the text of Manu (see Setlur, page 258). The word *anvaya* is also found in another verse, Narada, XIII.2, quoted by Vachaspati Misra in the first section in the Chapter on Partition. The Calcutta edition contains one obvious misprint in this verse—the long *u* of the second word being printed as short. It also prints the concluding word of the verse as *tadanvayah*, but this seems to be a misprint for *tadanvayah*, for the context does not require the plural, *anvaya* being a collective noun in ordinary use. The parallel verse from Yajnavalkya, II.117 uses the singular; the Bombay edition, Dr. Jolly and the Vivada Ratnakara (page 456), and also the

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Mitakshara which quotes the verse at II.11.18, all have the singular; and we have not been referred to any work which in such a context uses the plural. Vachaspati Misra in his comment on the verse seems to agree that the word means the sons of the daughters in whose default they are to take the property. Here again the context makes it impossible for the word *anvaya* to include the wife, but it is noteworthy that Vachaspati Misra does not suggest for the word a wider interpretation than that of Vijnanesvara on Yajnavalkya, II.117. Dr. Jolly's footnote on this verse at page 189 of the Sacred Books of the East, Vol. XXXIII, is that according to the usual explanations the male issue of the daughters is meant, though there is nothing in the text to warrant an exclusion of the female issue of daughters. Here again the accepted interpretation of the word does not extend beyond the issue. The Smriti Chandrika, Exhibit 10 (Mysore edition, page 663), noticing Yajnavalkya, II.117 and Narada XIII.2, refers to the impossibility of unmarried daughters having *anvaya*, and thus clearly uses the word in the sense of issue. In his Chapter on Non-payment of wages or hire Vachaspati Misra quotes a verse of Katyayana laying down that a female slave who bears her master a son must, " in consideration of her progeny (*bija*, a word which will have to be referred to again) be enfranchised with her child " (Tagore, page 91). The original of the expression " with her child " is " *sanvaya* ", and Vachaspati Misra in adopting the comment of the Prakasa, the Ratnakara, and the Parijata on the verse accepts the paraphrase of the word, if indeed he does not make it himself, by *svajanitaputrasahita*, ' with the son borne by herself '. As in this context it was a woman's *anvaya* that was being spoken of, the word could not of course include the wife, but it is important to note that other relatives of the woman are also all necessarily excluded. Near the end of the section on Partition during the lifetime of the father two verses are quoted under Tagore's heading " of a co-heir " in which the expression तद्वंशस्य *tadvansasya* and

तदन्वयस्य *tadanvayasya* occur; these are rendered by Tagore (page 241) as " (of) his male descendants " and " (of) his lineal descendants ", Setlur rendering both *vansa* and *anvaya* by progeny. Much reliance has been placed by Mr. Jha on Vachaspati Misra's comment (along with its sequel) on a verse of Katyayana's in the Section on " Succession to property of re-united parceners "—(Tagore, page 307, and Setlur, page 273). The verse is thus translated by Colebrooke in his Digest Book V, Chapter VIII, Section I, verse 427 " On failure of nearer claimants, re-united brothers must be considered as heirs of those who are re-united and disunited brothers of those who are disunited; (for) they reciprocally share (the estates) if they have no progeny ". Neither Tagore nor Setlur has rendered Vachaspati Misra's comment on the verse at all closely, and the attempt of the appellant to get a translation of it from Dr. Jha in his cross-examination was not very successful. That comment seems to be as follows :

" He (Katyayana) qualifies by ' nirbija, etc.', the statement already made that in default of one, another is to take the property. The meaning is that being without issue (*anvaya*), they inter se take each other's property." This will become clearer if it is observed that the second half of the verse speaks of *abhave*, ' in default ', and of *nirbija nyoyabhaginah*, ' without issue, taking one another's shares '. Vachaspati Misra in the first sentence takes the *abhave* to mean not the default of nearer heirs (as Colebrooke apparently did) but the death of one of the persons spoken of, re-united or otherwise; according to the Ratnakara, however, the word means *bharyadyabhave*, ' in default of the wife and the like ', but it has not even been argued that this makes any difference to the point that the appellant has endeavoured to make. The contention is that as Vachaspati Misra has paraphrased the term निर्बीजाः *nirbijah* by निरन्वयाः *niranvayah*, and has said that persons who are *niranvaya* take the shares of one

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another, and as, further, in the summary of the chapter that follows immediately after, the wife is placed among the heirs of a re-united parcener between his son, grandson or great grandson and his re-united parceners, he must be taken to have included the wife in the *anvaya* of the deceased. The summary, however, which is rendered by Dr. Ganganath Jha at page 138 of the evidence, makes inheritance by the wife conditional on her being fully endowed with several qualifications and turning her back upon the eight forms of sexual intercourse; and in any case Vachaspati Misra's paraphrase by *niranvayah*, ' without *anvaya* ', of the plain word *nirbijah*, ' without issue ', occurring in Katyayana's verse cannot be read with his summary of the whole Section in order to determine what meaning he attached to the word *anvaya* in Narada's quarter-verse *sarvasvam chanvaye sati*. Katyayana's word nirbija can only mean ' without issue ' and was in fact so interpreted by Vachaspati Misra himself when, dealing with Narada's verse a little earlier (*see* Tagore, page 306), he paraphrased it by *nirapatya*, a word which clearly means without issue. The Ratnakara (page 602) paraphrases it similarly by *santana-rahita*, again clearly " Without issue ". *Bija* cannot mean the wife, and can only mean the issue or offspring; *see* for example Colebrooke's Mitakshara II.1.18 where Gautama's text स्त्री वा सा स्त्री बीजं वा लिप्सेत संयता वा भवेत् is thus rendered by Colebrooke " or the widow of a childless man: and she may either remain chaste, or may seek *offspring* ", the last word ' offspring ' being the rendering of *bija* in the original.

Several other passages have been referred to on behalf of the appellant in order to make out a case for the inclusion of the wife in the term *anvaya*. It does not, however, appear that they really go far towards establishing the contention. There is, for instance, a verse from Manu VIII.198 which Vachaspati Misra has quoted both in the Chapter on

Sale without Ownership and in the Chapter on Women and Other Matters, where Tagore has put in a heading " Gift or Sale without Ownership " which does not occur either in the Calcutta or in the Bombay edition, (Tagore, pages 56 and 222). In the later chapter the Calcutta edition prints the word on which reliance is placed by the appellant as *svanvaya*, but in the chapter on Sale without Ownership both the Calcutta and the Bombay editions print the word as *sanvaya*. The Ratnakara (page 103) reads *svanvaya*. In Manu the word appears as *sanvaya*, and Dr. Buhler translates it as " A kinsman (of the owner)—Sacred Books of the East, VII. XXV, page 289. As the verse prescribes different penalties for offenders according as they are or are not kinsmen of the owner and as the latter are indicated by the term *niranvaya*, the contrasting term for the former would appear to be *sanvaya* and not *svanvaya*. Whichever reading is taken as the correct one, it does not appear that we have here anything very substantial affecting the question in issue. Sanskrit grammar is too flexible to restrict us to one way of dissolving the compound *svanvaya*, or the compound *patyanvaya* which has also been referred to from Medhatithi's paraphrase of the word *sapinda* in Manu IX.59, so as to compel the interpretation of *anvaya* by itself as a relative: we may for instance compare the ways in which the compound *sanvaya* is dissolved and interpreted in this verse and in Manu II.168 which will be presently referred to. Stress was laid on the following translation by Dr. Jha of Medhatithi on this verse, Manu VIII.198, at page 246 of Part I of Vol. I of his Manusmriti—" If a relative ", ' sanvaya '; " anvaya " means *relation*; he who has some *relationship* is a " relative "—such as the son, the wife, the brother and so forth ". Dr. Jha says in his evidence that the inclusion of the wife in this translation was an accidental mistake. The two published editions of Medhatithi that have been referred to at the Bar—Mandlik's and Gharpure's—do not contain the word ' wife ', and Dr. Jha swears that he did not come

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across that word in any of the manuscripts consulted by him. Manu similarly prescribes penalties for *niranvaya* and *sanvaya* offenders in VIII.331, and the commentators again take the word *anvaya* to mean *sambandha*, relation or connection with the owner but this does not seem to have any bearing on whether the wife is included in the *anvaya* of the husband. It must be remembered that in the disputed expression *putradaradyanvyanam*, the word *anvaya* cannot possibly be taken in the sense of mere connection, relation or association, or even of *vansa*, race or lineage, and that idiom and the context alone must be decisive, rather than such considerations as whether the wife has such a relation to the husband as to make her *sanvaya* in reference to him in other contexts. In Manu II.168 it is laid down that a twice-born man who does not study the Vedas but applies himself to other (and wordly) studies soon falls to the condition of a *sudra* with his *anvaya*. Dr. Buhler at page 61 translates the word *anvaya* by " descendants "; Kulluka renders *sanvayah* by *putra-pautradisahitah*, ' with his son, grandson and the like ', and if this be somewhat vague, Medhatithi renders it by the expression *putrapautradisantatya saha*, ' with his progeny (*santati*) headed by the son and the grandson '. The explanation given by these commentators in this context seems to exclude the wife from the denotation of the term *anvaya* used as a collective noun, the use with which we are concerned. We have not been referred to any context with the word *anvaya* in it which is more helpful in interpreting the same word in *Sarvasvam chanvaye sati*. Reference was also made to the interpretation by the commentators Medhatithi and Kulluka of the word *kula* in such verse of Manu as II.184, VII.9, VIII.46 and IX.7. The last two, however, are plainly against the appellant—the first makes *kula* a part of the *gotra*, and the second by the context excludes the wife and also the issue from the *kula*. In the first two the word is used in an extensive sense, and on Manu VII.9

Kulluka specifically includes the wife in the *kula*. But the word is not only capable, as already shown, of meaning part of the gotra, but is used in Raghu III. 1 with the word *santati*, an Amarakosha synonym of *vansa* but here used in the sense of continuance or perpetuation. This shows clearly that the synonyms given in the Amarakosha are not always interchangeable—a proposition which should have been obvious but was ignored in the reasoning followed by Professor Sharma. In our opinion the word *anvaya* in Narada's verse is not shown to have been taken by Vachaspati Misra to include the wife as belonging to the *gotra*.

The position thus is that according to overwhelming usage the word *anvaya* denotes the lineage or the descendants or posterity, that it is a collective noun, when referring to individuals, and that it is hardly ever used in the sense of a relative but generally indicates a body of relatives,—issue, offspring, progeny, descendants, posterity etc., being the equivalents commonly used by lexicographers and translators of standing—though occasionally on account of metrical exigencies and the like the word may be taken by *upalakshana* to denote an individual relative. *Upalakshana*, is however not to be resorted to unnecessarily,—and in the context *putradaradyanvayanam*, not only is there no particular reason for the application of it, but texts such as those of Narada XIII.2, and Yajnavalka II.175, are sufficient to show that the word *anvaya* has been used in the sense of a body of relatives which the dictionaries identify with descendants or posterity and translators of standing take to be the issue or offspring or progeny. If the word *anvaya* be used in this collective sense, the plural number of the compound suggests that we are dealing here not with a *karmadharaya* but with a *dvandva*. One of the appellant's translators has said that there is no harm in the plural even if the compound be taken to be a *karmadharaya* and the word *anvaya* taken in the sense of a body of relations. The compound is,

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however, not from a Smriti but from Vachaspati Misra's own comment. In interpreting the Smritis commentators often say that a singular or a plural number was not intended, but that the singular includes the plural and vice-versa: Apararka, e.g. at page 730 of the edition already referred to, says that the plural विभजताम् *vibhajatam* in Yajnavalkya II.123 was अविवक्षित *avivakshita*. The reason is that the Smritis must be taken as they are, while the commentators have to make the texts applicable to all manner of changed conditions. That principle, however, cannot apply to the comments of the author of the Vivada Chintamani, who cannot be lightly assumed to have used a plural where a singular would have been quite sufficient. Other reasons for regarding the compound as a *dvandva* instead of a *karmadharaya* have already been given, and no reason has been shown to us why the *yathasankhya* principle of interpretation should not apply in the context. The plural ending of the compound is, thus, another reason for holding that the compound is a *dvandva*, and not a *karmadharaya*, and that the comment means that what is necessary to the gift of a son, a wife and the *sarvasva* is the consent, *respectively*, of the son, the wife and the like, and the *anvaya*. If the *adi* after the *dara* be really a misprint or an inaccuracy in the manuscript, the vagueness introduced by that word in connection with the consent necessary to the gift of the wife will disappear; but the term *anvaya* is itself vague in contexts where degrees of descent are material, and its precise denotation will have to be gathered as best may. The gloss दायोऽन्वयागतम् *dayo'nvaya-gatam*, which occurs in the Section on Deya and will be dealt with later, and Vachaspati Misra's later remarks about the necessity of consent, would seem to suggest that *anvaya* is restricted to heritable issue: Mr. Jha himself would confine it to heirs but not to issue or descendants. The word is also used in literature to mean retinue or attendants, but even the

appellant does not contend that that sense is applicable here. There is nothing in the present context to show that the wife is one of the persons included in that body of relations which is denoted by the word *anvaya*. In putting his own gloss upon the texts Vachaspati Misra, like other commentators, may have been giving expression to peculiar customs already in force in Mithila or he may, occasionally, at any rate, have been anticipating Mithila customs. In either case he could hardly have left undefined the perhaps vague term *anvaya* with its usual sense of descendants or issue, if it was his intention to include the wife in the denotation of that word. The appellant has thus failed satisfactorily to make out her contention that Vachaspati Misra makes the consent of the wife essential to the husband's gift of his entire estate (*sarvasva*). The question whether such a gift can be avoided because it was made without the consent of the *anvaya* is not discussed in this Section, and must be dealt with later.

After the eight-fold *adeya* Vachaspati Misra turns to the *deya*, 'what may be given', which, according to the verses of Narada at the opening of the chapter, is of one kind only. He begins with a verse of Brihaspati, XV. 3, which has been thus rendered by Dr. Jolly at page 342 of the Sacred Books of the East, Vol. XXXIII:—

"What remains after defraying (the necessary expenses for) the food and clothing of his family may be given by a man; otherwise (by giving more than that), the religious merit (supposed to be acquired by the giver) though tasting like honey at first will change into poison in the end."

After this quotation the Bombay edition gives Yajnavalkya II.175—(Gharpure, pages 311 to 313), but this verse is not given in the Calcutta edition. We next have a verse of Katyayana the correct

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reading of which is in dispute. The reading in the Calcutta edition may be closely rendered as follows :—

" Except, however,(1) the whole estate and the dwelling house,—what remains after the maintenance of the family—the wealth which is $\frac{\text{self-acquired}}{\text{one's own}}$ may be given; that may not be given which is other than this."

Then comes the comment :—

" Even (out of) what is one's own, that which is in excess (i.e. of the maintenance of the family) may be given. In giving what is not in excess, (one incurs) sin; but as regards that which is in excess, (one obtains) merit.

" Here, as (the text is) that ' the donor's religious merit will otherwise be.....(2) (scil. when that is given away which is not in excess of the maintenance of the family), it is not only that there is no acquisition of merit on the ground that that is not done which is ordained, but sin (is) also (incurred) for doing that which is forbidden. Nevertheless the gift does take effect, as there is sufficient reason seen (for it, viz. in the title of the donor)."

All this comment is found in what appear from the Calcutta edition to be two sentences, the first ending with the first sentence in the above rendering. Having regard to the contents of the various sentences in the original, the punctuation appears to be defective. Vachaspati Misra continues—

" Consequently it cannot be resumed; thus a gift of what is not one's own cannot be effected, similarly in the case of immoveable property also :—so (says) the Smritisara. As to(1) consent, that is necessary only in the case of what is joint(3) and not what is not joint ".

(1) ' *tu* ' in the original.
(2) Last quarter of Brihaspati's verse quoted above.
(3) ' *madhyaga* ' in the original.

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He next quotes two verses of Brihaspati, XV. 4 and 5, which have been thus rendered by Dr. Jolly (Loc. cit. page 342) :—

" When any field (or house) is given away, belonging to a number of houses or fields acquired in one of the seven modes of (lawful) acquisition, it is ordained to be viewed as a valid gift, whether it has been inherited from the father or acquired by the donor himself.

" Self-acquired property may be given away at pleasure (by its owner); a pledge may be disposed of according to the rules of mortgage; in the case of property received as a marriage portion, or inherited from an ancestor, the bestowal of the whole is not admitted."

The comment on this is a quotation from Manu, X. 115, preceded by " *Saptagamah* (means) seven-fold acquisition ". This is plainly not quite to the point, as the word *saptagama* in Brihaspati's first verse is used as an adjective and the compound ought therefore to have been expounded as a *bahuvrihi*. That, however, is a small matter, and the word leads to the quotation from Manu which is thus rendered by Dr. Buhler (Sacred Books of the East, Vol. XXV, page 426) :—

" There are seven lawful modes of acquiring property, viz. inheritance, finding or friendly donation, purchase, conquest, lending at interest, the performance of work and the acceptance of gifts from virtuous men."

Vachaspati Misra's comment on this verse is—

"Here *daya* ('inheritance') (means) what has come from an / by reason of *anvaya*; *labha*(1) (means) finding of treasure and the like; purchase is well-known; conquest (is) in battle; *prayoga*,(1) interest; performance of work, agriculture, trade and the like ".

(1) Rendered by Dr. Buhler, as ' finding ' or ' friendly donation ' and ' lending at interest ', respectively.

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The important point in this comment is *Dayo'n-vayagatam*, regarding the interpretation of which the parties are not agreed as shown by the alternative renderings given above according to the appellant and the respondent respectively. Vachaspati Misra's next sentence in the Calcutta edition is—

"(All) this (is) by way of illustration. (The gist is) that whatever becomes one's own in any manner whatsoever, (if) not owned in common with others, (may be given) simply at one's own pleasure, but (if) owned in common with others, may be given when consented to by them. Property inherited from an ancestor,(1) though immoveable, (must in the above reference be) undivided".

The comment continues—

" For it is said :

"When, however, a marriage gift, or inherited property(2), or what has been obtained by valour, is given with the assent of the wife, kinsmen, or supreme ruler, the gift acquires validity "—(Dr. Jolly's translation of Brihaspati XV.6 at pages 342-43 loc. cit.)

Vachaspati Misra then begins his comment on this verse of Brihaspati as follows :—

" Marriage gift(3)" (means that) which is received at (the time of) marriage for use by the bride; it is only when such property is being given away by the husband that the consent of the wife is necessary, for this is consistent with reason, but not clothes, etc. which are received by the husband even for his own use, because that would involve extending the Smriti to unintended (lit unseen) objects. Even in respect of inherited property(2), (which is) undivided,

(1) Dr. Jolly's translation above, of *kramayatam* in Brihaspati's last line.

(2) *Kramayatam.*

(3) *Saudayikam.*

(whether) immoveable or moveable, the consent of other sharers is necessary (for a gift to others)....."

The first point in dispute between the parties on this treatment of *deya* by Vachaspati Misra is what it is that according to him may be given. According to the opening verse of Brihaspati, a man may give that which remains after defraying the expenses of the food and clothing of his family; the *deya* would thus appear to be all that belongs to a man, his *sarvasva*, minus what is required for the maintenance of the family. Katyayana's verse as given in the Calcutta edition puts this somewhat differently; not only does it except the maintenance of the family and, further, the dwelling house, from the *deya*, but it also classes the entire estate as an exception along with the dwelling house; and it says that *dravya*, wealth, which is *svaka*, may be given. It has been urged on behalf of the appellant that *dravya* here means moveable property only. This contention is plainly wrong. If that was the sense in which the word was used by Katyayana, the house could not have been made an exception. It is true that the word *dravya* is sometimes used in the sense of moveable property or chattels, as for example in Yajnavalkya II. 121 (Colebrooke I.5.3). But the word is commonly used in the sense of property in general. Vijnanesvara's well-known definition of *vibhaga*, partition, or distribution, in the Mitakshara I—1.4 employs the word *dravya*, though Colebrooke's rendering does not bring it out; Setlur's rendering is "partition (vibhaga) is the adjustment of the ownership of many persons in the aggregate *wealth* by assigning particular portions of the aggregate to several ownership". In I. 2. 6 Vijnanesvara, in referring to the unequal distribution authorised by Yajnavalkya II. 114, uses the word *dravya* for the term 'property' in Colebrooke's rendering "this unequal distribution supposes property by himself acquired". In Yajnavalkya II. 118 the word *dravya* is used for the word 'estate' in Colebrook's rendering (I. 4.1) " whatever else is required

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by a co-parcener himself without detriment to the father's estate..... ... ..."; and in the next verse the "hereditary property" of the translation is *kramadabhyagatam dravyam*. The Mitakshara comment on Yajnavalkya's suretyship verse, which has been quoted already, speaks of *dravya-vibhaga* irrespective of whether the property is moveable or otherwise. The word is similarly used in the opening verse in the present chapter on gifts It is not necessary to labour the point any further; to restrict the word to moveable property is to disregard well-known passages from the Mitakshara and treat with indifference the logic of the verse. It is also impossible for similar reasons to attach much importance to the appellant's contention that *svaka* in the verse means not merely " one's own ", which would be expressed by *sva* without the addition of *ka*, but " acquired by oneself ". Pandit Ishwari Dutt went the length of suggesting that metrical exigencies might have led Katyayana to use *svaka* instead of *svoparjita*, a word which would unmistakably mean " self-acquired ". It will, however, not be difficult even for a school-boy to replace the *svaka* of the verse by *svoparjita* and read that quarter of the verse as द्रव्य स्वोपार्जितं देयम् *dravyam svoparjitam deyam*. The affix *ka* more often than not makes little or no difference in the meaning. In the section on Persons excluded from inheritance, for instance, Vachaspati Misra quotes Yajnavalkya II. 140 after quoting Manu IX. 201—203, and the *unmatta* and अनंश *anansa* of Manu become *unmattaka* and निरंशक *niransaka* in Yajnavalkya without any difference whatsoever in the sense. In the section on the Sons the *datta* and the *kritaka* of Yama appear as *dattaka* and *krita* in Yajnavalkya II. 130-31 quoted by Vachaspati Misra after *datta* and *krita* in Narada, Manu Baudhayana, and Vishnu. As regards the word *svaka* itself, we have Manu IX. 207 quoted by Vachaspati Misra in the section on *Jivat-pitrika-vibhaga* using the words स्वकादंशात् *svakadansat* which Kulluka takes to

mean the same thing as the स्वात्स्वादंशात् *svat svadansat* of Manu IX.118, quoted by Vachaspati Misra in the next section but one. The word *svaka* is used by Manu of a father, eyes, seat and body in III. 220, and IV. 44, 154 and 184, and according to Pandit Ishwari Dutt means no more than ' one's own ' emphatically. In Manu IX.199 is laid down that women shall not make abstraction even from the husbands' स्वकांवित्त *svaka vitta* without permission. The expression is translated by Dr. Buhler (page 372) as their husbands' *particular* property. The verse is quoted in the Vivada Ratnakara in the Chapter on Duties in respect of stridhan; and Chandeswar Misra's comment on the adjective *svaka* is that it refers to " husband's property held not in common with other members of the family "—(*see* Sarkar, page 33)—which is by no means the same thing as 'self-acquired'. In the Smriti Chandrika the word *svakam* occurring in this verse of Katyayana is paraphrased *yatheshta-viniyogarham,* which means capable of being disposed of at one's discretion. There is nothing in the context of the Chintamani to indicate that the word *svaka* in Katyayana's verse was taken by Vachaspati Misra to mean self-acquired, and there is therefore no reason why the third quarter of the verse should not be rendered in the way contended for by the respondent—" the wealth which is one's own ".

Another point that has been disputed in connection with this verse is whether it is correctly read with *sarvasva* as a member of a compound ending with *varjam* or *varjjam,* (meaning, *except*), or as a noun in the nominative case, in the form *sarvasvam,* so as to be the subject of the sentence. The Calcutta edition gives the former reading, and this is also found in the Smriti Chandrika. The Bombay edition and the Vivada Ratnakara give the other reading, which is also found at page 149 of the Vivadarnavasetu, page 144 of Hemadiri's Chaturvarga

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Chintamani and page 255 of the Parasaramadhava in the Bibliotheca Indica Series. If we take the reading of the Calcutta edition of the Vivada Chintamani, a man may give away whatever is his own with three exceptions (*1*) the entire property, (*2*) the house and (*3*) whatever is necessary for the maintenance of the family, though the last item is not *expressed* in the form of an exception like the other two which are governed by the ending *varjjam*. The difficulty that arises on this reading is that if the house is not to be given away, and if further a man must not part with whatever may be necessary for the maintenance of the family, there seems little point in providing that he may not give away his whole property; the exception of the *sarvasva* will only operate in the very rare, if not practically impossible, case of a man who has no house and who requires nothing for the maintenance of the family. The other reading is stoutly resisted by the appellant because it would make the *sarvasva* alienable, and it is pointed out that if the word be read in the nominative case, the grammatical construction of the sentence becomes a little awkward in that there would be an extra nominative with which the other nominative *dravyam* will have to be taken to be in apposition. It seems to us that the appellant's translators have made far too much of this slight grammatical difficulty and far too little of the logical difficulty involved in making an exception of the *sarvasva* when the house and the maintenance of the family must in any case be saved, and the maintenance of the family is, moreover, excepted in a form independent of the *sarvasva* and mentioned after it. It appears from pages 423-424 of the first volume of Colebrooke's Digest (Higginbotham, 1874), Book II, Chapter IV, Section II, verse 10, that Jagannath took the same reading as the Calcutta edition of the Vivada Chintamani, but in his comment noticed the other reading with the word *sarvasva* in the nominative case. For practical purposes it does not seem to be very material which reading is taken, for even on

the Bombay reading the *sarvasva* does not, on this verse alone, really become alienable because it is subject to the two exceptions of the house and the maintenance of the family. It is true that the verses quoted from Katyayana himself in the Section on *Adeya* make *sarvasva* inalienable except in a time of distress, but there is really no contradiction between that provision and the present formula with its exceptions, the earlier verses dealing in substance with the occasion of the gift—to which Vachaspati Misra attaches the consent of the *anvaya* as a condition—and the later with the extent of that which may be given.

Vachaspati Misra, in his comment on Katyayana's verse as given in the Calcutta edition, does not expressly say that he agrees in the Smritisara view referred to. The Smritisara has not been produced by either party, and it is not easy even to say with any degree of certainty how much of the comment is intended to give the Smritisara view and how much the view of Vachaspati Misra himself. At the same time, there is nothing in the passage as printed in the Calcutta edition (or in the Bombay edition either) to indicate that Vachaspati Misra was here giving expression to a view in which he did not himself concur. It will be seen later, when we come to Brihaspati, XV.7 or XXV.93, that he apparently adopted the factum valet view in the present comment for himself: the gift does take effect दानसिद्धिस्तु भवत्येव and cannot be resumed, नच्छेत्तुं शक्येत. The words, moreover, that intervene between the mention of the Smritisara and that of Brihaspati can only be taken as Vachaspati Misra's own comment: "As to consent, that is necessary only in the case of what is joint and not what is not joint". This passage will have to be referred to again when we deal with the quotation *dampatyor madhyagam dhanam* from the Sraddha-Viveka, because here too we have the word *madhyaga* which has been translated as "joint".

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Much stress was laid on behalf of the appellant on Vachaspati Misra's comment on the verse from Manu, दायोऽन्वयागतम् *dayo' nvayagatam*. The appellant would translate this by "Daya (means) what has come from an *anvaya*", the object being to establish that the wife is an *anvaya* of the husband because the husband does sometimes inherit to her. The compound *anvayagatam* is capable from a grammatical point of view of being dissolved in more than one way. Appellant's way has the disadvantage of taking the word *anvaya* in a sense—the sense of an individual relative—which is not found in the dictionaries or in ordinary usage. The respondent would take the compound to mean "come by reason of *anvaya*", capable as the last word is of meaning relation in the abstract. This way of dissolving the compound fits in with the Mitakshara definition of *daya*—"The term heritage (*daya*) signifies that wealth, which becomes the property of another, solely by reason of *relation* to the owner"—Colebrooke's Mitakshara I.1.2. The comment *dayo' nvayagatam* is not peculiar to Vachaspati Misra but is also found in Kulluka and Medhatithi on Manu X.115. The word *anvaya* also means succession, and it is possible to treat *anvayagatam* in the same way as the word *Kramayata* which occurs in the quotation from Brihaspati and also in the subsequent comment of Vachaspati Misra himself. Expressions like *kramayatam* such as *kramadayatam* and *kramadabhyagatam* (already referred to) occur in many places in the Mitakshara such as I.4, 2 and 4 where Colebrooke has rendered them by "descended in succession" or "inherited in regular succession". The context was not one in which Vachaspati Misra was at all likely to put a forced meaning on the word *anvaya*, and we are not satisfied that this portion of the comment can really be taken to show that the word *anvaya* does mean a relative. When Vachaspati Misra says that the gist is that whatever becomes one's own in any manner whatsoever, if not owned in common with

others (*asadharanam*), may be given simply at one's own pleasure, but if owned in common with others, may be given when consented to by them, he states a perfectly intelligible doctrine which throws much valuable light on his statements about *vimati* and *sammati* in the Section on *adeya*. He affirms the same position in the last sentence which has been thus rendered above: " Even with respect to inherited property, which is undivided, whether immoveable or moveable, the consent of other sharers is necessary for a gift to others ": this on Brihaspati's verse about the gift of *kramayata* property taking effect, just after the verse which denies " the bestowal of the whole ". Mr. Jha has contended that the word *bhagi*, sharer, in this sentence will apply to the wife because of Vachaspati Misra's concluding sentence in the comment of Yajnavalkya II.52. We are not prepared to accept this contention for the reasons already indicated; whether in the husband's self-acquisitions or in the ancestral property, the wife is only to receive a share in conditions which cannot be brought about by her, and as the discussion about the consent of the *anvaya* to the gift of *sarvasva* does not show that Vachaspati Misra considered her consent necessary, we cannot suppose that he used the word *bhagi* in the present context to include her among other co-parceners as ordinarily recognized.

The discussion of *deya* in the Vivada Chintamani thus seems to show that the sole owner of an estate is entitled to alienate it, provided he does not part with the house and with whatever may be necessary for the maintenance of the family, that a gift will stand even if it violates the injunction that what is necessary for the maintenance of the family must be excepted, and that it is only in respect of undivided, inherited or other property that the consent of other co-sharers is necessary to a gift. Why the question of consent should arise at all in respect of divided property is not discussed in the portion translated, but a little later, there is quoted a verse which seems

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identical with Brihaspati, XV.7 or XXV.93, but is given there without the name of the Smritikara, though we find it cited under the name of Manu at the end of the section on Reunion under a special heading found in Tagore (*see* page 309, paragraph 3). The verse also occurs in a passage from the Dvaita Parisishta relied upon by the appellant, and will be again referred to later. Setlur's reading of the passage from the Vivada Chintamani is much closer than Tagore's and is as follows:—

"As for the text: 'All co-heirs are alike in respect of immoveable property, whether they are divided or undivided. Any one singly is always powerless to give away, pledge or sell'. This is intended to lay down that one singly is powerless in respect of property which has not been actually divided into shares, but is enjoyed in common and that where so divided, each can do independently whatever he likes. Some others think that this passage is intended to lay down that the consent of even the divided parceners should be obtained to remove all suspicion of their being undivided". Vachaspati Misra also deals with the same verse and offers similar comment on it in the Section on *Daya*, which is roughly summarised in the first five paragraphs on page 79 of Tagore's book. It is important to note that the last words of this passage are स्वतन्त्रस्वामिदत्तं च नोच्छेद्यम् which Tagore renders by "the gift of an article which belongs to the donor, cannot be recalled". Tagore has omitted the adjective स्वतन्त्र *svatantra*, independent, which qualifies the स्वामी *svami*, owner. We have not been referred to anything said anywhere else by Vachaspati Misra against this last opinion, which seems to be his own. It is convenient to recur to this point later.

Reliance was also placed by the appellant on one or two sentences from the *Dvaita* द्वैत० (or *Suslishta* सुश्लिष्ट०) *parisishta* परिशिष्ट. It is difficult to follow

them without the context, which it is therefore necessary to set out in full.

We begin with a verse (on page 34) which as remarked already, is dealt with by Vachaspati Misra in his Sections on *Deya* and Reunion, and which can be identified with Brihaspati (XV.7 or) XXV.93 and has been translated by Dr. Jolly (page 384, Sacred Books of the East, Vol. XXXIII) as follows :—

" Whether kinsmen are united or separate, they are all alike as regards immoveable property, as no one of them has power in any case to give, mortgage or sell it."

The comment on this is—

" Some (say) on the authority of the words actually found (lit. heard) here that one (alone) has no power of sale and the like regarding even divided immoveables. That is not so, because it is opposed to many texts. But where though (kinsmen are) divided, there has been no demarcation of their shares, it (i.e. the immoveable property) still remains common (1), and since it is thus common (2) (to many), one (alone) has no power. As regards all divided property without exception (3), (a transaction) takes effect which is carried out by (an) independent (owner) only; otherwise the precept (in the texts) would come to nought(4).

After this we have Brihaspati's verse on the eight-fold *adeya* XV.2 (Dr. Jolly, page 342) which has been already referred to. The comment on this verse is as follows :—

" Here also (it is meant) that a gift does not take effect by reason of the texts in case of the absence of consent of the son and the wife, and (in

(1) *Madhyaka*. (2) *Sadharana*. (3) To express the effect of the word ' *eva* ' in the original.

(4) Pandit Iswari Dutta's translation at page 509 of the evidence is " Otherwise there is danger of a contrary order ".

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case) of one's entire wealth when there is (any) *anvaya*, living.

" In actual fact, however, there is no ownership over the wife since (she) is only obtained as a wife. (If it be asked) how then did Harischandra sell her (i.e. his wife), (the answer is) they (i.e. persons like Harischandra) surely were almost like gods and therefore this (i.e. Harischandra's example) is of no consequence. In the opinion of the Smritisara, however, as regards the entire wealth a gift does take effect even though (made) by a man who has (some) *anvaya*, for it is made by an independent owner, his manifest ownership being a sufficient reason (i.e. to support the sale); but the donor incurs sin on account of doing a forbidden act. But that is not so. It might have been so if there had been no express prohibition of it."

The author then gives Narada IV.4-5 (Dr. Jolly, page 128) and offers the following comment:—

" The entire wealth may not be given even with the consent of the *anvaya*, as (its) gift is prohibited in case of its very existence. So (say) some, and this is right, for there is no counter-exception, as Katyayana (by his verses) '(These) should not be subjected either to a sale or to a gift, (if they be) unwilling. etc. ' has laid down the gift and sale—with consent —of a wife and a son only."

It is to be observed that in this passage the author clearly recognises in his comment on Brihaspati XXV.93 that where property has been actually divided among the co-parceners, each may independently dispose of his own share. He does this in spite of the text and says that the text is opposed to many other texts. He also treats the words *madhyaga* and *sadharana* (the original apparently wrongly prints *madhyaka eva*) as meaning much the same. The rendering of the first sentence of the comment on Brihaspati's verse about the eight-fold *adeya* that

we have adopted follows the original closely. The appellant's translators endeavoured to make out that the sentence dealt with the gift of *sarvasva* only, and that the absence of consent of the son and wife and the existence of *anvaya* were both of them conditions which made the text prohibiting the gift of *sarvasva* applicable. They even went the length of maintaining that the words *chanvaye sati* were an anticipatory quotation from Narada. It is true that two verses from Narada containing these words are actually given a few lines afterwards, but quotations consisting merely of a conjunction *cha* and a locative absolute *anvaye sati* and conveying no complete idea by themselves and not marked by the usual इती *iti* are not often found. What is more, Brihaspati mentions among his eight *adeyas* the son and the wife as well as the *sarvasva*, and neither Brihaspati nor Narada—between whose verses the comment occurs—says anything about the absence of consent of the son and wife in regard to the gift of the *sarvasva* or even of the son and wife as is commonly read into Katyayana's verses. The author's comments about ownership over the wife and the sale of his wife by Harischandra also suggest that he did mean to deal with the sale of the wife in addition to the sale of the *sarvasva* in his first sentence on Brihaspati's *adeyas*. The words *chanvaye sati* are in the context more than capable of fairly introducing a second instance of failure of gift by reason of the text, while the word *putradaravimatu*, read with the expression *vachanabalad danasiddhih*, makes a complete sentence, leaving it to be easily understood that it is the gift of the son and the wife that fails for the reason given. A statement of that kind is not inappropriate as a comment on Brihaspati, and the appellant's way of rendering the sentence has nothing in the context to recommend it.

It is also clear that Keshava Misra, the grandson of Vachaspati Misra, differed from the Smritisara view that the gift of one's entire wealth does take effect even though the donor have some *anvaya* living,

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and that all that happens in such a case is that the donor incurs sin on account of doing a forbidden act. Keshava Misra refuses to accept that view on the ground that the text (of Narada) makes *sarvasva adeya* when there is *anvaya* living, which he (Keshava Misra treats as an express prohibition of the gift. In his comment on Narada's verses he recurs to the same point and shows from Katyayana's verses (as he reads them) that consent would operate to validate a gift in the case of a wife and son only, but that there is no authority for holding that the *sarvasva* may be given with the consent of the *anvaya*. This view is not unintelligible, but it must be observed that it is not the view of Vachaspati Misra who has said both before and after Katyayana's verses that the *sarvasva* may be given with the consent of the *anvaya*. It is also not the view of the Ratnakara (page 130) where in commenting on the verses of Brihaspati XV 4 to 7, the author says on XV.5 *Sarvasvadanam anvayananumatya anumatyapi cha yaddanam tatsarvam vidyate*, which in the context means that the gift of the entire property, which is not to be made according to the verse, is a gift without the consent of the *anvaya*, but that whatever gift is made with consent will all stand good. What becomes of a gift of the entire wealth, if made without the consent of the *anvaya* if any, will be considered later.

Appellant has also relied on a maxim quoted in the Sraddha Viveka of Sulapani to which a passing reference has been made before now. This quotation is *dampatyor madhyagam dhanam*. Colebrooke gives it in Book V, Chapter VIII, Section I, text 415, rendering it by " wealth is common to the married pair ". In a footnote he says: " I can nowhere find the text cited at full length: this much of it has been frequently quoted; but the author of it (Datta) is here named for the first time, and he does not rank among legislators ". The context in which this quotation occurs in the Sraddha Viveka was put to the

respondent's translation and deals with the question of whether a deceased wife is entitled to *pindas* independently of her husband or receives them through him. A quotation from such a context would prima facie be but a poor basis for a new construction of the Vivada Chintamani. It has not been shown that Vachaspati Misra himself has anywhere adopted the quotation. On the contrary, appellant has laid stress—as we have already said—on the omission of Vachaspati Misra, when commenting on Yajnavalkya II. 52, to take notice of Apastamba's 19th Sutra which makes a wife an associate of the husband " with respect to the acquisition of property ". The dictum *dampatyor madhyagam dhanam* has been noticed in several Hindu law books, but has nevertheless not enabled any of the commentators concerned to hold that the wife's interest in the husband's property is such as to entitle her to claim a partition from him. The maxim was before the Court in *Sorolah Dossee* v. *Bhoobun Mohan Neoghy*(1) where the position of the Dayabhaga school as regards the wife's interest in the husband's property is dealt with in detail. In his Dayatattwa (VII. 7) Raghunandana quotes it from the Sraddha Viveka in his comment on Yajnavalya's suretyship verse. He does so as an apparent bar to partition between husband and wife, and his conclusion is that the maxim notwithstanding, there is partition between husband and wife in accordance with Yajnavalkya's own verse ' should the father make his sons participators of equal shares, he should allot equal shares to his wives'—(Sarkar pages 40-41). As to Vachaspati Misra, his division in the section on Stridhan of *bhartri-daya*, which he interprets as *bhartri-dhanam*, the wealth of the husband, into that which comes on his death to the widow in default of other heirs, and that which come to her during his lifetime with his consent becoming स्त्रीस्वत्वास्पद *strisvatvaspada* 'the subject of ownership by a woman'—is significant. If the husband can allow

(1) (1888) I. L. R. 15 Cal. 292.

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some of *his* property—her भर्तृधनम् *bhartri-dhanam* —in his lifetime to become *hers*, the implication is that he can have property in which she has no ownership, and to that extent at least, the maxim *dampatyor madhyagam dhanam* will not hold good under the Vivada Chintamani. The Ratnakara also divides Katyayana's *bhartri-daya* into two classes in the same way, and its interpretation of the word *bhartri-daya* as 'property which is the subject of the wife's ownership through her relationship to the husband' (Sarkar and Chatterjee, VIII. 8, page 34) is even more clearly against the applicability of the maxim *dampatyor madhyagam dhanam* to secular matters; if the maxim applied, there could be no property of the husband's which does not also belong to the wife. Vachaspati Misra's treatment of Yaj. II. 114—115 in the section on *Jivat—patrika—vibhaga* also shows that the husband is at liberty to give away or divide his self-acquisitions in any manner that he may choose and without any interference from his wife, provided only that where he chooses to give equal shares to the sons, he must also give equal shares to the wives unless they have already received stridhan from him or from their father-in-law. This also necessarily implies that the wife is not really a co-owner of the husband's self-acquisitions, at any rate in the sense of being entitled to prevent him from giving them away. The maxim *dampatyor madhyagam dhanam*, if it be assumed to be applicable to such property according to the view of Vachaspati Misra, will therefore mean no more than that as long as such property is actually undivided, she is entitled to enjoy it in common with the husband. As regards ancestral property, we have already said that we have not been referred to any Mithila authority who deals with the position expressly. That the husband in Mithila may hold property independently of the wife, and thus irrespective of the maxim *dampatyor madhyagam dhanam*, will also appear clear from such texts as Manu IX. 199 which has been dealt with in the Ratnakara VIII. 2. This verse of Manu's, which has been already referred

to, lays down that " women shall not make abstraction from family (property) common to many—*kutumbad bahumadhyagat*—nor even without the husband's permission, from his own property—*svakad vittat*. The comment of the Ratnakara on this verse is thus rendered by Sarkar and Chatterjee (page 33) " Here by the word " family " is intended family property by reason of contextual association: hence, out of joint property " abstraction " i.e., secret appropriation of property, should not be made by women without the permission of the owners. Likewise, " from even husband's own property " i.e., from the husband's property held not in common with other members of the family (कुटुम्बान्तरापेक्ष या भर्तुरसाधारणधनात्) secret appropriation should not be made, without the permission of the owner of the property. This is the meaning ". The last passage shows that the word *madhyaga* was taken as equivalent to *sadharana*, though it has been suggested on behalf of the appellant that the words do not convey one and the same idea. The Dayabhaga (Colebrooke II.48) took it that if property was *madhyaga*, it could not be divided. This passage was put to Dr. Bhagabat Kumar Shastri in the cross-examination for the appellant (*see* page 58 of the evidence), but has naturally not been relied on by Mr. Jha. Where the Dayabhaga has property held in common, the Mitakshara has joint property, but this distinction has little to do with us, and *madhyaga* and *sadharana* both apply to property that is not yet held severally. No attempt has been, however, made to show that the Mithila school has made any substantial distinction between the two words. Reference has already been made to the passage from the Dvaita Parisishta in which it was said that where though kinsmen are divided, there has been no demarcation of their shares, the immoveable property still remains common (*madhyaga* or *madhyaka*) and since it is thus common (*sadharana*) to many, one alone has no power to dispose of it. The same passage occurs in Vachaspati Misra's comment on Brihaspati's verse,

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XV. 7 or XXV.93, in his discussion of *Deya*; and three or four lines afterwards Vachaspati Misra says that a gift made by an independent (*svatantra*) owner is not to be " recalled "—Tagore, page 79 already referred to.

Reference may perhaps be made here to a passage from Vachaspati Misra's first section of the chapter on Deya Vibhaga. The context is Manu IX.104 quoted at the beginning of the section : " After the death of the father and the mother, the brothers, being assembled, may equally divide among themselves the paternal estate.....". On this Vachaspati Misra considers inter alia an objection which is thus put by Tagore (page 224) " Property over which the father has an independent right shall be divided at his pleasure only, while he is living. Therefore, his demise is essential to the partition of the above-mentioned property. But what is the necessity for the demise of the mother? She has no right whatever over it ". Vachaspati Misra does not meet the objection by saying that all property is common between the father and the mother,—*dampatyor madhyagam dhanam*—and that the mother is a co-owner with the father. On the contrary, he first puts out of the way a text of Sankha that " They are not independent who have their father living, and so while their mother is living ", with the remark that this text is meant not to bear on partition but to eulogise a mother possessing good qualities. He then re-states the objection in the form, according to Tagore (page 225), " How can dependence, with regard to the partition of an estate, upon a person who has no right over it, be consistent with reason? " and meets it by saying that the term पैतृक *pitrika*, ' paternal ' in Manu's verse, being formed by an *ekasesha* (uni-residual compound), includes the mother's property as well, and that Manu enjoins waiting for the mother's death only in respect of *her* wealth. This also, like the *bhartri-daya* and other passages already referred to, implies that the husband was regarded as

holding property in which the wife had no स्वाम्य *svamya*, ownership, certainly after his death and probably also before that event. Vachaspati Misra does not confine the verse to what must have been even rarer in former times than now—a case where there has been a separation in estate between husband and wife. Mr. Jha has endeavoured to meet this by urging that the property referred to in the comment as property over which the father has an independent right must be his self-acquired property. The difficulty in accepting this contention is that after the father's death, there is no room, so far as the sons are concerned, for any distinction between ancestral property and the father's self-acquisitions, and there is no reason to think that Manu's verse was either intended or taken by the Mithila commentators to be confined to the father's self-acquisitions. It is true that the fourth quarter of the verse says of the sons that they have no power over the property while their parents are living, but this cannot be taken to indicate that the property in question was the father's self-acquired property, for Manu made the son (like the wife and the slave) *adhana* and powerless even over his own self-acquisitions. The Mitakshara distinction between the father's self-acquired and ancestral property, as regards the son's right to claim partition, has, it seems to us, no bearing on the comment of Vachaspati Misra on Manu's verse. Mr. Jha refers to Vachaspati Misra's comment on Manu IX. 192, quoted after the comment on Narada, XIII.2, in this Section, but that comment only makes a distinction between the paternal and the ancestral property as regards the son's right of partition during the father's lifetime, and has no bearing on partition after the death of the father. We are, therefore, not satisfied that in the Mithila school the wife is actually regarded as a co-parcener of her husband and co-owner of property with him, on the dictum *dampatyor madhyagam dhanam*, which is not even shown to have been adopted in any of the leading Mithila authorities on *Vyavahara* or law proper. The Mitakshara, as

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has been already shown, concedes the ownership of the wife in the husband's wealth, but nevertheless does not recognize her as a co-parcener of his in the sense of entitling her to demand partition from him, or avoid alienations made by him on his own account, or take his property by right of survivorship as a son does on account of his interest by birth.

As a matter of fact there is no great difficulty about the translation of the maxim *dampatyor madhyagam dhanam*, though the respondent's translators made many difficulties about it. The translation of the other passages relied on for the appellant was, however, a different matter, and we have so far dealt principally with the arguments that were addressed to us on that point only. We have said that the translations or interpretations that the appellant asked us to place on those passages were novel, and the point of that observation is that it will be impossible, by a decision founded on a new construction of the words of Vachaspati Misra or other Mithila treatise, to run counter to what appears to be the current of modern authority—[*see Thakoorain Sahiba* v. *Mohun Lall*(1)]. The argument advanced on Vachaspati Misra's concluding sentence in his comment on Yajnavalkya's suretyship verse would not even have been open to the appellant but for the fact that in the Mithila case of *Ganesh Dutt Thakoor* v. *Jewach Thakoorain*(2), their Lordships of the Judicial Committee had no occasion expressly to decide the point, though they did observe that "there is no doubt that, according to the law in force in Bengal (their Lordships meant Mithila) the mother, though not entitled to require a partition so long as her sons remained united, is entitled, if a partition takes place between her sons, to receive the share of a son in property which is ancestral or acquired by the employment of ancestral wealth". Most of the argument on behalf of the appellant was based on the

(1) (1867) 11 Moo. I. A. 386, 403.
(2) (1903) I. L. R. 31 Cal. 262, P. C.

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assumption that the word of Vachaspati Misra was decisive in the Mithila school, so much so that it was even argued that if Vachaspati Misra put some opinion into the mouth of Chandeswar Thakur by a palpable mistake, it would not be open to us even to consider what Chandeswar Thakur himself had really said. No authority was cited for this extreme position. It is true that Tagore in his preface (page xxvii) to the Vivada Chintamani says that this work "is a work of paramount authority in the province of Mithila or Behar"; but he himself bases this on Colebrooke's observation that the Vivada Chintamani is among "the most conspicuous works" of the Mithila school and the observation of Sir William Macnaghten that in Mithila "respect is paid chiefly" to the Vivada Chintamani among other works. Tagore's observation about the position of the Vivada Chintamani in the Mithila school has been repeated in some decisions, but Mr. Jha has not been able to refer us to any case where the Vivada Chintamani was followed in spite of a contrary view expressed in the Vivada Ratnakara and the Mitakshara. In a Mithila case decided by the Sudder Dewanny Adalut as long ago as 1837, *Surja Kumari* v. *Gandhrap Singh*(1), it was held that "Allowing that the virtual exclusion of the daughter's son was intended by Vachaspati Misra, his dictum could not prevail over the doctrine held by other Maithila authors and the texts of Manu and other Munis". We have before us the 1873 edition of the volume (published by Sreenauth Banerjee and Brothers, Calcutta) which makes the following among other remarks on the case:

"Vachaspati Misra comparatively is a modern Maithila writer, and however respected he may be for his learning, his authority for the exclusion or degradation of the daughter's son cannot avail against the many strong texts of *Munis*, decisive of his right, and the concurring opinions of expounders including writers of Maithila. It is then more of curiosity than

(1) (1837) 6 Sel. Rep. 168.

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importance to investigate what really is the doctrine of the author of the Chintamani on the subject..... .....It seems therefore that Vachaspati Misra has omitted the daughter's son from the series of heirs, but in a mode which exposes him to the imputation of ambiguity and inconsistency.....". A foot-note against the last sentence quoted above says, " A popular rumour is said to exist in Maithila that Vachaspati Misra was dissatisfied with his own daughter's son, his presumptive heir."

Mr. J. C. Ghose is not the only modern writer on Hindu law who expresses the view that the translation of the Vivada Chintamani into English before the Vivada Ratnakara made the former a book of superior authority, though during the time of the Hindu kings the Vivada Ratnakara had unquestioned authority in Mithila (see his Hindu law, Vol. I, pages 15-16). In the recent decision in *Sourendra Mohan Sinha* v. *Hari Prasad*(1) their Lordships of the Judicial Committee do not seem altogether to have accepted the position that the Vivada Chintamani is a binding authority in the Mithila school; for they observe (page 155) that " Assuming that the Chief Justice was correct in stating in the judgment that the Vivada Chintamani is an authority which is binding upon those who are governed by the Mithila school of Hindu law, the passages which have been cited as from it... .....seem to relate only to debts.....". The question of the relative authority of the Vivada Chintamani does not, however, really arise in the present case. We have already shown that in his concluding comment upon Yajnavalkya's suretyship verse Vachaspati Misra cannot be held to have laid down any doctrine different from the Ratnakara, that the Dvaita Parisishta is also to the same effect as the Ratnakara and that both these authorities, like the Vivada Chintamani itself, seem to be in agreement with the Mitakshara, in holding, not that the wife has a right to demand a partition at least of ancestral

(1) (1925) I. L. R. 5 Pat. 135, P. C.

property in the hands of the husband (as has been contended for the appellant), but that in certain circumstances which are briefly but clearly indicated she is to receive the same share as each of the sons.

As regards the Chapter on the " Resumption of Gifts " the appellant principally relied on Vachaspati Misra's disputed compound about the persons with whose consent a man may give away or sell his entire wealth. Our conclusion on the grammatical and philological contentions advanced before us was that the appellant has not succeeded in showing that Vachaspati Misra includes ' the wife ' in the *anvaya* whose consent, according to him, is necessary to the gift or sale of the entire wealth. When we turn to Vachaspati Misra's succeeding Section on the *Deya* we find him apparently saying on Katyayana that one may properly give away or sell all that belongs to one's self in excess of what may be necessary for the maintenance of the family, that a gift which does not except the maintenance nevertheless does not fail, and that the consent of others is only necessary in the case of property owned in common with others. In contrasting this with the proposition in the Section on *Adeya* that the entire wealth may not be given even at a time of distress except with the consent of the *anvaya*, it is useful to bear in mind that the great great grandson is a conceivable example of a person included in the *anvaya* who nevertheless does not by birth acquire an interest in the ancestral property, that the gift of the *deya* has no particular reference to a time of distress, and that in this later section it is repeatedly affirmed that consent is only necessary in the case of *madhyaga* or *avibhakta* property, that the consent of the sharers must be taken in such a case, and that a man is free (*svatantra*) to give away his separate property. The Dvaita Parisishta, as already shown, expressly approves of the doctrine that the entire wealth may not be given even with the consent of the *anvaya* as the gift is prohibited in case of the

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very existence of *anvaya*; and Vachaspati Misra's comment on Brihaspati's verse enumerating the eight kinds of *adeya* property does not make it clear whether he accepts, or like his grandson the author of the Dvaita Parisishta, differs from the opinion of the Smritisara that a gift of one's entire property does take effect for the reason that it is made by an independent owner, though the donor incurs sin for doing a forbidden act. But he certainly differs from the view mentioned at the end of his comment on Katyayana's verse in the Section that the mere existence of *anvaya* is a bar to the gift of the *sarvasva*, and his view in this *Adeya* Section is that the entitre wealth may be given in a time of distress with the consent of the *anvaya* but not without it. In the Section on *Deya* he refers to the Smritisara view on Katyayana's verse beginning with *sarvasva*. There is nothing in this context—no '*tu*' even as in the comment on Brihaspati's eight-fold *adeya*—to suggest that he differs from the Smritisara. Nor is it clear that the observation " nevertheless the gift is effective, as there is sufficient reason seen (for it, namely in the title of the donor) " is not a statement of Vachaspati Misra's own opinion but is only a statement of the Smritisara view. The next sentence begins " consequently it cannot be resumed....." and this shows definitely that the gift of the entire estate in violation of this text will stand. This may, however, possibly, be part of a quotation from the Smritisara; but the observation that " as to consent, that is necessary only in the case of what is joint and not of what is not joint ", which follows some quotation from the Smritisara of which we cannot on the materials before us confidently fix the beginning, is clearly an expression of Vachaspati Misra's own view. This is confirmed by Vachaspati Misra's comment on Brihaspati XV.7 in the same Section ending with " a gift of an article which belongs to the donor cannot be recalled "—Tagore, page 79, a comment which is repeated on the same verse (though cited under the

name of Manu) near the end of the Section on Reunion, in the following words:—

" This is intended to lay down that one singly is powerless in respect of property which has not been actually divided into shares, but is enjoyed in common, and that where so divided, each can do independently whatever he likes "—(Setlur, page 274). It would, therefore, appear that according to Vachaspati Misra the gift of his entire property by the sole owner, whether he takes the consent of the *anvaya* or not, is on the whole not void even though the family may be left without the means of supporting themselves. At the end of his Section on *Adatta*, the fourth and last Section in the Chapter on ' Resumption of Gifts ', he cites a verse of Narada IV.12 which is thus rendered by Dr. Jolly (page 130): " Both the donee who covets invalid gifts and accepts them from avarice, and the donor of what ought not to be given who yet gives it away, deserve punishment ". " Invalid gifts " is Dr. Jolly's rendering of *Adatta* in the original; Tagore makes it " what is *deemed* ungiven "; " what ought not to be given " is of course *adeya* in the original. It will be noticed at once that the verse treats as an offence the gift, but not the receipt, of what ought not to be given; unlike some other commentators Vachaspati Misra does not deduce from this the culpability of the receipt also—see also Colebrooke's Mitakshara I.1.10. The Mitakshara, after dealing with Yajnavalkya II.175, a verse which lays down that the entire wealth may not be given—is not *deya*—when there is issue (*anvaya*), introduces the next verse requiring acceptance to be public, especially of immoveable property, as follows: " Having thus mentioned property which may be given (*deya*), with the exception of a wife and a son, the author mentions in that context the rule that property which is not alienable (*adeya*) should be accepted by the donee in public "—(Gharpure, page 313). This suggests that according to the Mitakshara a gift of the entire wealth is valid even if the donor have

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anvaya, though it violates Yajnavalkya's text. The doctrine of factum valet is, as has been pointed out in many cases, not peculiar to the Dayabhaga school of Hindu law. Vijnanesvara also adopts it in such passages as the one rendered by Colebrooke at I.1.30, as follows :—

"It (the consent of separated kindred) is not required, on account of any want of sufficient power in the single owner; and the transaction (gift, sale or mortgage of immoveable property) is consequently valid even without the consent of separated kinsmen". On Yajnavalkya II.130 the Mitakshara quotes Manu 9.168 and apparently treats as valid the gift of a son, though made in breach of a condition (see Colebrooke, I.11.10).

Of the eight kinds of *adeya* Vachaspati Misra has himself said that some are so because of want of ownership (*svatva*) while some others may not be given because of want of independence (*svatantrya*); in the case of *sarvasva*, there is ex hypothesi no want of ownership or of independence either. The prohibition of a gift of the *sarvasva* seems to be of the nature of a moral and not a legal prohibition. The conditions referred to in some of the texts make it easy to see the object of the prohibition. If, according, to Narada, the *sarvasva* may not be given when there is *anvaya*, this prohibition is taken by Vachaspati Misra to mean that where there is *anvaya*, its consent is necessary to the gift. The verse of Katyayana quoted in the Section on *Deya* in substance empowers the sole owner to give away all his property with the exception of the house and what may be necessary for the maintenance of the family; and Vachaspati Misra's comment, as we have already shown, indicates, when read with his dicta in allied contexts, that in his view a gift is not invalid merely because it does not except the maintenance of the family. The easiest way of reconciling the conflict would appear to be to uphold the gift subject to a charge for maintenance.

Jagannath commenting on this verse gives the definite Dayabhaga view that a gift of the entire estate is not invalid. Modern scholars of standing like Mr. Golap Chandra Sarkar, Shastri, (Hindu law, Chapter XVI) and Dr. P. N. Sen (Hindu Jurisprudence, Tagore Law Lectures, 1909) take " the rule that the extent of a person's gift should not be such as to deprive his family of the means of subsistence " or " the prohibition of the gift of the entire property when there are sons to be provided for " to be " nothing more than a moral or religious injunction and the excess of the limit thus laid down cannot be a ground for holding the gift invalid "—(Tagore Law Lectures, 1909, page 85). In *Balwant Singh* v. *Rani Kishori*(1) their Lordships of the Judicial Committee, dealing with the texts bearing on the alienation of immoveable property acquired by a Mitakshara father, observed :—" It appears to them that the subject is one of those in which from the earliest times there have been two conflicting principles of law, one favouring the perpetual integrity and the fixed succession of family property, and the other the free use of such property for the circumstances of the day. The controversies and conflicting decisions on the father's powers of mortgage and sale, on the payment of his debts out of the inheritance, and on the testamentary power, will occur to everybody who is familiar with Indian litigations of the past century or so. On each of these subjects there has been a growing tendency, coincident with the growth of commerce, to give more effect to the latter of the two principles, viz., the use of property by the living generation, or its living heads ". After noticing the Mithila case of *Raja Bishen Perkash Narain Singh* v. *Bawa Misser*(2) among the other cases, their Lordships adopted the view that notwithstanding the conflicting nature of the original texts in the Mitakshara a Hindu in his lifetime has a right to dispose of his self-

(1) (1898) I. L. R. 20 All. 267, P. C.
(2) (1873) 12 Beng. L. R. 430.

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acquired property, whether moveable or immoveable, according to his own pleasure. The bulk of the property we are concerned with in the present case is ancestral property, the Anandgarh estate, which had fallen to Ugra Mohan's share exclusively at the partition with his stepbrother. The nature of the prohibition as regards the gift of such property is much the same as what was considered in *Balwant Singh's*(1) case or in the adoption case *Sri Balusu Gurulingaswami* v. *Sri Balusu*(2); and the appellant has not succeeded in showing that according to Vachaspati Misra the wife has such an interest in the ancestral property as to entitle her to any voice in its management or disposal by the husband. There is, moreover, one peculiarity of the Mithila school which goes very much against the appellant's contentions that the Mithila wife is a co-parcener of her husband and that it is not competent to him, without her consent, to give away his whole property. This peculiarity is the doctrine of adoption in the Kritrima form. In a case decided as long ago as 1812, *Sree Narain Rai* v. *Bhya Jha*(3), the pandit of the Sudder Dewanny Adalut gave the following exposition. which does not seem to have been challenged in any subsequent case—"If a man appoint another his adopted son, that person, so adopted, stands in the relation to him of a son, and offers up his funeral oblations, and is heir to his estate; but the person, so appointed, does not become the adopted son of the adopter's wife, nor does he offer funeral oblations to her, nor succeed to her property. If a woman appointed an adopted son, he stands in the relation to her of a son, offers to her funeral oblations, and is heir to her estate; but he does not become the adopted son of her husband, nor offer to him funeral oblations, nor succeed to his property. If a husband and wife jointly appoint an adopted son, he stands in the relation of son to both, and is heir to the estate of both. If

(1) (1898) I. L. R. 20 All. 267, P. C.
(2) (1899) I. L. R. 21 All. 460, P. C.
(3) (1812) 2 Beng. Sel. Rep. 29.

the husband appoint one person, and the wife another, adopted son, they stand in the relation of sons to each of them respectively, and do not perform the ceremony of offering funeral oblations, nor succeed to the estate of the husband and wife jointly; such is the usage of Mithila ". The husband can adopt in this form without any religious ceremonies and independently of the wife, and vice versa; and the Kritrima son adopted by the husband takes his property as heir to the exclusion of the wife. A son adopted in the Dattaka form—a form which is not yet obsolete in Mithila, *see Chandreshwar* v. *Bisheshwar*(1)—also excludes the wife; but unlike the Kritrima son he becomes a member of the adopter's family and thus incurs obligations to the adoptive father's wife. The Mithila husband's power to adopt a Kritrima son to himself and thus prevent his wife from succeeding to his property goes far to show that her interest in his property is even weaker than under the Mitakshara.

What the appellant had to prove was that under the peculiar doctrines of the Mithila school she was entitled to avoid her husband's bequest of the Anandgarh estate, his own separate property, reserving only a small allowance for her, and possibly made without her consent. We say " possibly made ", because though the will is not before us, it was found by Chaudhuri, J. against the appellant that the will had been signed by her, and Flectcher, J., with whom Richardson, J. agreed, also observed that one of the signatures that appears on each of the four sheets of the will is the signature of the appellant, and that there is no evidence to show the truth of her story that the signatures were obtained from her on blank sheets of paper for some totally different transaction. Attestation does not necessarily import consent, and it may be that the appellant has some better evidence —none has yet been produced—to support her story of the signatures and establish that she did not in fact consent to her husband's testamentary disposition of

(1) (1926) I. L. R. 5 Pat. 777, 847.

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his property. But until that evidence is produced and accepted by the Court, the position naturally would be, as was apparently the view of Chaudhuri, J., that she had in fact consented to the will. What she has tried to prove on the special texts placed before us is that she was entitled to demand partition from her husband and that the gift of his entire property by a Mithila husband is invalid. On the published translations of the Mithila law books the appellant never had any case at all. The special translations put in for her bear date the 16th of November, 1924, (Pandit Iswari Dutt) and the 16th of July, 1926, (Professor Ramautar Sharma). The arguments that we have dealt with in this case were being built up from day to day during the protracted hearing of the appeal. It is plain, therefore, that appellant's story that " she had been strongly advised by eminent Counsel in England and in India that her right to get possession of the entire disputed estate was unassailable, under the Mithila law, inspite of the will set up by the other side which, even if genuine (which is denied) was void under the Mithila law ", must be unfounded.

We are clearly of opinion that the Vivada Chintamani does not give the wife the right to demand partition, and that all that that authority can be taken to have laid down is that, as under the Mitakshara, the wife is to receive a share equal to that of a son when her husband chooses to make an equal division of his self-acquisitions, or chooses or is forced by the sons to divide the ancestral property. This qualified right, if it may be so called, to receive a share does not constitute her a co-parcener of the husband. We have observed that the maxim from the Sraddha Viveka regarding property being common to the married pair has not been shown to have been adopted by any of the leading Mithila authorities on Vyavahara, and that the Vivada Chintamani, like the Mitakshara definitely lays down that in an undivided family a widow takes nothing by survivorship. This in fact

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led Mr. Jha to dwell on the rights of the wife as a wife, though what the appellant was seeking to enforce is her right, not as a wife, but as a widow, in order to avoid the bequest. We are also of opinion that the consent that Vachaspati Misra speaks of is the consent of the *anvaya* and that it is by no means clear, to say the least, that Vachaspati Misra included the wife in that body. We are inclined, in view of what he says in the Section on *Deya* as regards the necessity of consent, to think that Vachaspati Misra intended to restrict the *anvaya* whose consent he considered necessary, to such descendents as acquire by birth an interest in the property in the hands of the father; if so, he could not have included the wife in the *anvaya*. It seems to us that the prohibition of a gift of the entire wealth without the consent of the *anvaya* was understood by Vachaspati Misra himself to be in the nature of a moral injunction, and that even in his view a gift of the entire wealth made without the consent of the *anvaya* was not void. The wife's right to maintenance is a different matter from a right to avoid a gift of the entire property made by the husband. It will not be difficult to reconcile the wife's right to maintenance, as laid down in modern decisions, with the factum valet view of a gift of his entire property by the husband; the gift may stand and the wife's maintenance charged on the property as in *Jamna* v. *Machul Sahu*.(1) If the wife be assumed to be included in the *anvaya*, and if it be further assumed that her consent is so essential that a gift of the entire estate will, according to the Mithila school, fail unless it is made with her consent, the question would still remain whether that would entitle the appellant to avoid the bequest which is not a bequest of the entire property but makes an exception in favour of the appellant and may even have been made with her consent. She claims to have proceeded with the negotiations on the footing that she had a right to the estate in spite of her husband's will.

(1) (1879) I. L. R. 2 All. 315.

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For the purposes of the negotiations she may have been entitled to assume that that was so, but it is impossible to conceive of eminent Counsel in England and in India advising her that her right to get possession of the entire estate in spite of her husband's will was unassailable under the Mithila law. In our opinion the Mithila law does not entitle her to do so; she has signally failed to show that she was a co-parcener of her husband, a claim which, if it means anything at all in the circumstances of this case, means a right of survivorship and the consequent right to avoid the husband's testamentary disposition of the property against the survivor's right to take the estate on his death. She has also failed to show that as a widow she is entitled to avoid the will on the ground that it was made without her consent. It follows that we must treat as entirely unfounded her contention that the compromise should not be given effect to because it is an unconscionable bargain.

These being our views, we are clearly of opinion that the plaintiff had very little chance of success in her suit for the estate on the ground of fraud, and in all probability equally little chance of success on the basis of the Mithila law as urged for her.

Is the compromise for no consideration or for a grossly inadequate consideration?

It is contended on behalf of the plaintiff that the maintenance, house rent and conveyance which the compromise gave her was what she would have got in any case even if her suit for possession of the estate had failed. The decree for arrears of maintenance was also for no more than was due to her, as under the Hindu law she was entitled to maintenance from the time of the death of her husband. She therefore received no consideration whatsoever for surrendering her claims to the estate and her right to the jewellery and the gardens. This compromise should, therefore, it is urged, not be recorded.

We are unable to accept this contention. A compromise of a disputed claim stands upon a different footing from a transfer of a vested interest. "A compromise is an agreement to put an end to disputes and terminate or avoid litigation; and in such case the consideration which each party receives is not the sacrifice of a right but the abandonment of a claim," [*see Trigge* v. *Lacallee*(1)]. In this case Lord Kingsdown observed that an English compromise is the same as the French "transaction" and is based upon the civil law, and that though the case was to be decided under the French law, the English law was the same. His Lordship referred to the House of Lords case of *Stewart* v. *Stewart*(2), where it was held by Lord Cottenham that the rule of the civil law was adopted both in England and in France. We think that in this respect there is no difference in any law based upon a civilized system. In *Stapilton* v. *Stapilton*(3) Hardwicke, L. C. referred to *Cann* v. *Cann*(4) in which Lord Macclesfield had laid down that an agreement entered into upon a supposition of a right or a doubtful right, though it afterwards comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other; and therefore the compromise of a doubtful right is a sufficient foundation of an agreement. In the same book (White and Tudor, 9th edition, volume I, page 185) the law on the subject has been thus enunciated:

"The compromise of doubtful claims, whatever may be the actual rights of the parties has, from the policy of preventing litigation, been generally upheld in all enlightened systems of jurisprudence

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(1) (1862) 15 Moo., P. C., 270.
(2) (1839) 6 Cl. & Fin. 911.
(3) (1793) 1 Atk. 2.
(4) (1721) 1 Wms. 723.

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In our law, it is clear that if a person, after due deliberation, enter into an agreement for the purpose of compromising a claim made bona fide, to which he believed himself to be liable, and with the nature and extent of which he is fully acquainted, the compromise of such a claim is a sufficient consideration for the agreement, and a Court of Equity, without inquiring whether he was in truth liable to the claim, will compel a specific performance * * *

* * * * *

The real consideration and motive of a compromise, as well in our law as in the civil law and systems derived from it, is not the sacrifice of a right but the abandonment of a claim.

' In dealing with a compromise, always supposing to be a thing that is within the power of each party, if honestly done, all that a Court of Justice has to do is to ascertain that the claim or the representation on the one side is bona fide and truly made, and that on the other side the answer or defence or counter-claim is also bona fide and truly made'."

In the case before us, whatever may be said about the claim put forward by the plaintiff on the basis of fraud in connection with the probate proceedings and on the basis of the Mithila law, or in respect of the jewellery and gardens as being her personal properties, there is no doubt that the defendants, who had obtained a probate of the will of Ugrah Mohan Thakur, honestly believed that they were justified in resisting the claim of the plaintiff and that she was not entitled to get anything more than the Rs. 100 per month which was allowed to her under the will of her husband. Their agreeing to suffer a decree for past and future maintenance and for house rent and conveyance was good and sufficient consideration for the plaintiff to abandon the rest

of her claims. In *Miles* v. *New Zealand Alford Estate Company*(1), it was held that a bona fide compromise of a real claim was good consideration whether the claim would have been successful or not. Bowen, L.J. observed as follows :—

"It seems to me that if an intending litigant bona fide forbears a right to litigate a question of law or fact which is not fictitious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating to be able to litigate his claim, even if he turns out to be wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence; and I think therefore that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise you would have to try the whole cause to know if the man had a right to compromise it, and with regard to the questions of law it is obvious you could never safely compromise a question of law at all."

We have already shown that it is absolutely irrelevant in this connection what rights the appellant actually had under the Mithila law, though for other reasons already indicated we have dealt with those rights. Our decision on that point cannot affect the position that in a compromise of bona fide claims, the real consideration received by each party is the abandonment of his claim by the other.

In *Knowles* v. *Roberts*(2) in an action to enforce the compromise of a former action brought in assertion of a right plaintiff was not allowed to set out in his statement of claim allegations as to his right and the corresponding liabilities of defendant which were

(1) (1886) L. R. 32 Ch. 266.
(2) (1888) L. R. 38 Ch. 263.

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contained in his former statement of claim. Such allegations were ordered to be struck out.

It should be borne in mind that the compromise before us is not a compromise between strangers but substantially between members of the same family, the widow of Ugrah Mohan Thakur on the one side and his nephew and residuary legatee on the other. About family settlements, White and Tudor, 9th edition, volume I, page 198, basing upon the case of *Stapilton* v. *Stapilton*(1), already referred to, says as follows :—

"From the case of *Stapilton* v. *Stapilton*(1) down to the present day the current of authorities has been uniform, and wherever doubts and disputes have arisen with regard to the rights of different members of the same family * * * * * and fair compromises have been entered into to preserve the harmony and affection, or to save the honor of the family, those arrangements have been sustained by this Court, albeit, perhaps, resting upon grounds which would not have been considered satisfactory if the transaction had occurred between mere strangers."

In *Williams* v. *Williams*(2) it has been held that a family arrangement may be such as the Court will uphold, although there are no rights in dispute and if sufficient motive for the arrangement is proved, the Court will not consider the quantum of the consideration. This principle has been followed repeatedly in India. In the case of *Helan Dasi* v. *Durga Das Mundal*(3) Mookerjee, J. held that if parties settle a dispute, such settlement would not be set aside on the ground that it gave to one of the parties more than what he might possibly have recovered if he had taken the judgment of the Court upon the matters then in difference between them. His Lordship

(1) (1793) 1 Atk. 2.
(2) (1867) 2 Ch. 294.
(3) (1906) 4 Cal. L. J. 323.

followed the decisions in *Williams* v. *Williams*(1) and *Stapilton* v. *Stapilton*(2) referred to above.

No doubt, a family arrangement may be set aside as was laid down by Mookerjee, J. in the case of *Satya Kumar Banerjee* v. *Satya Kripal Banerjee*(3) on the ground of mistake in equality of position, or undue influence, coercion, fraud or any other similar ground, but any such allegation must be clearly established. We have held that there is no such ground in this case. Assuming for a moment that the points of Mithila law propounded for the appellant were found to be correct, that would not be a ground for setting aside the compromise. Their Lordships of the Judicial Committee in the case of *Rajunder Narain Rae* v. *Bijai Govind Sing*(4) observed as follows :—

"The appellants are not entitled to avail themselves of all the light which subsequent investigation in the course of the suit has thrown upon their claims. If the nature or the extent of the rights of the respective parties could be considered as the fair subject of doubt at the date of the deed, and if, to avoid expense and delay by legal inquiry, they agreed to settle the contest by an amicable arrangement, such transaction is not to be disturbed on the ground of the inequality of benefit which either party may eventually have received from it."

There the heirs of the deceased had given up a moiety of a right which was doubtful at the time but became quite clear subsequently, and it was urged that the respondents should not be allowed to take advantage of it. In the case before us there was no mistake. The lady has deposed that she knew her position under the Mithila law; and if she compromised willingly as we have held she did, she is bound

(1) (1867) 2 Ch. 294.
(2) (1793) 1 Atk. 2.
(3) (1909) 10 Cal. L. J. 503.
(4) (1839) 2 Moo. I. A. 181.

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by it. In the case of *Ram Nirunjun Singh* v. *Prayag Singh*(1) their Lordships quoted with approval Kerr on Fraud and observed:—

" 'Mistake in law is not a ground for setting aside a compromise, if the parties to the transaction were in difficulty and doubt, and wished to put an end to disputes and to terminate or avoid litigation. If one or more parties having, or supposing they have, claims upon a given subject-matter, or claims against each other, agree to compromise these claims, and the knowledge, or means of knowledge, of each of them with respect to the mode in which, and the circumstances under which, his claim arises, stand upon an equal footing, and there is absence of fraud or misrepresentation, the transaction is binding, although the conclusion at which the parties may have arrived is not that which a Court of Justice would have arrived at had its decision been sought. *The real consideration which each party receives under a compromise being, not the sacrifice of the right, but the settlement of the dispute, and the abandonment of the claim.* It is no objection to the validity of the transaction that the right was really in one of the parties only, and that the others had no right whatever. If, for instance, two parties claim adversely to each other the inheritance of a deceased person, and, in order to avoid litigation, agree to divide the inheritance, it is no ground for setting aside the agreement that only one was heir, and that the other gave up the right which he really possessed. The fact that the one may have had no claim is immaterial, if he was honestly mistaken as to his claim. It is enough if, at the time of the compromise, he may have believed he had a claim, and that the parties have, by the transaction, avoided the necessity of going to law. To render valid the compromise of a litigation, it is not even necessary that the question in dispute should really be doubtful, if the parties bona fide consider it to be so. It is enough

(1) (1881) I. L. R. 8 Cal. 138.

to render a compromise valid, that there is a question to be decided between them. 'A compromise of doubtful rights will not be set aside on any other ground than fraud.'

This is the rule of law regarding compromise generally. But that the Courts go still further in favour of upholding compromises by which family disputes are settled, appears from the following passage in the same treatise, page 364:

'The principles which apply to the case of ordinary compromise between strangers, do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend.' ''

Here the compromise was not even of a doubtful claim but of something much weaker, of a novel claim based principally on a novel reading of imperfect editions of the Vivada Chintamani and the Dvaita-Parisishta.

In our own High Court similar views have been taken in the case of *Jagdam Sahay* v. *Rupnarain Mahton*(1) where it was held that where there was a supposition of right in both parties and the right is a doubtful one, an agreement of compromise entered into by the parties is binding on them irrespective of the fact whether in truth the properties in dispute belonged to one party or to the other, and in the case of *Gajadhar Prasad* v. *Lachhuman Lal Sahu*(2) in which it was held that if there was a bona fide claim made, although it might turn out in the end that there

(1) (1924) 5 Pat. L. T. 375.
(2) (1927) 8 Pat. L. T. 759.

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was no substance in it, an arrangement come to by all the members of the family to settle that claim was a valid agreement and binding upon all the parties concerned. The contention of the appellant assumes that the plaintiff would have necessarily been awarded maintenance at Rs. 1,000 per month from the date of her husband's death, but this assumption is in our opinion entirely unjustified. We have already discussed the financial position of the estate and have shown that it would have prevented any Court from allowing her maintenance at that rate from the date of death of her husband. For the first 14 or 15 years she would have got much less than this. Possibly the Court would have ordered a somewhat higher maintenance to take effect after the debt was discharged, but one cannot be sure of this. If under the circumstances the compromise was for maintenance at an uniform rate of Rs. 1,000 per month on the condition that the lady surrendered her claim to the estate, jewellery, gardens, etc., the compromise cannot be said to be without consideration, and cannot be ignored on that ground. This being our conclusion, we hold that the compromise was neither unjust to her nor an improvident act on her part. The question, therefore, of exercising the inherent power of the Court, assuming that there is any such power in spite of the mandatory provisions of Order XXIII, rule 3, of the Civil Procedure Code, does not arise. If we have any such power, this is certainly not a case in which that power can reasonably be exercised. Reliance was placed on behalf of the appellant on the observations of their Lordships of the Judicial Committee in the case of *Sourendranath Mitra* v. *Tarubala Dasi*(1), a case already referred to when we were dealing with the applicability of the doctrine of a pardanashin lady to this case. Their Lordships referred to the case of *Neale* v. *Gordon Lennox*(2), and then observed, with respect to Order XXIII, rule 3, of the Civil Procedure Code, that—

(1) (1930) I. L. R. 57 Cal. 1311, P. C.
(2) (1902) A. C. 465.

" The words of the rule do not in terms appear to confer a discretion on the Court, but their Lordships desire to say nothing to prejudge a contention that the Courts retain an inherent power not to allow their proceedings to be used to work a substantial injustice, such as emerged in the case of *Neale* v. *Gordon Lennox*(1)."

The case of *Neale* v. *Gordon Lennox*(1) was one of a compromise entered into by Counsel. Here the compromise was entered into by the lady herself, and as was pointed out by their Lordships in *Tarubala's*(2) case, cases here have to be decided according to the law prevailing in this country. Their Lordships observed :—

" Their Lordships approach the case, bearing in mind that the questions in issue have to be determined in accordance with the law in India, and that it by no means follows that implications of authority, which are readily inferred in other countries, ought to be established in the conditions which prevail in India."

Under our law, should a grossly unfair compromise come before a Court, as for example where a helpless person, such as an inexperienced pardanashin lady, has been induced to agree to an unconscionable bargain, such a compromise would be ignored or relieved against without relying upon the principle laid down in *Neale* v. *Gordon Lennox*(1). For the Court will be entitled in the circumstances to presume that such a compromise could not have been entered into by the helpless person except under the influence of fraud or coercion, etc., or that it could not have been intelligently entered into; in other words, that the act of physical execution was not accompanied by the necessary mental act. For these reasons we are of opinion that the compromise cannot be interfered with on the ground urged, viz., that its terms

(1) (1902) A. C. 465.
(2) (1930) I. L. R. 57 Cal. 1311, P. C.

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are unjust to the appellant and that it was improvident on her part to accept them.

Lawfulness of the compromise.

We now come to the various legal objections raised on behalf of the appellant against the lawful character of the compromise and against its being recorded. These are:

(*1*) That the compromise cannot be recorded as no decree can be passed on its basis under section 42 of the Specific Relief Act.

(*2*) That a compromise not specifically enforceable cannot be recorded and that the compromise in question is not so enforceable.

(*3*) That the contract to compromise stands rescinded on account of the defendants not having performed their part of the obligations arising under it.

(*4*) That all the defendants not having joined in the compromise, it is unfit to be recorded.

(*5*) That the compromise is unlawful, a olves a transfer to the defendant of the sheb ght of the lady and such a transfer is vc the Hindu law.

(*6*) That some of the t and the identity of the pai unascertainable, and as the vag cannot be separated from the rest of the compromise, the whole of it is void.

(*7*) That the compromise is unlawful, as Mr. Savi being an executor had no power to compromise the suit and create a charge on the estate without the permission of the Probate Court.

Three grounds have also been urged as barring proceedings for the recording of the compromise. They are—

(*1*) That the inquiry is barred by the principle of res judicata.

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(2) That the petition of compromise required registration and, not being so registered, cannot be used in evidence and acted upon, and that it bars oral evidence.

(3) That the defendants waived their right to have the compromise recorded.

Is the compromise unfit to be recorded on the ground that no decree can be passed on its basis under section 42 of the Specific Relief Act?

The contention of the appellant in this respect may be summarised thus:

The compromise provides for a maintenance of Rs. 1,000 per month payable in future, which is to be a charge on the estate, provision for a house and a conveyance, and a decree for arrears of maintenance which is also to be a charge on the estate.

Now it is contended that under the terms of the compromise no decree capable of execution can be passed for future maintenance, house and conyevance as the compromise only declares the plaintiff's right to get these things from the defendant, and these obligations, it is said, can only be enforced by suit, especially as the maintenance has been declared a charge on the estate and such a charge cannot be enforced in execution proceedings. In respect of the arrears of maintenance the compromise provides for an executable decree, but it is urged that as the compromise provides their being charged upon the estate, this also cannot be enforced in execution of the decree but will require a separate suit. This being the case and the plaintiff being entitled to other reliefs than a mere declaration, section 42 of the Specific Relief Act, it is urged, bars the passing of any decree. It is further contended that the plaintiff's abandoning her other reliefs amounts to her not suing for them at all, and thus section 42 of the Act comes into operation, and no compromise can be recorded unless

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the Court is in a position to pass a decree in accordance with it, while the only decree which the Court can pass in this case being a declaratory one is barred by section 42 of the Specific Relief Act. Reliance has been placed upon the case of *Aubhoyessury Dabee* v. *Gouri Sunkur Panday*(1) and *Matangini Dassee* v. *Choonetmoney Dassee*(2). The first of these cases laid down that where a consent decree ordered the payment of the decretal amount by instalments and properties mentioned in the schedule of the decree stood charged for the payment of the instalments, the properties could not be sold in execution of the decree, but that a separate suit was necessary under section 67 of the Transfer of Property Act. The second case laid down that where a decree declared the amount payable to the plaintiff in respect of future maintenance and made it a charge upon the estate of the testator, such a charge was properly enforceable by suit and could not be given effect to in execution. Reliance has also been placed upon the case of *Gobinda Chandra Pal* v. *Dwarka Nath Pal*(3) where a suit was brought on the basis of a compromise decree which created a charge upon immoveable property. The suit was decreed, and the High Court on appeal upheld the decree; this implies that the initial compromise decree could not be enforced in execution. Further reliance is placed upon the case of *Sarada Prosad Roy Chowdhury* v. *Rai Mohan Saha*(4) for the proposition that when a plaintiff abandons the other reliefs claimed in the suit, or does not offer evidence in support of them, this amounts to his not suing for such other reliefs at all.

The considerations which arise on the contentions for the appellant on this branch of the case are these:

(*1*) Whether the decree, which can be passed on the basis of the compromise in question, can only be

(1) (1895) I. L. R. 22 Cal. 859.
(2) (1895) I. L. R. 22 Cal. 903.
(3) (1908) I. L. R. 35 Cal. 837.
(4) (1924) 85 Ind. Cas. 629.

a declaratory decree and thus not enforceable in the execution department.

(2) Does the compromise amount to the plaintiff abandoning her other reliefs and does the passing of a purely declaratory decree so far as the future maintenance is concerned offend against the provision of section 42 of the Specific Relief Act?

It may at once be conceded that after the passing of the Specific Relief Act, section 42 of that Act is the only law which authorizes a Court to pass a declaratory decree; and we need not refer to the cases cited by the appellant to show that where a plaintiff, being entitled to other reliefs, does not seek them, he is not entitled to a pure declaration. The Court will not merely make a declaration of a hypothetical or an abstract right without any reference to its practical utility.

Now as to the first consideration set out above, there is not the least doubt in our minds that in this case a fully effective executable decree can be passed, as has in fact been done by the learned Subordinate Judge.

So far as the arrears of maintenance are concerned, the compromise itself expressly provides for the passing of an executable decree. The objection about the decree not being executable on the ground that it created a charge on the estate is untenable. The two cases *Aubhoyessury Dabee* v. *Gauri Shanker*(1) and *Matangini* v. *Choonetmoney*(2) relied upon by the appellant were decided before the passing of the Civil Procedure Code of 1908. Since then section 99 of the Transfer of Property Act, which required the institution of a separate suit to enforce a charge, has been transferred with some modification to Order XXXIV of the Civil Procedure Code and as a result a decree creating a charge is

(1) (1895) I. L. R. 22 Cal. 859.
(2) (1895) I. L. R. 22 Cal. 903.

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now clearly executable. The change in law was pointed out in Calcutta in the case of *Tarak Nath Adhikari* v. *Bhubaneshwar Mitra*(1), and in this Court in *Raja Braja Sunder Deb* v. *Sarat Kumari*(2), a case arising out of proceedings in execution of a decree which awarded maintenance and charged it on an estate. Sharifuddin and Chapman, JJ. held that if a charge is created by the decree itself, no fresh suit is necessary for enforcing it and that it can be enforced by putting the decree into execution. Apart from this, the case of *Matangini Dassee* v. *Choonetmoney Dassee*(3) was based upon the consideration that there was a deed creating the charge as directed by the first decree, and that deed was the basis of the second suit. That such a decree can be enforced in execution has been clearly explained by Sir Dinshaw Mulla in his commentary on the Civil Procedure Code, 9th edition, page 938, under Order XXXIV, rule 14, where the learned commentator has indicated that in order to come within the prohibition of that rule the mortgage or charge for which a suit is necessary should be prior to the decree. The plain meaning of Order XXXIV, rule 14, and authority alike leave no doubt that so far as the decree for the past maintenance is concerned, it can be executed and that no separate suit will be necessary for enforcing the charge. As regards the future maintenance and the provision for house and conveyance, the compromise does not expressly say that the liability of the defendant in these respects can be enforced in the execution department, but there is nothing to prevent the Court from passing an executable decree for them as well. A 'decree' has been defined in the Civil Procedure Code as

> "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of parties with regard to all or any of the matters in controversy in suit."

(1) (1914) I. L. R. 42 Cal. 780.
(2) (1916) 2 Pat. L. J. 55.
(3) (1895) I. L. R. 22 Cal. 908.

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Now this determination may be arrived in one of two ways: either, after contest, by the Court coming to its own conclusion on the materials placed before it, or on the parties themselves agreeing to settle their difference on certain lines and asking the Court to adjudicate their respective rights and liabilities in accordance with that settlement. In both cases the Court has to pass orders. In one case the order is based on the decision of the Court itself, and in the other the Court, after being informed of the agreement of the parties, makes a formal adjudication on the basis of the agreement. In both cases the Court will generally order the parties to carry out their respective obligations. An adjudication may, in some cases, be purely declaratory; this will happen if a declaration be sufficient to give the party having a right all the relief he is in need of. If, on the other hand, a declaration is not enough, the Court will order the party, who has infringed the right of another, to restore that right to the rightful party as found by the Court, or as admitted by the other party. What the parties do in a compromise of a suit is to adjust their rights and liabilities outside the Court, and then come and ask the Court to recognize those rights and liabilities and pass its formal expression of adjudication accordingly. This is what is provided in Order XXIII, rule 3. The Court is required to record the compromise, which thus really takes the place of a judgment in a contested suit. In the present case the defendants have by the compromise accepted a liability to pay maintenance at a certain rate and to provide a house and a conveyance. The actual words of the compromise are:

> "The defendants nos. 1 and 2 agree to pay and will pay to the plaintiff till her death Rs. 1,000 per month for her maintenance from the beginning of November, etc., etc. The said maintenance will be a charge on the estate of Babu Ugrah Mohan Thakur aforesaid."

Similar is the term about the house and the conveyance, except that there is no mention of a charge. Here

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is an admission of liabilities and a promise of the defendants to discharge them, and the parties have asked the Court to pass a decree on the basis of them. The plaintiff in her suit asked the Court, in case her claim to the estate failed, to adjudicate the amount of maintenance and to order the defendant to pay it. The plaintiff and defendants have agreed that the amount shall be Rs. 1,000 per month. It cannot be seriously maintained and nothing has been urged before us to show, that had the case been decided on contest and had the Court fixed the amount of maintenance payable to the plaintiff, the Court would not have been competent to order the defendants to pay the amount, or that such an order would not have been enforceable. What difference can it make if instead of the Court determining the amount of maintenance to be paid to the plaintiff, the amount is settled by the parties themselves? We are, therefore, of opinion that on this compromise the Court below was not incompetent to pass an executable decree. No doubt a practice has grown up according to which when a suit is compromised, a formal decree is not drawn up specifying the orders of the Court but the decree drawn up says that the suit is decreed or dismissed (as the case may be) in the terms of the compromise and the petition of compromise is attached to the decree as an annexure. Nevertheless as soon as the petition of compromise is adopted as a part of the decree it passes from the domain of mere contracts into that of decrees and the promise of a party to pay is converted into an order of the Court to that party to pay. We may here refer to Seton on Judgments and Orders, volume I, page 124, where the learned author gives the form of a judgment on consent, thus:

> "And the plaintiff and the defendant by their Counsel (or solicitors) consenting to this judgment (or order) this Court doth order....."

Seton further notes "that a compromise ought not to be introduced into the body of the order but either

identified or scheduled. It is, however, common practice to insert undertakings in the body of the order and in the event of breach the undertaking may be enforced by writ of attachment, whereas if it forms part of the agreement set forth in the schedule, proceedings in the nature of specific performance might be necessary." This, of course, is the practice in England. In India it has been held that a compromise attached to a formal decree has the same effect as if it were embodied in the decree itself. Order XXIII, rule 3, imperatively lays down that the Court after recording the compromise shall pass a decree in accordance therewith, and though the decree actually drawn up in this case is not strictly formal, the compromise petition having been simply attached to the decree, we propose while dealing with the connected Civil Revision no. 483 of 1932 to order a fresh and formal decree to be drawn up as required by law and as indicated by Seton.

That an executable decree can be passed for future maintenance, that is a decree entitling the decree-holder to realise such maintenance in execution proceedings admits of no doubt. Such a decree was held to be executable by a Full Bench of the Calcutta High Court in the case of *Ashutosh Bannerjee* v. *Lukhimoni Debya*(1) and was as a matter of fact passed by their Lordships of the Privy Council in *Ekradeshwar Singh* v. *Janeshwari Bahusain*(2) though the precise question now raised by the appellant was not directly decided there. Assuming for a moment that such a decree cannot be passed under the law on the ground that the cause of action for future maintenance has not yet arisen, as the learned Judges who referred the case to the Full Bench in *Ashutosh Bannerjee* v. *Lukhimoni Debya*(1) were inclined to hold, the plaintiff can again have no grievance whatsoever; for on such an assumption the only decree possible would be a declaratory

(1) (1891) I. L. R. 19 Cal. 139, F. B.
(2) (1914) I. L. R. 42 Cal. 582, P. C.

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one and section 42 of the Specific Relief Act could thus have no application. It was, however, contended that though such a decree can be passed under the law, it cannot be passed in the present case, as it has not been provided for in the compromise and it will be going beyond the terms of the compromise to pass an executable decree. We, however, do not think so. In our opinion, as we have already indicated, an order passed under Order XXIII, rule 3, to a party to perform an obligation, which he has himself undertaken, is not an interference with the compromise. The parties have asked the Court to pass a decree according to the terms of the compromise, and in doing so the Court has to add its command to the undertakings of the parties.

Assuming, however, that the Court is precluded from passing an executable decree for future maintenance under the terms of the compromise, even then section 42 of the Specific Relief Act will not bar the passing of such a decree. The plaintiff in fact did sue for all the reliefs to which she was entitled to at the time. Therefore, in our opinion, the requirements of section 42 of the Specific Relief Act have been fully complied with. The Calcutta case of *Sarada Prosad Roy Chowdhury* v. *Rai Mohan Saha*(1) which has been cited for the appellant, must be treated as a decision on its own special facts. We agree that section 42 of the Specific Relief Act is intended to avoid a multiplicity of suits. The legislature wants that all the possible reliefs which a plaintiff is entitled to get must, except as otherwise provided, be included in one suit. but we see nothing in the law to prevent a plaintiff after he has brought a suit for all the reliefs from contenting himself with a pure declaration if that be all that is necessary in the circumstances. Unlike the Calcutta case, we have here a case of a compromise, and Order XXIII, rule 3, makes no distinction on the score of the nature of decree to be passed in the suit.

(1) (1924) 85 Ind. Cas. 629.

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Apart from this, in our opinion the plaintiff need not have sued for any relief, except a declaration, so far as the future maintenance is concerned. Future maintenance had not fallen due, and the plaintiff had no cause of action in respect of it. Though it has been held that an executable decree for future maintenance can be passed, it has nowhere been laid down that a plaintiff must sue for such a decree. If a plaintiff chooses to seek a declaration only for future maintenance for which the cause of action has not accrued, section 42 of the Specific Relief Act cannot stand in his way where the words " able to seek further relief " mean " able to seek " it on the date of the suit: *see Govinda* v. *Perumdevi*(1). If is obvious that the plaintiff cannot be said to have been able to seek the relief of realisation of the future maintenance, which had not fallen due till the date of the institution of the suit. Therefore, the plaintiff if she had so chosen could have sought a declaration of right regarding her future maintenance and for fixing its amount, without asking for an executable decree for it. We have, however, shown that an executable decree for future maintenance can be passed on the basis of the compromise before us, and in our opinion the learned Subordinate Judge was right in passing such a decree, and we propose, in disposing of the revisional application, to see that the decree is made clear and formal.

Can the recording of this compromise be refused on the ground that its terms are not specifically enforceable?

The contention on behalf of the appellant has been that the defendant's application to record the compromise was on the same footing as if it were a suit for specific performance of a contract, that a proceeding under Order XXIII, rule 3, is a speedy remedy alternative to such a suit, that the terms of the compromise, at any rate several of them, are not

(1) (1888) I. L. R. 12 Mad. 186.

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specifically enforceable and two of them not enforceable at all, and that, therefore, the compromise cannot be recorded, as an order for recording a compromise means the passing of a decree, which in effect would be a decree for the specific performance of a contract. It is urged that the obligation of the defendant to provide a house and a conveyance for the plaintiff cannot be specifically enforced. The payment of the future maintenance on the due date (the first of each month) cannot also be specifically enforced nor the payment of the past maintenance. There are, however, two terms which cannot be enforced at all, namely, the one contained in paragraph 6 of the petition that the defendant will be obedient to the plaintiff and look after her, and the provision in paragraph 3 that the interest on the arrears of maintenance will be spent by the plaintiff in consultation with Suraj Mohan on a scholarship fund and religious work. There must be mutuality in specific performance, and as the plaintiff could not have secured specific performance of these terms from the defendants, the defendants on their part cannot claim from the plaintiff specific performance of her part of the contract, namely, that she should get her other claims dismissed.

Now it may at once be conceded that the provision in Order XXIII, rule 3, for an inquiry about the fact and lawfulness of a compromise of a suit in the suit itself is a speedier alternative to a separate suit for specific performance of the contract to compromise the suit on certain terms. It has been laid down in Halsbury's Laws of England, volume XVI, Article 1096, page 540, with reference to a compromise in a suit between husband and wife, that "the Court will recognize a settlement of difference, and an agreement of compromise entered into is valid and may be made an order of the Court or may be enforced in the Chancery Division". Sanderson, C. J. in the case of *Sourendra Nath Mitra* v. *Tarubala Dasi*(1), while

(1) (1925) 29 Cal. W. N. 832, 835.

dealing with the application for leave to appeal to the Privy Council against the judgment of the Calcutta High Court, observed as follows :—

" An application to record an adjustment under Order XXIII, rule 3, is in some way a very special matter, because it is a matter as to which a party is allowed to stand upon and to enforce an agreement which was not in existence at the date of the suit. It is a method whereby for convenience a party is allowed to enforce what is really a new cause of action altogether and this is done, in order to avoid the necessity of abandoning one suit and starting another ".

Lord Halsbury in the case of *Neale* v. *Gordon Lennox*(1) already referred to above observed :

" The Court is asked for its assistance, and I entirely repudiate the technical distinction between what is called an application for specific performance and an order to be made that such and such thing should be done. The Court is asked for its assistance when this order is asked to be made to enforce that the trial of the cause should not go on ".

As a matter of fact, prior to the passing of the Civil Procedure Code of 1908 and when the corresponding section of the old Civil Procedure Code, viz., section 375 was in force, it was held in a Calcutta case that when a compromise was disputed the question could not be inquired into in the suit itself, and that the remedy of the party, who wanted to stand by it was to sue the repudiating party for specific performance of the contract; *see Hara Sundari Debi* v. *Kumar Dakheneshwar*(2), but this view was overruled by the Full Bench in *Bujodarlub Sinha* v. *Ram Nath Ghosh*(3). In the case of *Ruttonsey Lalji* v. *Poori Bai*(4), Scott, J. holding that a disputed compromise could be enquired into in the suit itself, observed :

(1) (1902) A. C. 465.
(2) (1885) I. L. R. 11 Cal. 250.
(3) (1897) I. L. R. 24 Cal. 908.
(4) (1882) I. L. R. 7 Bom. 304.

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" I think the legislature introduced this rule to meet the case where parties, having agreed together, subsequently fall out. It was devised as an alternative and more expeditious course than a separate suit for specific performance, which remedy still remains open to the parties ".

This observation of Scott, J. was quoted with approval in the case of *Karuppan* v. *Ramasami*,(1) and *Appasami* v. *Manikam*(2).

The fallacy, however, in the contention of the appellant is that it confuses a suit for the specific performance of the contract to compromise the suit in a particular way with a suit for the specific performance of the obligations mutually agreed to be performed after the disposal of the suit on such compromise. An example will make this clear. Suppose *A* institutes a suit against *B* for recovery of Rs. 1,000 on the basis of a loan, besides Rs. 500 as interest on that loan, the total claim being for Rs. 1,500. In the course of the suit *A* and *B* arrive at a compromise that *A* will accept Rs. 1,000 in full satisfaction of his claim and that this Rs. 1,000 will be payable three years after the date of the decree. After having agreed to this term *A* backs out of the agreement. Supposing the speedier remedy provided under Order XXIII, rule 3, were not available, *B* could have recourse to a suit against *A* for specific performance of the contract to compromise the suit on the terms agreed to, and if successful, he will get a decree compelling *A* to have the suit decreed on the terms agreed to by him though *A* would have no obligation to discharge after the decree in the first suit, but on the contrary *B* would be under an obligation to pay Rs. 1,000 to *A* after three years. No other remedy of specific performance would be either necessary or available to *B*. Suppose, on the other hand, that *A* stands by the compromise and *B* backs out of it, the suit which *A*, if he so likes, will institute against *B* for

(1) (1885) I. L. R. 8 Mad. 482.
(2) (1885) I. L. R. 9 Mad. 103.

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the specific performance of contract on the basis of the compromise will be that *B* be compelled to submit to a decree for Rs. 1,000 payable after three years, and not for the payment of Rs. 1,000 which has not according to the terms of the compromise fallen due up till then, being payable three years after the date of the decree. Therefore, in our opinion the analogy between an inquiry under Order XXIII, rule 3, and a suit for specific performance of contract does not get over the distinction between specific performance of the contract to compromise a pending suit and specific performance of the undertakings to be carried out by one party or the other after the decree in that suit. Specific performance of the contract to compromise the suit itself merely means compelling the party who backs out of the compromise to have the pending suit disposed of by a decree on the terms already agreed upon by the parties, but it does not mean the performance of obligations arising under this decree. This will be the nature of the suit if such a suit be still maintainable in spite of the fact that the law has provided a special procedure in the suit itself in order to avoid multiplicity of suits.

In this case the defendants have applied for the compromise to be recorded. They are in the position of a plaintiff, while the plaintiff is in the position of the defendant. The prayer of the defendants would, if the proceeding were framed in the terms of a suit, be that the plaintiff be specifically compelled (in the proceeding itself) to have the original suit disposed of on the terms agreed upon by the parties, while the defendants are ready and willing to submit to the decree which he agreed to have passed against him. No doubt, in a suit for specific performance of contract, mutuality is essential, and the Court will not pass a decree for the specific performance of a contract unless the plaintiff could also be compelled to specifically perform his part of the obligation. But in the present case, regarded as a case of specific performance, the obligation which the defendant

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undertook was to have a decree for past and future maintenance and for providing a house and conveyance passed against him in consideration of the plaintiff having her other claims in the suit dismissed. The Court, if there had been a suit for specific performance of the contract of compromise, would have been fully competent at the instance of either party to compel the other to have the original suit disposed of on the terms agreed to.

Now what Order XXIII, rule 3, requires is that the agreement or adjustment should be lawful. Lawful, in our opinion, means lawful within the meaning of the Contract Act; that is to say, the rule requires an agreement which is legally enforceable, but not necessarily one that is specifically enforceable. We are unable to accept the contention of the appellant that in order to enable the Court to record a compromise the terms, which are to be complied with after the decree, should be specifically enforceable under the Specific Relief Act. To hold this will mean the exclusion of a large number of cases from the purview of Order XXIII, rule 3. For instance, suits for realisation of money will not be compromisable, and parties will be precluded from settling their disputes about monetary liabilities by fixing amounts to be payable by one to another or by fixing instalments. All such suits will go outside this section, because obligations for payment of money though certainly enforceable are not specifically enforceable in the sense that a specific sum of money cannot be made payable like, say, a specific book, picture or article of furniture. If the terms settled by the parties be enforceable under the law, we do not see why the compromise should be held to be other than perfectly lawful. There is no reason, and we have no power, to import into Order XXIII, rule 3, restrictions which are not to be found there. If one of the parties agreed in a pending suit to do, after the decree, things which are not specifically enforceable, the Court will even then, in our opinion, have to

record the compromise—provided there is nothing unlawful in it—and to pass a decree. It is not the business of the Court to speculate on the difficulties that may arise at the time of execution. It will be for the executing Court to devise means and give suitable remedies in case the compromise decree is disobeyed. The Code of Civil Procedure contemplates the passing of a decree for specific performance of a contract which cannot be specifically enforced. Such a decree may not be passed on contest, but in our opinion can be passed with consent; and if the compromise be lawful, we do not see how the Court can refuse to record it and pass in accordance with it a decree which may contain terms that are not specifically enforceable. The difficulty of the execution in such cases has been provided for in the Code of Civil Procedure. Order XXI, rule 32, provides that where a party against whom a decree for specific performance of contract .....has been passed has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced..... by his detention in the civil prison or by the attachment of his property or by both. Let us give an example. Supposing *A* has brought a suit against *B*, claiming damages of Rs. 5,000 on account of *B's* failure to deliver 5,000 maunds of wheat of a certain quality as contracted by him. The parties compromise the suit; the claim of damages is given up, and *B* agrees to have a decree passed to the effect that he would deliver to *A* 5,000 maunds of wheat of a particular quality within six months at a certain rate. There is nothing in Order XXIII, rule 3, to prevent a decree being passed on this compromise, though it is obvious that the undertaking to deliver wheat of a particular kind is not specifically enforceable and though, had *A's* suit been for specific performance of the contract to deliver wheat, the Court would have refused specific performance.

Let us take another example of two countersuits. *B* enters into an agreement with *A* to repair a

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painting of *A* for a consideration of Rs. 1,000 and receives an advance of Rs. 200. This is a perfectly lawful agreement enforceable under the law. *B* does the work, but *A* is not satisfied and feeling that the painting has been spoiled, refuses to give *B* the balance of Rs. 800. Two suits are instituted: one by *A* against *B* for the damage alleged to have been caused to the painting and the other by *B* against *A* for recovery of Rs. 800. The parties compromise on the terms that *A* is to give up his claim for damages on *B*'s undertaking to repair the painting to the satisfaction of an artist, and that he is to consent to a decree in *B*'s suit. In pursuance of this compromise *A* lets a decree for Rs. 800 passed against himself. Thereafter *B* backs out of the compromise. Supposing that the special remedy provided under Order XXIII, rule 3, were not available, what would be the remedy of *A*? Can he not sue *B* for specific performance of the contract in order to compel him to consent to a decree in *A's* suit on the terms agreed to by *B*? We are of opinion that he can, and the Court would compel *B* to specifically perform his part of the contract by consenting to or suffering a decree in *A's* suit to the effect that *B* will repair the painting to the satisfaction of the artist. Similarly, if *A* applies in his suit under Order XXIII, rule 3, under the mandatory provision of that section, the compromise will have to be recorded provided, of course, that the Court is satisfied about the factum of the compromise. The obvious difference between a decree on contest and one by consent is that while in the one the Court is debarred from passing a decree for specific performance of a contract which requires the personal skill of the defendants, such a decree must be passed if that be the way the parties agree to compromise the suit. On passing an order of recording a compromise under Order XXIII, rule 3, the Court is to pass a decree not for the specific performance of the original contract—the contract to repair the painting—nor of the future undertaking to repair to the satisfaction of *X*, but for the specific

performance of the new contract to have the suit disposed of in a particular manner—a contract which did not exist at the time of institution of the suit as was pointed out by Sanderson, C.J. in *Tarubala's*(1) case. And this decree in the suit itself follows as a matter of course.

The analogy between a suit for specific performance of a contract and a proceeding under Order XXIII, rule 3, should not be carried too far. There is one obvious difference between them; while the Specific Relief Act gives the Court discretion to refuse specific performance of a contract and has specified cases in which specific performance of a contract cannot be granted, no such exception has been made in Order XXIII, rule 3, of the Civil Procedure Code under which it is obligatory upon the Court to record a compromise if the Court is satisfied that the parties have settled their disputes by a lawful compromise. In the one case the matter is left to the discretion of the Court, but in the other no such discretion has been left to the Court, as was pointed out by their Lordships of the Privy Council in *Tarubala's*(2) case. That there is this difference between granting a decree for specific performance of a contract and recording a compromise was pointed out by Telang, J. in the case of *Gokhul Das Ballabh Das Manufg. Company* v. *James Scott*(3), and we respectfully agree in the views expressed by that distinguished Judge. It will be observed that while the judgment was taken to be one by Mr. Justice Telang only, his colleague Mr. Justice Farran also agreed in those views. A question was raised in that case whether a compromise can be recorded under the provision of section 375 of the old Civil Procedure Code if one party repudiated it. The Calcutta High Court had already held in *Hara Sundari Debi* v. *Kumar Dakhineswar*(4), a case already

(1) (1925) 29 Cal. W. N. 832.
(2) (1930) I. L. R. 57 Cal. 1311, P. C.
(3) (1891) I. L. R. 16 Bom. 202.
(4) (1885) I. L. R. 11 Cal. 250.

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referred to, that the enquiry could not be conducted in the suit and that a separate suit was necessary. The Madras High Court had taken another view, namely, that such an enquiry could be held even under section 375 of the old Civil Procedure Code. The Calcutta Full Bench decision in *Bujodarlub Sinha* v. *Ram Nath Ghosh*(1) was not pronounced till then. It was contended before Telang and Farran, JJ. that while the power of the Court to grant specific relief was discretionary, the provision of section 375 was mandatory, and that the legislature could not have contemplated an enquiry as to the fact of compromise and its lawfulness in a summary enquiry in the suit itself. Telang, J. observed :—

" The other point raised is that, whereas if a suit was brought for the specific performance of such an agreement as is referred to in section 375 (i.e. the agreement to compromise the suit), the Court might have a discretion to refuse the specific performance, the Court would have no such discretion in the summary proceedings under section 375. This again is, doubtless, correct, but it is difficult to see precisely what effect it should have on the construction of the section. Supposing the section is construed in the limited sense which Mr. Jardine contends for, (namely, that a compromise can only be recorded if both parties agree to its being so done,) the same argument will still be not without force. For, in the case of an agreement which the parties are still willing to carry out at the time when the application is made to the Court, a decree according to that agreement may be a decree for the specific performance of an agreement, which, under the general principles of the Code and the law embodied in the Specific Relief Act, is not enforceable by that mode of relief. The argument under consideration, therefore, applies, whichever of the two rival constructions is adopted, and cannot be treated as affording any special objection against

(1) (1897) I. L. R. 24 Cal. 908, F. B.

either. Further, the tendency of the decisions in England, and of the changes introduced under the Judicature Acts seems, as Mr. Justice Scott pointed out, to be unfavourable to this agreement. (The portions within brackets are ours)."

He then referred to the case of *Eden* v. *Naish*(1) and after quoting the remarks of Sir C. Hall, V. C. proceeded :—

"It is true, that the English cases arose under a system, which allows the Court a discretion to refer the parties to a regular suit; and for that and other reasons they are not strictly speaking authorities under section 375, if that section is construed as being absolutely imperative. Still assuming the section to be imperative, the tendency of English legal opinion is not altogether without weight here. For the Indian Legislature would appear to have gone a step or two further in the same direction, for the purpose of avoiding multiplicity of judicial proceedings in this matter..... There is, doubtless, some force in the argument adduced by the High Court of Calcutta [referring to *Hara Sundari Debi* v. *Kumar Dakhineswar*(2)] about the discretion which the Court had in a suit for specfic performance not being admissible under section 375."

He then discussed various arguments which could be advanced as to the difference in treatment between the specific performance of the agreement to compromise a suit when dealt with in the suit itself and a suit for specific performance of the contract, and referred to the case of *The Hero*(3), and then proceeded :

"These remarks seem to me very applicable in the present case, specially when it is remembered that the Specific Relief Act and the Civil Procedure Code were under consideration of the Legislature almost about the same time. But, however, that may be, and it is

(1) (1878) L. R. 7 Ch. D. 781.
(2) (1885) I. L. R. 11 Cal. 250.
(3) (1891) L. R. Pr. D. 204.

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not absolutely necessary to decide the point now, it is enough for the purposes of the present case to say, that I am not prepared to hold that the agreement under consideration ought to leave the Courts to put a different interpretation on the words of section 375 than that which has been above indicated."

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This was the view about the mandatory nature of the provisions of section 375 of the old Code taken by the Full Bench of the Calcutta High Court and of the Bombay and the Madras High Courts, it being unanimously held that the provisions of section 375 were mandatory and that no question of discretion in granting a decree for specific performance of contract arises when the decree is to be passed on consent. Now Order XXIII, rule 3, has been made very clear, by amending the section previously in force, and is mandatory as was pointed out by their Lordships of the Privy Council. The specific performance of the agreement to end the suit by a decree in accordance with a compromise is obviously different from specific performance of agreed acts to be performed after such decree, which the Court may or may not be in a position to supervise or enforce, but this does not prevent the passing of a decree according to the compromise. If after a compromise decree is passed, the consenting party disobeys the decree, the decree-holder has his remedy in Order XXI, rule 32, and, if in spite of his imprisonment in the civil prison or attachment of his property or both, the judgment-debtor still continues to disobey, the Court may order his property to be sold and award to the decree-holder such compensation as it thinks fit and shall pay the balance to the judgment-debtor on his application. For breach of a contract not specifically enforceable the aggrieved party is entitled not to specific performance but to damages. Similarly, the Civil Procedure Code provides a remedy in case a decree for specific performance of a contract is passed but cannot be specifically enforced; damages may in such a case be granted to

the aggrieved party even after the decree has been passed.

Reliance has been placed on behalf of the appellant upon the case of *Blackett* v. *Bates*(1). The facts there were that under the award of an arbitrator defendant was to execute to the plaintiff a lease of the right to use such part of a certain railway made by the plaintiff as lay upon the land of the defendant, the lease to be in the words set out in the award; and the defendant was to have the right of running carriages over the whole line on certain terms and of requiring the plaintiff to supply engine power, while the plaintiff was to have an engine on the railway and during the term to keep the whole railway in good repair. The lease did not provide for these privileges awarded to the defendant. The plaintiff first applied to have the award set aside, but his application was refused. Then he filed his bill for specific performance of the award. This was granted by the trial Court, but was refused on appeal. Lord Cranworth, L.C. observed :

" The rights of the parties in respect of specific performance are the same as if the award had been simply an agreement between them. Had it been an agreement, would there have been a case for specific performance? I think not, and for this short and simple reason—that the Court does not grant specific performance unless it can give full relief to both parties. Here the plaintiff gets at once what he seeks —the lease; but the defendant cannot get what he is entitled to, for his right is not a right to something which can be performed at once, but a right to enforce the performance by the plaintiff of daily duties during the whole term of the lease. The Court has no means of enforcing the performance of these duties, all it can do is to punish the plaintiff by imprisonment or fine, if he does not perform them."

(1) (1865) L. R. 1 Ch. A. C. 117.

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This case has no bearing upon the one before us. First of all there was no mutuality of obligations in the award; while it imposed the execution of a lease upon the defendant, no such obligation was imposed upon the plaintiff. Secondly, an award stands upon a different footing from a compromise in a pending suit at any rate under our law. Even in England a compromise is specifically enforced. The Court will specifically enforce a private compromise of rights provided there is a valid contract between the parties. Under the Judicature Act, sections 5 and 24, the Court will also enforce by staying proceedings a compromise for putting an end to litigation: (White and Tudor, 8th edition, page 253). As we have said, when a Court records a compromise it enforces not the terms agreed upon by the parties to be carried out in future but only the agreement to have the suit disposed of. And thirdly, the plaintiff's prayer in that suit was refused in exercise of a discretion which is left to the Court in a suit for specific performance of contract, while the recording of a compromise is mandatory under our Code, as we have already pointed out. Apart from this the obligation of the plaintiff in that case could not at all be specifically enforced for obvious reasons. This is not the case here. In this case, excepting two terms, namely, about Suraj Mohan being obedient to the lady and to look after her and about the expenditure of interest on the arrears of maintenance on scholarships and religious works with the consultation of defendant no. 2, there is no other term in the compromise which cannot be lawfully enforced. The future maintenance can be definitely secured to her even by independent means apart from its being made a charge on the estate. No doubt, the punctuality of payment cannot be enforced, as no decree for payment of money can directly ensure that the defendant judgment-debtor be punctual, but any irregularity in the payment can always be remedied in suitable modes in the execution department and the plaintiff can be amply compensated if the payment of

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her future maintenance is delayed, or default is made in the payment of the instalments of the arrear maintenance or the interest on it. The provision for a house and a conveyance can very easily be secured. If the defendant fails to provide a suitable house or a conveyance, the executing Court may have them found by a commissioner appointed by the Court at the cost of the defendant; or, as a last resort, it may allow the plaintiff to arrange for these things herself and make the defendant liable for the cost.

It is now necessary to refer to a decision which has been relied upon by the appellant to support the contention that a compromise can only be recorded if its terms are specifically enforceable. This is the case of *Saiyid Mehdi Ali Khan* v. *Chaudhuri Ghanshiam Singh*(1). The facts of the case were that the respondent Ghanshiam had mortgaged two villages to the appellant Mehdi Ali Khan, and the latter instituted a suit to enforce his security. One Bharat Singh claiming to be an adopted son of Ghanshiam intervened in that suit. His position as an adopted son of Ghanshiam was disputed by Mehdi Ali Khan. Bharat's application was rejected, and he instituted a separate suit, impleading Mehdi Ali Khan, some other mortgagees of Ghanshiam and Ghanshiam himself. This suit was compromised, and this compromise was the subject-matter of dispute before the Privy Council. The compromise was to the effect that Ghanshiam would sell 15 biswas of land to Mehdi Ali Khan in full discharge of his dues and that Mehdi Ali Khan would bear the expenses of the sale and pay Rs. 5,000 to Ghanshiam for part payment to another mortgagee of his, one Gokhul Chand, and that Ghanshiam would see that these 15 biswas are transferred to Mehdi Ali Khan free of Gokhul Chand's charge. Bharat agreed to release these 15 biswas from his claim and to witness the deed. It was also agreed that the sale deed would be written, signed by the

(1) (1927) 46 Cal. L. J. 209, P. C.

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parties and witnesses and registered by the 11th of November, 1921, and an agreement would be drawn up and registered by the parties and partition lots would be drawn up by 31st December, 1921. Then there were certain terms to be embodied in the deed of sale. Lord Blanesburgh in delivering the judgment of their Lordships in that case observed as follows :—

"Before their Lordships the question mainly argued was that the compromise was not a complete and final settlement of the suit so far as the appellant was concerned : that its terms were not of a character of which specific performance could be granted, and, less strongly, that it was not, *ab initio*, binding upon the son, the respondent Kunwar Bharat.

Their Lordships have been unable to accept any of these contentions. They are in full accord with the learned Judges of the High Court as to the authority of Ghanshiam to bind Kunwar Bharat to the compromise in respect of his interest in the property, and in their judgment the terms agreed to are such as to be susceptible in every detail to an effective order in the nature of specific performance against any party to the compromise who seeks to escape from his obligations thereunder".

This case is no authority for the proposition that a compromise cannot be recorded unless the terms are specifically enforceable. The effective order is spoken of as an order "in the nature of specific performance," and not an order of "specific performance". In fact a number of terms in that compromise were not specifically enforceable, such as the term about Bharat witnessing the deed, or releasing the claim etc. or that things would be done, by a certain date. In the case before us every material obligation which the defendant has undertaken can be enforced against him and every advantage gained by the plaintiff can be suitably secured to her.

We now proceed to consider the position created by the compromise containing two provisions, which

we hold to be unenforceable, namely, about Suraj Mohan being obedient and looking after the plaintiff and about the expenditure of the interest on the arrears of maintenance over scholarships and religious works in consultation with the defendant. It was also conceded by the respondents that none of these can be enforced. They are far too vague and general to be capable of enforcement in any manner.

Regarding the first of these provisions, as we have already said, it was not an integral part of the contract, but was merely put down to produce domestic happiness, and is severable from the rest of the contract. Leake on Contract (6th edition, page 571) says that

"Where a contract contains several promises, or a promise to do several matters, some of which are illegal, a promise which can be separated from the illegality may be valid. 'The general rule is that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good'. So a bond may be good, though the condition is good in part and illegal in part."

This was the view taken by the Calcutta High Court in the case of *Punnoo Bibi* v. *Fyez Bakhsh*(1). The defendant, a Muhammadan husband, executed a kabinamah in favour of his wife, by which he agreed among other things that he would maintain her and make over to her whatever money he should earn; that he would never exercise any violence upon her, that he would not take her away from home, that it should not be within his power to marry or make any nikah without her permission, that he would do nothing without her permission, etc., etc. The plaintiff sued her husband to recover from him all

(1) (1874) 15 Beng. L. R. 5 (App.).

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his earnings amounting to Rs. 565. The trial Court decreed the suit. The lower appellate Court dismissed it. On second appeal the High Court held that although some part of the agreement might be illegal as being contrary to public policy and therefore void, yet that part which was legal could be enforced. The Court treated the suit as one to enforce that part only of the contract which was legal. Couch, C. J. said that the section of the Contract Act applicable to the case was 57. The above considerations equally apply to the conditions about the expenditure of the interest of the arrears of maintenance on scholarships and religious works. The condition is to our mind a recommendation to the lady which she may or may not accept. Mr. P. R. Das, who appeared for the Savis and Mr. Ghose who appeared for defendant no. 2, expressly stated before us that the defendants do not want to enforce this.

Fry in his standard book on Specific Performance, Article 346, says that the uncertainty of description of the subject-matter may be got over by the election of one party to the contract where the effect of the contract is to give such a right of election. In this case there is an uncertainty about the object of the expenditure, namely, religious work (dharam) and there is also uncertainty as to the consequence of the lady not accepting the advice given by defendant no. 2. Defendant no. 2 now elects not to insist upon this condition. The condition was a restriction upon the free right of the plaintiff to spend the amount of interest in any way she liked. The condition was in favour of defendant No. 2, and he elects to abandon it. The rest of the contract is perfectly valid. Reliance has been placed by the appellant on the case of *Sarbesh Chandra Basu* v. *Khetra Pal Singh*(1) where the question was the setting aside of a consent decree, a part of which was obviously illegal. Mookerjee, J. said :

(1) (1910) 11 Cal. L. J. 346.

"It may be observed that there is authority for the proposition, *Price* v. *Griffiths*(1), that where an agreement to grant a lease of an entire property cannot be enforced as to the whole, it will not necessarily be enforced as to a share, because as Knight Bruce, L. J. puts it, a lease of an undivided moiety may be a very different thing from a lease of the whole".

This case has no application to the present one, because the illegal severable part is in no way connected with the legal part of the contract.

Here, as we have said, everyone of the terms entered into by the defendant in favour of the plaintiff is enforceable. The two unenforceable terms are not an integral, unseverable part of the compromise, and therefore the compromise is lawful, and under the mandatory provisions of the law must be recorded.

Does the contract to compromise stand rescinded on account of the defendants not having performed their part of the obligation under it?

It is contended that the proceeding being analogous to a suit for specific performance of a contract, the defendant is not entitled to have the compromise recorded as he himself failed to perform his part of the obligation, viz., that he did not continue paying the plaintiff her maintenance of Rs. 1,000 per month, that he failed to provide a suitable house at a place of pilgrimage, and a conveyance, and that he made defaults in payment of the instalments of the arrears of maintenance and the interest. It is further argued that, though the plaintiff was repudiating the compromise and opposing the defendant's application to have it recorded, she was willing and ready without prejudice to her case to receive the future and past maintenance allowance and made several attempts to obtain payment. These attempts were resisted by the defendant

(1) (1851) 1 De G. M. & G. 80.

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who maintained that as long as the plaintiff was fighting the case, she was not entitled to get anything under the terms of the compromise. This attitude of the defendant, it is urged, amounts to his refusal to perform his part of the contract, and, therefore, the contract stands rescinded. In short, the argument is that in spite of the plaintiff's repudiation of the compromise, the defendant in order to be entitled to specific performance of the compromise, ought to have carried out what he had promised, or at least made an unconditional offer to do so. The offer, if any, was conditional on the plaintiff's not opposing the recording of the compromise, and therefore does not save the defendant.

This argument, again suffers from the same fallacy as the one which we have just dealt with on the last topic, in that it confuses the specific performance of the contract to compromise the suit with the specific performance of the terms of the compromise itself which were to be performed after the disposal of the suit and in accordance with the compromise decree to be passed in the suit. The contract between the plaintiff and the defendant was that on her part the plaintiff would abandon her suit in respect of the estate, gardens, jewellery, etc., viz., all claims except to the maintenance agreed upon, and that on his part the defendant in return for the plaintiff doing so would submit to a decree of the Court making him liable for past maintenance to be paid in certain instalments with interest, and for future maintenance at the rate of Rs. 1,000 per month, besides paying Rs. 17,000 in cash towards the past maintenance and providing a house and conveyance for her. The promise of the defendant to suffer to a decree on certain terms was the consideration for the promise of the plaintiff to have the rest of her suit dismissed, and vice versa. It is true that a party is not entitled to specific performance of a contract unless he shows that he has all along been and is ready and willing to perform his

part of the contract. If the proceeding under Order XXIII, rule 3, be regarded in the light of a suit by the defendant for specific performance of a contract, what the defendant seeks is that the plaintiff should be compelled to let her suit be dismissed in respect of other claims and that he is ready and willing to submit to a decree to be passed by the Court against him in terms of the compromise. It was not, in our opinion, at all necessary for the defendant to carry out the obligations that were to arise only after the passing of the compromise decree, when the plaintiff herself was resisting the passing of the decree.

It is an admitted fact that after the 7th April the defendant did not perform the obligations which were to arise under the compromise decree. Unsuccessful attempts were made by the plaintiff to force the defendant to carry out those obligations, while she herself was repudiating the compromise. In our opinion, the defendant was entirely justified in resisting these attempts.

We have shown that at the time of the compromise the defendant paid to the plaintiff a sum of Rs. 17,000 out of Rs. 1,17,000 found due to her at the rate of Rs. 1,000 per month from the time of her husband's death till the end of October, 1924. He further paid another Rs. 3,000 towards the future maintenance of November, December, 1924, and January, 1925, for which the plaintiff granted him a receipt. After that, the defendant paid to the plaintiff a sum of Rs. 1,500 at Allahabad, which, according to her, consisted of Rs. 500 for her expenses and another Rs. 1,000 for the *barkhi-sradh* of her husband. We have, however, held that this story of the plaintiff is untrue and that the entire amount of Rs. 1,500 was paid to her towards her maintenance, as deposed to by Suraj Mohan. This shows that her maintenance up to the middle of March was paid well in time. We have also held that the defendant spent a sum of Rs. 3,000 and odd on the plaintiff's account which must be set off against her

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maintenance allowance. Therefore, on the 7th April, 1925, when the plaintiff filed her application under section 151 to set aside the compromise decree, nothing was due to her on account of maintenance; in fact, her maintenance was overpaid and the instalments of the past maintenance as fixed by the compromise had not till then fallen due, nor had any interest become payable by that time. After the filing of the application under section 151, the defendant stopped payment of the maintenance. The plaintiff made attempts to secure payment of the monthly maintenance agreed upon, while she was prosecuting an application under section 151 of the Civil Procedure Code to avoid the very compromise under which she was to get the maintenance allowance. The defendant resisted this attempt and was successful. When the compromise decree passed on the 26th November, 1924, was set aside by this Court on the 8th of June, 1926, and the defendant formally applied, on the 16th of August, 1926, to have the compromise recorded, and the case became sub judice once more, the Court ordered the defendant to pay to the plaintiff allowance at the old rate of Rs. 150 together with another Rs. 50 as house-rent, and this amount the plaintiff continued to get till the order appealed against was passed. Since then, the defendant has been depositing Rs. 1,000 every month in Court, out of which Rs. 500 per month is being paid under provincial orders to the plaintiff as her maintenance. Under a later order of this Court the plaintiff has also been getting Rs. 200 as house-rent, and Rs. 100 for conveyance, for which separate deposits are being made by the defendant. Out of the monies deposited, certain sums have been allowed to the plaintiff for the purpose of this litigation and for her husband's sradh. Therefore, as we have said, it cannot be disputed that after the 7th of April, when the plaintiff filed her application under section 151 repudiating the compromise, the defendant, though always ready and willing to submit to a decree and then carry out the terms of the decree, has not been

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carrying out the terms of the disputed decree which itself was set aside on the 8th June, 1926. The defendant has always maintained that so long as the plaintiff was attempting to have the compromise revoked, she was not entitled to get the benefits of the compromise. The point, therefore, is, has the defendant forfeited his right to have the compromise recorded? In our opinion, he has not. As we have already said more than once, there is a distinction between the promise of the defendant to submit to a decree and the promise to carry out the terms of that decree when passed. The immediate consideration for the compromise between the plaintiff and the defendant was, as we have said, that the plaintiff agreed to abandon her suit in respect of all claims except that of maintenance and that in consideration of this the defendant consented to let a decree be passed against him in terms of the compromise. The defendant was always ready and willing to perform this promise, which was the consideration for the plaintiff's promise.

Section 38 of the Indian Contract Act, which has been relied upon by the appellant, is of no help to her, but is really in favour of the defendant. It says that

"Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions:—

(1) it must be unconditional;

(2) it must be made at a proper time and place....."

In this case the promisor was the defendant. He promised to the plaintiff to submit to a decree, if, in her turn, she let her claims, other than that for maintenance, be dismissed. There was always an offer by the defendant to perform this promise, and his right under the contract subsists. The contract was completed on the 25th of November, 1924. On

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the next date, he paid the courtfees on behalf of the plaintiff (the plaintiff's suit having been instituted in forma pauperis) in order to enable the Court to pass the decree against him. When, on the 7th of April, the plaintiff applied to have the decree set aside, the defendant resisted her attempt. When the plaintiff was unsuccessful in the Court below and came up to the High Court, the defendant resisted her appeal, and since the decree was set aside, he has all along been fighting to have a decree passed against him in terms of the compromise. Nothing more could be done by the defendant.

Sir Sultan Ahmed further relied upon section 39 of the Indian Contract Act. This section says that

> "When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance."

Again, this section helps the defendant. Regarding the part to be performed by the defendant, he was the promisor and the plaintiff the promisee. Sir Sultan Ahmed argued that on account of the defendant having refused to perform his part of the contract, the promisee-plaintiff did put an end to the contract; but, as we have shewn, there was no refusal on the part of the defendant to carry out his part of the promise, viz., to have a decree according to the compromise passed against him. The default is by the plaintiff in performing her part of the promise, and it is the defendant and not the plaintiff that is entitled to put an end to the contract.

Section 54 of the Indian Contract Act is another section relied upon by the appellant. It runs:

> "When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed, till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract."

This section, in our opinion, is in favour of the defendant. There were reciprocal promises. Even if the promise to compromise be extended to the performance by the defendant of the obligations that could only arise out of a compromise decree to be passed against him, there was nothing until the decree was passed to require him to fulfil those obligations. The promise of the defendant to pay the maintenance of Rs. 1,000 etc. was dependent upon the dismissal of the plaintiff's suit in respect of all her claims other than those for maintenance etc., as provided in the compromise and on the passing of a decree for maintenance etc. against him. The plaintiff being the promisee could not claim the performance of the obligations of the defendant till she performed her part of the contract by abandoning her other claims and obtaining a decree against the defendant. Therefore, the promisor of the second part, viz., the plaintiff, having failed to perform her part, could not claim performance of the promise of the defendant. This section does not show that the contract would come to an end. The defaulting party certainly cannot insist upon the performance of the promise by the other party; but, nevertheless, the other party can enforce the contract against the defaulting party.

It is really unnecessary to refer to the cases relied upon by the appellant, as the law seems to us to be perfectly clear under the various sections of the Contract Act. Those cases lay down that when a party is in default, he cannot sue for specific performance of contract; but in this case, as we have shown above, there has been no default on the part of the defendant. He was all along not only ready and willing, but anxious to submit to a decree; and, in fact, the essence of the whole of the present litigation is that while the defendant wants a decree against him in terms of the compromise, the plaintiff wants to repudiate the compromise. Apart from this, though it is not material for the purpose of this case,

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it is clear that up to the 7th of April, when the plaintiff filed her application repudiating the compromise, the defendant was not in default but discharged his obligations under the decree.

We would, however, like to refer to two cases relied upon by the plaintiff. One of them is *Ardeshir Mama* v. *Flora Sassoon*(1). There the defendant agreed to sell a certain house on Malabar Hill in Bombay to the plaintiff. The promise was not performed. The plaintiff sued for specific performance but later on abandoned his claim and pressed for damages only. The suit was dismissed. The plaintiff appealed to the Privy Council, and their Lordships held as follows:

"Where the injured party sued at law for a breach, going, as in the present case, to the root of the contract, he thereby elected to treat the contract as at an end and himself as discharged from its obligations. No further performance by him was either contemplated or had to be tendered. In a suit for specific performance on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness, and willingness from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it inevitable dismissal of the suit."

What their Lordships have held is that there must be continuous willingness and readiness on the plaintiff's part, from the date of the contract to the time of the hearing, to perform his part of the contract. Here, as we have said, the whole endeavour of the defendant has been to have a consent decree passed against himself. No better evidence of

(1) (1928) I. L. R. 52 Bom. 597, P. C.

continuous readiness and willingness could be available.

The next case relied upon by the appellant is *Sabapathy Pillay* v. *Vanmahalinga Pillay*(1). The facts of that case were rather complicated. It is enough to say that the litigation between the parties ended in a compromise under which there were various acts to be done by one party for the benefit of another. One of the acts was, that the plaintiff would deposit Rs. 13,000 in Court, whereupon the defendant would get a release of certain properties in which the plaintiff was interested. On that release, again, the plaintiff was to pay to the defendant a sum of Rs. 2,200. In other words, there was some act to be performed by the plaintiff, then some act to be performed by the defendant, and afterwards, there was a third act to be performed by the plaintiff, viz., the payment of Rs. 2,200 to the defendant. The plaintiff failed to perform his first obligation, viz., to deposit Rs. 13,000 in Court. Defendant, therefore, did not get the release of the plaintiff's property; but he executed the decree for the realization of the Rs. 2,200 from the plaintiff. The High Court disallowed this execution and held that to enable the defendant to succeed, there must be performance by him of his part of the contract. His offer to perform it, after the plaintiff deposited Rs. 13,000 was not an unconditional offer, and, therefore, it was held that the defendant could not realise the Rs. 2,200. It is obvious that this has absolutely no bearing on the present case. In that case, the payment of Rs. 2,200 by the plaintiff to the defendant was to be made on the defendant getting a release of his property, though that release also was dependent upon payment of Rs. 13,000 by the plaintiff. There were three promises, and the performance of the third promise by the plaintiff to the defendant was dependent upon the performance of the second promise by the

(1) (1914) I. L. R. 38 Mad. 959.

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defendant to the plaintiff. Here, there are only two sets of promises; one by the plaintiff to the defendant to let her suit for other claims be dismissed, and the other by the defendant to the plaintiff to let a decree be passed against himself for maintenance, etc. Both of them are to be simultaneously performed, and if one refuses to perform his part; as the plaintiff is doing in this case, the defendant can insist upon the plaintiff performing it, as long as he is ready and willing to perform his own part simultaneously with the part to be performed by the plaintiff. On the face of the clear section of the Indian Contract Act, which we have referred to, it is not very essential to refer to the various cases, some of which have been referred to by the learned Subordinate Judge. However, we would like to examine, in passing, *Ram Sahae Singh* v. *Dhunookdharee Singh*(1), where it was held that a promise entered into in a former suit, no fraud being alleged, is not annulled by non-performance by one of the parties. The other parties may sue for its enforcement, but they cannot revert to their original rights. The ratio decidendi of this case, apparently, is that the consideration for a compromise is that each party gets the benefit of having the case disposed of in a particular manner. This being done, the original dispute comes to an end, and, if any party fails to carry out his promise, the aggrieved party has his remedy under the compromise. The next decision relied upon by the learned Subordinate Judge is also, in our opinion, applicable to the case, viz., *Bishun Kumar Roy* v. *Maharaj Joy Harish Chander Dev Roy*(2), in which it was decided that a compromise must be treated as a new and positive contract, and a breach of its stipulations may be a ground for a suit for its enforcement but not for the revival of the original claim. It is obvious, therefore, that the plaintiff cannot go back to her original rights, and if there had been any default on the part of the

(1) (1864) 1 W. R. 266.
(2) (1865) 2 W. R. 209.

defendant, as we hold there was not, the plaintiff had her remedy by executing the decree which she had obtained; and as we have said, the defendant was entirely justified in not carrying out the terms of the decree as long as the decree itself was disputed by the plaintiff. In *Jones* v. *Barkley*(1) it was held that when something was to be performed by each of the parties at the same time, he who was ready and offered to perform his part but was discharged by the other may maintain an action against the other for not performing his part. Lord Mansfield said that the party must show that he was ready, but if the other stopped him on the ground of an intention not to perform his part, it was not necessary for the first party to go further and do a nugatory act.

In *Bayley Worthington and Cohen's Contract*, In re(2). Parker, J. said:

"Default must, I think, involve either not doing what you ought or doing what you ought not, having regard to your relations with the other parties concerned in the transaction; in other words, it involves the breach of some duty you owe to another or others. It refers to personal conduct and is not the same thing as breach of contract. If *A* contracts that *B* shall do something by a certain day, and *B* does not do it by the day named, *A* commits a breach of contract; but if the question arises whether the delay be due to *A's* default, *A's* personal conduct has to be considered, and the question will be whether he has committed some breach of his duty towards *B*."

Later on, the learned Judge observed: "In my opinion the repudiation of the contract by the purchaser relieved the vendors during such time as the purchaser insisted on repudiation from proceeding with their part of the bargain." Reliance was placed upon the case of *Jones* v. *Barkley*(1).

(1) (1781) 2 Doug. 685; 99 E. R. 434.

(2) (1909) L. R. 1 Ch. 648, 656.

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In another case, *British and Beningtons, Limited* v. *North-Western Cachar Tea Company, Limited*(1), Lord Atkinson followed *Jones* v. *Barkley*(2) and relied upon the remarks of Lord Mansfield we have quoted above. In the case before us, since the plaintiff applied to the Court to set the compromise decree aside, the defendant was not bound to continue to carry out the terms of that decree. In our opinion, however, the performance of the terms of the decree is absolutely immaterial for the purposes of this case.

We would like in this connection to deal with a contention advanced by Mr. Manuk, on behalf of the respondent, that as long as the plaintiff did not refund all the benefits which she had received under the compromise, she could not be permitted to resist the defendant's application for the recording of the compromise. No authority for this proposition has been placed before us. If the plaintiff's objection succeeds and the compromise is not recorded, the plaintiff certainly cannot be allowed to retain more than she would be legally entitled to irrespective of the compromise; but no law has been placed before us to show that she must refund the moneys received before she could be heard against the defendant's application. She wanted a trial of the suit on the merits. It was the defendant who raised the bar of the compromise to that trial, and it is for the defendant to establish that the bar exists, viz., that there has been a lawful compromise. There is no question of estoppel here nor of waiver. The plaintiff has no doubt continued to receive some maintenance allowance, but that is not on the basis of the compromise and is without prejudice to either party.

Is the compromise unfit to be recorded on account of all the parties to the suit not having joined in it?

It is contended that Naresh Mohan, Debi Prasad and Hardutti, the defendants in the suit, not having

(1) (1923) A. C. 48, 63.
(2) (1781) 2 Doug. 684; 99 E. R. 434.

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joined in the compromise, it is unlawful and cannot be recorded. No authority has been placed before us in support of this proposition. It is quite open to a plaintiff to compromise his suit with some of the defendants only, leaving the others altogether alone, or proceeding with the suit against them. For instance, if *A* brings a suit for money against *B* and *C* jointly, it is open to the plaintiff to compromise with *B* only and be satisfied with a decree against him and leave *C* alone. In this case Naresh Mohan was joined as defendant partly because as one of the reversioners of his uncle Ugrah Mohan he would be entitled, if the will were to be found invalid, to succeed jointly with Suraj Mohan to the estate after the lady's death, and partly because he was a co-sharer of the Kanchangarh estate which had taken the lease of the estate of Ugrah Mohan Thakur. Similarly, Debi Prasad was joined on account of his being the trustee of the Kanchangarh estate, and Hardutti was joined as a transferee from Savi, the executor of the estate, of one of the Calcutta houses. The compromise was between the plaintiff on the one hand and Savi and Suraj Mohan on the other. They were the parties mainly interested in contesting the plaintiff's suit. Having given up her claim to the estate and being satisfied with a maintenance for which the estate was sufficient security, the plaintiff need not have troubled about the other defendants. A compromise with some of the defendants cannot be illegal, even if a plaintiff wants to proceed with the suit against the other defendants if he still requires any relief against them; the suit against the remaining defendants would in such a case be disposed of on contest as against them only and by consent as against the defendants who are parties to the compromise. This is in accordance with the view taken in this Court in the case of *Abbhayanand Singh* v. *Sir Rameshwar Singh*(1) where some of the defendants compromised the suit and the Subordinate Judge deferred passing a decree against the consenting

(1) (1929) 12 Pat. L. T. 46.

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defendants and proceeded to hear the suit as against the others. In the present case no relief was claimed against the remaining defendants personally, and as against them all that she asked for was that she should get the entire estate free from the transfers made by the executor. If she gave up this claim, she had nothing further to do with the other defendants, and these latter were not in any way interested in the compromise. We do not find anything unlawful in the compromise because several defendants were no parties to it.

Is the compromise unlawful as it involves a transfer to the defendant of the shebaitship right of the plaintiff and is therefore void under the Hindu Law?

It is true that a shebaitship cannot be transferred for a consideration, and any such transfer is void under the Hindu law; but in the present case there has been no such transfer. The plaintiff was not the de facto shebait and, as we have already found, her right to the shebaitship was doubtful. She was suing to get the shebaitship from the defendant who was in possession of the office. There is no law which prevents a plaintiff from abandoning his suit for obtaining a shebaitship, though it may be that if he does so for personal gain, the arrangement between the parties may be successfully attacked in a proper proceeding. No law insists upon a plaintiff prosecuting his suit if he chooses to abandon it. In this case the plaintiff received no consideration for abandoning her claim to the shebaitship whatever its merits might have been. What she got was a maintenance past and future and a house and a conveyance. She was under the law entitled to them. There is nothing to show that in fixing the amount of maintenance the question of the shebaitship was so much referred to by the parties. As a matter of fact the shebaitship is not specifically mentioned in the petition itself. As was pointed out by Rankin, C. J. in the case of *Panchanan*

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validity of the compromise. The petitioner may as an heir of Ugrah Mohan Thakur administer the same."

This view of the learned Subordinate Judge is entirely wrong. Paragraph 8 of the petition of compromise clearly states

"That the plaintiff has given up all the claims made by her in the suit, save and except the claim for maintenance and the maintenance allowance in arrear, and the rent of the house according to the aforesaid term which has been settled. In future (the plaintiff) will not have and shall not lay any claim whatsoever."

Apart from this the defendant being in possession as a shebait, the plaintiff cannot take it without a decree of the Court. There is, however, no doubt that the plaintiff gave up all her claims in the suit, except the claim of maintenance and house allowance, etc., and we have held in the earlier part of the judgment that the compromise covered the whole suit. There was no reservation and, therefore, her claim in respect of the shebaitship must stand dismissed. Though the learned Subordinate Judge has not passed any decree about the shebaitship in favour of the plaintiff, his observations quoted above may lead to unnecessary trouble and litigation. In our opinion they are entirely unwarranted and erroneous and cannot be allowed to have any effect.

Is the compromise unlawful on account of uncertainty?

The uncertainty complained of is first of all about two terms of the compromise, namely, about Suraj Mohan being obedient to the lady and looking after her and about the spending of the interest in consultation with the defendant. We have already dealt with this point.

The other uncertainties pointed out are about the provision for the house and the conveyance, as to the parties to the compromise, and as to the estate of Ugrah Mohan on which the maintenance is to be a charge and from which the maintenance is to be paid. We will take these up one by one.

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It is contended that the house which the plaintiff is to get is not sufficiently described, nor the conveyance clearly specified, and that the executing Court will find difficulty in securing these things to the plaintiff if the defendant should make any default.

Now the provision for the house and conveyance is contained in paragraph 4 of the petition of compromise which runs thus:

"Defendants nos. 1 and 2 will arrange a house for the residence of the plaintiff according to her position at a monthly rent exceeding Rs. 100 and not exceeding Rs. 200 at Benares or some other place, and the payment of rent thereof shall rest with defendants nos. 1 and 2. Besides that they (defendants 1 and 2) will provide a carriage with horse for going to the Ganges for bathing and for darshan of deities (paying visits to idols). The rent of the house and the carriage expense will be in addition to Rs. 1,000 for the maintenance allowance."

We do not find any uncertainty in this. Our attention was drawn to section 29 of the Contract Act which says:

"Agreements the meaning of which is not certain or capable of being made certain are void."

Particular stress has been laid upon *Illustration* (*f*) to that section:

"*A* agrees to sell to *B* my white horse for Rs. 500 or Rs. 1,000. There is nothing to show which of the two prices is to be given. The agreement is void."

This illustration has, however, no application as the uncertainty is incapable of being removed in any manner. '*Certum est quod certum reddi potest*'. There is in the case before us nothing in the terms about the provision for a house and a conveyance which cannot be determined with reasonable certainty. The specification that the rent of the house is to be not less than Rs. 100 nor more than Rs. 200 is nothing but an indication of what was meant by providing earlier, that the house is to be in accordance with the position of the lady. The limits given for the rent only make—and were clearly intended to make—this last more precise; the position of the lady is recognized to be such that a house on a rent of Rs. 100 to Rs. 200

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will be considered suitable for her. The defendant is in the first instance to provide such a house and be responsible for the rent. In case he should fail to do so or the house provided by him should not be acceptable to the lady, the Court in the execution department can easily give suitable redress either by the appointment of a commissioner to find a house that is in the judgment of the Court suitable or in the last resort, if the Court should find that this cannot be done, by awarding to the plaintiff suitable compensation, namely, the house-rent in cash. As a matter of fact, during the pendency of this appeal this Court has actually had to make such an arrangement, and to allow the plaintiff to take a house for herself and realise from the defendant rent not exceeding Rs. 200 on production of vouchers. A similar arrangement could, if necessary, be made and has in fact been made by this Court about the conveyance also. It was contended before us rather strenuously that the description of the carriage and the horse has not been given. No description was needed; all that is necessary is a carriage and a horse which can reasonably carry the lady for her bath and worship, and this can be easily gathered from the context. As regards this also there is ample power in the Court to arrange for such a conveyance, and as already indicated, this has actually been done by this Court during the pendency of the appeal.

The next uncertainty pointed out is about the words "estate of Ugrah Mohan Thakur". It is contended that the words are indefinite, in that they do not make it clear whether the estate meant is the estate as it stood when Ugrah Mohan Thakur died, or the estate as it stood on the date of the compromise. This also can easily be made certain. The estate of Ugrah Mohan Thakur so far as the immovable property was concerned continued to be the same except that one Calcutta house has been sold and another house in Calcutta has been acquired by the Improvement Trust and the estate has been leased out for some

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years to the Kanchangarh Estate. The sale proceeds of the houses have not, however, been shown to have been taken away from the estate and were apparently used in the administration in meeting the debts left by Suraj Mohan. The lease to Kanchangarh was intended to last only a few years more. The estate as it stood on the date of the compromise was ample security for the plaintiff's maintenance. The plaintiff was content to drop her entire suit on getting the maintenance, etc., provided in the compromise, and did nothing, before applying under section 151, to indicate that she meant to proceed with the suit against the other defendants. In our opinion the words "estate of Ugrah Mohan Thakur" in the circumstances obviously meant the estate as it stood at the date of the compromise and it was substantially the estate as it stood at the time of the death of Ugrah Mohan Thakur. There is no uncertainty in this respect. Regarding the uncertainty of the parties to the compromise, much need not be said. It was contended that while the body of the petition mentions that the parties have compromised, really speaking the compromise was between the plaintiff on the one hand and the two defendants on the other. Who were the contracting parties has been made certain by the signatures of the parties concerned. There does not therefore remain any uncertainty in this respect. We hold that the contract is not vitiated by any real, irremediable uncertainty either in the terms or as regards the parties.

Is the compromise unlawful on account of the fact that Mr. Savi being the executor of the estate of Ugrah Mohan Thakur compromised the suit which created a charge on the estate of the deceased without the permission of the court?

The law in this respect is contained in section 90 of the Probate and Administration Act (Act V of 1881), the law which was in force at the time of the compromise (corresponding to section 307 of the

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Indian Succession Act of 1925, now in force). The section ran thus:

"(1) An executor or administrator has subject to the provision of this section power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under section 4.

(2) The power of an executor to dispose of immoveable property so vested in him subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order * * * *."

There is nothing before us to show that the will of Ugrah Mohan Thakur placed any restriction upon the power of the executor and, therefore, in the absence of any restriction he was perfectly competent to compromise the suit by agreeing to the creation of a charge on the estate of the deceased for the maintenance of the lady. In fact the maintenance of the widow can always be made a charge on the estate of her husband and Mr. Savi did nothing more. But assuming that he had no such power, the transaction would be not altogether void, but only voidable. Sub-clause (4) of this very section says

"A disposal of property by an executor or administrator in contravention of sub-section (2) or sub-section (3) as the case may be is voidable at the instance of any other person interested in the property:"

see Eastern Mortgage and Agency Company, Limited v. *Rebati Kumar Ray*(1) followed in *Charu Chandra Pal* v. *Kalidas Chandra*(2). The only person interested in the property of the deceased is the residuary legatee under his will, namely, Suraj Mohan Thakur. The plaintiff cannot complain of the charge after giving up her claim to the estate, and Suraj Mohan Thakur not only does not object to the creation of the charge but was a party to it and has all along been endeavouring to maintain the compromise.

Now we take up the considerations of law which have been put forward as barring any inquiry under

(1) (1906) 3 Cal. L. J. 260.
(2) (1910) 13 Cal. L. J. 447.

Order XXIII, rule 3, into the genuineness and lawfulness of the compromise. They are, as we have said, res judicata, want of registration of the petition of compromise, and waiver.

Res Judicata.

It is contended that the compromise gave rise to a cause of action, on the basis of which a decree was passed by the Subordinate Judge on the 26th November, 1924. That decree was set aside by a Division Bench of this Court (Jwala Prasad and Bucknill, JJ.). The decree having been set aside, no fresh decree, it is contended, can be passed on the basis of that compromise. It is even contended that the order of this Court setting aside the decree required that the plaintiff's suit should be tried on the merits. Reliance has been placed upon the cases of *Kalipadda De* v. *Dwijapada Das*(1) and *Hook* v. *Administrator-General of Bengal*(2) for the proposition that the statement of the principle of res judicata as contained in section 11 of the Civil Procedure Code is not exhaustive, and that the principle should be applied to this case. The contention is, however, untenable. The judgment of Jwala Prasad, J. clearly indicates that what the Court ordered was that the factum and the legality of the compromise, which were not enquired into by the lower Court, should be inquired into. It will make the matter clear if we quote a few passages to show what the judgment of this Court really meant. For instance two of the passages are—

> "(*1*) She (meaning the lady) on the other hand says that she did not present it (that is the petition of compromise) nor did she authorize anyone to present it and suggests that it was handed over to the Subordinate Judge fraudulently by the opposite party at the railway station in order to obtain an admission from her hurriedly without letting her know the contents of the petition. This again is a contentious matter and has not been investigated."

(The passages within the brackets are ours.)

(1) (1929) 34 Cal. W. N. 201, P. C.
(2) (1921) I. L. R. 48 Cal. 499, P. C.

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(2) " It seems from the summary order passed by the Subordinate Judge (Mr. N. N. Chakravarty) that he did not at all bestow his mind to the consideration of the compromise and its terms and did not realise the scope of the suit and the parties concerned in it. The compromise was not judicially disposed of, and the order passed by the Subordinate Judge lacks in judicial sanctity and the plaintiff can very well seek to avoid the order as well as the decree passed on its basis."

And in the end the order was that—

" the case be restored to its original number and taken up from the stage at which the compromise was filed and disposed of according to law."

It is obvious that the petition of compromise was not finally disposed of by this Court. A compromise, if genuine and valid, bars the trial of the suit, and the defendant can very well ask that the bar be first removed before the plaintiff is allowed to proceed to the trial of the suit, and this is what was meant by the application to record the compromise, and the learned Subordinate Judge by his order under appeal has held that the bar exists and has recorded the compromise and a decree is to follow in accordance with it as a matter of course.

Reliance is, however, placed upon a remark of Sir Dawson Miller, C.J. and Foster, J. in the course of the defendant's applicatoin for leave to appeal to the Privy Council against the orders of Jwala Prasad and Bucknill, JJ. The observation was made on an application of the plaintiff for the expeditious hearing of the application for leave to appeal and for maintenance. The sentence relied upon runs thus:

" We have been asked in this case to return the record of the original suit to the trial court to enable that court to proceed with the suit and we think that it is just and proper that we should do so."

The words " to proceed with the suit " are relied upon as being an interpretation of the order of Jwala Prasad and Bucknill, JJ. by the late Chief Justice and Mr. Justice Foster. and reliance has been placed upon the case of *Sivitri Ramayya* v. *Holebasappa Murgeppa*(1) for the proposition that the

(1) (1932) A. I. R. (Bom.) 257.

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construction of a document arrived at between the same parties operates as res judicata. We do not think that Sir Dawson Miller, C.J. and Foster, J. did at all construe the order of this Court. It was a passing remark on the application of the plaintiff. The words " to proceed with the suit " were a part of the request, and their Lordships said that that should be done. The question whether a suit has been compromised or not, which is to be inquired into under Order XXIII, rule 3, is as a matter of fact a part of the trial of the suit itself. It is an issue which arises during the pendency of the suit and if it be answered in the affirmative, namely, if it be held that the suit has been lawfully compromised, no other issue needs to be tried. Therefore, the words " to proceed with the suit " do not exclude the trial of an issue of compromise in the suit itself. If a construction of the order of Jwala Prasad and Bucknill, JJ. can constitute res judicata on the point, the consideration will apply with stronger force to the plaintiff herself as will appear presently; and as far as this Court is concerned we are concluded by the clear interpretation put upon that judgment by this Court. When the record went back to the Court below, the plaintiff objected to the trial of the question of the compromise, and by his order, dated the 2nd of September, 1926 (No. 29) the learned Subordinate Judge interpreted the order of this Court to mean that the question of compromise was to be tried. His order runs thus :

" From the aforesaid facts and circumstances it is abundantly clear that the effect of the order of the Hon'ble High Court is to make an investigation in the first instance regarding the allegation of the lady relating to the compromise. If it is established on evidence to be adduced by the parties that really there was fraud in connection with the said compromise, or, in other words, if it is proved to the satisfaction of the court that the said compromise or agreement was not legal, it would not be ordered to be recorded and the suit would then be heard and tried on its merits."

The plaintiff being dissatisfied with this order moved this Court. Das, J, who with Adami, J. heard and

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disposed of these applications (Civil Revisions Nos. 634 and 635 of 1926), remarked :

" It was the contention of Savitri Thakurain that the compromise decree has in effect been set aside by this court and that the learned Subordinate Judge under the order of this court should proceed to dispose of the suit. The learned Subordinate Judge rejected this contention and has fixed a date for disposal of the application which was presented in April, 1925."

The learned Judges did not express any dissent from the view taken by the learned Subordinate Judge. The plaintiff was, however, not satisfied, and the matter was pressed once more before this Court in Civil Revision no. 259 of 1927. The order runs thus :

" The first point taken by Mr. Pugh is that the order of Mr. Justice Jwala Prasad in this court precludes the court below from entering into the question of compromise. I do not read the order of Mr. Justice Jwala Prasad in the way in which Mr. Pugh reads it and for myself I am concluded by my own decision, dated the 17th December, 1925. This point must accordingly be overruled."

The order of 17th December is the one which we have just referred to. Sir Dawson Miller himself while rejecting the defendant's application for leave to appeal to the Privy Council said as follows :

" The order in the present case decides nothing as to the rights of the parties in the suit and merely directs the Judge to rehear the application for recording the compromise and to proceed thereafter according to law."

We, therefore, hold that the enquiry about the genuineness and validity of the compromise was not barred by any principle of res judicata.

Did the petition of compromise require registration under section 17 *of the Registration Act and is it inadmissible in evidence?*

It is contended that as the petition of compromise creates or declares the right of the plaintiff to get a maintenance of Rs. 1,000 per month and creates a charge on the immoveable property in respect of the same and as it is not registered, it is not admissible in evidence, and that the compromise having been reduced to writing, oral evidence of its terms cannot be given and, therefore, there is no material to prove the compromise, and hence none can be recorded.

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The law in this respect is contained in sections 17 and 49 of the Registration Act of 1908. Sub-clause (*b*) of section 17(*1*) enacts that

> " non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property ".

must be registered. Section 49 enacts that the documents which are required to be registered under section 17 shall not be received in evidence of any transaction affecting such property, etc., etc., unless it has been registered. The question before us is a very narrow one, namely, whether a petition of compromise asking the Court to pass a decree on certain terms comes within the purview of section 17 of the Registration Act. In the case of *Bindesri Naik* v. *Ganga Saran Sahu*(1), their Lordships of the Privy Council had before them the finding of the High Court of Allahabad that judicial proceedings did not require registration under section 17 of the then Registration Act (Act III of 1877). Lord Watson delivering the judgment of their Lordships observed: " Although, in the view which their Lordships take, the question whether those proceedings can be founded on, without their having been registered in terms of Act of 1877, does not necessarily arise in this appeal, they think it right to add that, having heard Counsel fully upon the point, they are satisfied that the provisions of section 17 of the Act do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties, or of order made by the Court." In *Pranal Anni* v. *Lakshmi Anni*(2) the Judicial Committee held that the razinamah in so far as it was submitted to and was acted upon judicially by the learned Judge was in itself a step in a judicial proceeding not requiring registration. The above two cases were followed by the Madras High Court in

(1) (1897) I. L. R. 20 All. 171, P. C.

(2) (1899) I. L. R. 22 Mad. 508, P. C.

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Natesa Chetti v. *Vengu Nachiar*(1). There have been a number of decisions of various High Courts to the same effect. It is sufficient if we refer to a few of them. In the case of *Appasami* v. *Manikam*(2), where the question was whether a disputed compromise can be recorded under section 375 of the old Code of Civil Procedure, one of the questions raised was that as the compromise created a charge on immoveable property, an oral agreement was ineffective in view of section 59 of the Transfer of Property Act. The Madras High Court held that "the intention of the parties to the agreement was, not that it should of itself create a charge on immoveable property but only that it should create a right to obtain a decree by way of specific performance. It is in the nature of a preliminary contract intended to be perfected by another document", and their Lordships did not consider that it was inoperative under Act IV of 1882. *Bindesri Naik's*(3) case was followed in Allahabad in *Raghubans Mani Singh* v. *Mahabir Singh*(4). Since these decisions Act III of 1877 has been replaced by Act XVI of 1908, the present Registration Act. The legislature must have been aware of the pronouncements of the Judicial Committee, but it is significant that it enacted the section in its old form. Had the legislature intended that petitions of compromise or petitions of the nature which were before their Lordships in Bindesri Naik's and Pranal Anni's cases required registration, they would have made provision for it in the new Act of 1908. In the case of *Nagendra Mohan Ray* v. *Pyari Mohan Saha*(5) the Calcutta High Court held that it was a well-settled principle of construction that the legislature is presumed to know not only the general principles of law but also the construction which the Courts have put upon particular statutes. Their Lordships relied upon the observations of

(1) (1909) I. L. R. 33 Mad. 102.
(2) (1885) I. L. R. 9 Mad. 103.
(3) (1897) I. L. R. 20 All. 171, P. C.
(4) (1905) I. L. R. 28 All. 78.
(5) (1915) I. L. R. 43 Cal. 108, 112.

Campbell, C. J. in *Mansell* v. *Queen*(1) and of James, L. J. in *Ex-parte Campbell*(2) to the effect that where a section of an Act which had received a judicial construction is re-enacted in the same words, such re-enactment must be treated as a legislative recognition of that construction. That the attention of the legislature was drawn to section 17 of the Registration Act of 1908 is clear from the fact that after the decisions of their Lordships of the Judicial Committee in the case of *Rani Hemanta Kumari Debi* v. *Midnapore Zamindari Company, Limited*(3), which laid down that a decree based upon a compromise even if it went beyond the scope of the suit did not require registration, they intervened and amended section 17(*2*), clause (*vi*). That clause at first did not refer to compromise decrees at all. It ran thus:

"Any decree or order of a court and any award."

This clause is one of the exceptions to section 17. Since the decision in *Hemanta Kumari's*(3) case it was amended in 1929 and runs thus:

"Any decree or order of a court except a decree or order expressed to be made on a compromise and comprising immoveable property other than that which is the subject matter of the suit or proceeding."

It is to be noted that the award which did not require registration under Act XVI of 1908 or the earlier Act was taken out from the exception and also a decree based upon a compromise which affected properties not within the suit. It is inconceivable that the Legislature exempted a compromise decree from registration, provided the compromise is within the scope of the suit, but intended that the compromise petition itself should require registration. Such a construction will make the exception in clause *vi* nugatory. Compromises were in the consideration of the Legislature, and if they wanted that petition of compromise should be compulsorily registrable but not the decree, they would have said so. The fact remains that a decree based upon

(1) (1857) 8 E. & B. 54, 73.
(2) (1870) L. R. 5 Ch. App. 703.
(3) (1919) I. L. R. 47 Cal. 485, P. C.; L. R. 46 I. A. 240.

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a compromise which does in fact create or extinguish a right is exempt from compulsory registration. The compromise petition which, on the other hand, only asks the Court to create or extinguish that right cannot be held to be compulsorily registrable. No authority has been placed before us for such a proposition, which is entirely against the intention of the Legislature as expressed in the year 1929. It may be argued that the amendment of the section does not affect the present case where the compromise was effected in 1924, but that is really immaterial; for as we have said, even at that time the interpretation of the Judicial Committee in *Bindesri Naik's*(1) case, the decisions in *Pranal Anni's*(2) case and *Hemanta Kumari's*(3) case were there, and in *Hemanta Kumari's*(3) case in the Calcutta High Court Beachcroft, J. had based his decision on the fact that judicial proceedings do not require registration. No doubt this ground was not argued before their Lordships of the Privy Council, nor was it dealt with by them, but at the same time their Lordships did not express their disapproval of the interpretation of law which was in conformity with their own observations in *Bindesri Naik's*(1) case and in *Pranal Anni's*(2) case. The two Privy Council cases were followed by a Full Bench of this Court in *Charu Chandra Mitra* v. *Sambhu Nath Pandey*(4) where it was held that affidavits, petitions and pleadings filed in the course of judicial proceedings do not require registration. But apart from this, section 17 of the Registration Act itself specifically provides that its provisions do not apply to a document which does not itself create, declare, assign, limit or extinguish any right, title or interest, etc., etc., but merely creates a right to obtain another document which will when executed create, declare, assign, limit or extinguish any such right, title or interest. The petition of compromise before us comes clearly within

(1) (1897) I. L. R. 20 All. 171, P. C.
(2) (1899) I. L. R. 22 Mad. 508.
(3) (1919) I. L. R. 47 Cal. 485, P. C.: L. R. 46 I. A. 240.
(4) (1918) 3 Pat. L. J. 255, F. B.

this exception. The petition does not by itself create a right of getting maintenance, etc., or create a charge by itself. No right in favour of the plaintiff is created by it, nor does it create a right in favour of the defendant to extinguish the claim of the plaintiff to the estate, gardens and jewellery. The petition enables the parties to go to Court and have a right in favour of the plaintiff created and her claim as against the defendant extinguished. It is, therefore, not necessary to rely upon the observations of their Lordships in the cases referred to above. It is needless for us to refer to the cases relied upon by the appellant. None of them are to the point. Some of them refer to petitions filed before revenue Courts which were sought to be used later on in civil suits as a basis of the title created by those petitions. No case has been placed before us showing that a petition of compromise before a Court of Justice cannot be acted upon by that Court itself unless it is registered.

That there is a distinction between a petition being used in the Court to which it is presented and its being subsequently used in another Court for the purpose of proving the right, if any, under that petition, has been recognized by their Lordships of the Privy Council in the case of *Vyaran Chetti* v. *Subramanian Chetti*(1) where Lord Buckmaster said: "and if, on the other hand, there are two distinct provisions, the one relating to rights of property and the other with regard to the division of the realisation moneys then, as these proceedings relate merely to the question of the realised money, it need not be registered for the purpose of being given in evidence in this suit, although it may be that it would require to be registered for the purpose of being given in evidence in a suit relating to the regulation of the rights against the estate itself." We, therefore, hold that the petition Exhibit A did not require registration and can be acted upon.

(1) (1920) I. L. R. 43 Mad. 660, P. C.

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Did the defendant waive his rights under the compromise?

It is contended that when the case went back to the lower Court after the order of Jwala Prasad and Bucknill, JJ. the plaintiff took steps to have the entire suit tried and the defendant acquiesced in it. We do not, however, find any acquiescence or abandonment of the compromise by the defendant. On 22nd July, 1927, the plaintiff filed an application renewing her previous application of 1923 to have a commission issued for her examination, and it is said that the defendant did not raise objection on that score as the commission was intended to examine the lady on the whole suit; but this is not so. As a matter of fact, on the 16th August, 1926, the defendant did apply for the stay of issue of commission and requested the Court to dispose of the case on the basis of the compromise. We do not, therefore, think there has been any abandonment of the compromise by the defendant.

These are our conclusions on the various questions of law and fact involved in the present appeal. The judgment has become very long, and it will be useful if we give a summary of our findings which are in general agreement with the learned Subordinate Judge.

We have found that the terms of the compromise, mentioned in the petition Exhibit A, have been proved to be those which were agreed to between the parties. The rival terms, alleged by the plaintiff, have not been proved to be the terms settled between them, and Suraj Mohan could not have agreed to them. No fraud was practised upon the plaintiff and she was not imposed upon in any way. Every item of the compromise was settled by her, and she understood them all fully, and willingly compromised the suit on these terms. Bodh Krishna Jha, a first cousin of the plaintiff, came to Suraj Mohan in December, 1923, and suggested a compromise on the basis of the lady

getting a maintenance. Suraj Mohan expressed his inability to do anything in the matter till he became a major. He attained majority on 1st of February, 1924, and Both Krishna Jha again came to him in March of that year, and suggested a meeting between him and the lady, and it was settled that he would meet her at some place of pilgrimage as he would not do so at Darbhanga. In October of that year Bodh Krishna Jha came to him for a third time and told him of the lady's expected visit to Simaria Ghat for the Kartick baths in the Ganges. On or about 16th of that month Durga Nath, who was married to the plaintiff's sister, came to Suraj Mohan and invited him to see the lady at Simaria Ghat. On this invitation Suraj Mohan went to Simaria Ghat. There the main terms of the compromise were settled; viz., that the lady would retire from the contest of the suit if given a maintenance of Rs. 1,000 per month from the date of her husband's death, the arrears for the past period to remain in deposit with the estate and interest thereon at six per cent. per annum to be paid to her for religious and charitable objects. These terms having been settled, Durga Nath was sent to fetch Ram Krishna Jha from Darbhanga where he was then practising as an Advocate. Ram Krishna Jha is a first cousin of the plaintiff, had been financing her, and has been in fact the life and soul of this case. Durga Nath could not find Ram Krishna Jha, as the latter had presumably come to Patna to file the revision application of the 18th November in this Court in connection with the suit. Thereupon the lady and Suraj Mohan all came to Monghyr. The hearing of the suit had been fixed for the 21st November. At Monghyr the party put up in the house of Baiju Mandal, the then sarishtadar of the District Judge's Court. The lady willingly put up in that house. Her story that for several days she took the house to be a dharamshala is untrue. No deception was practised

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on her. She was under no restraint, and was admittedly going to the river Ganges for her daily bath, and came out of the house unnoticed on her way to the station. Ram Krishna Jha was again sent for, and when he did not come, his brother, Bodh Krishna Jha, who had come to negotiate for peace was sent for from Supaul at the instance of the lady. On the 19th November Khan Bahadur Sayeed-ud-din, a lawyer for the lady, was sent for, and came to the lady and explained to her the nature and extent of her suit, which according to our finding she already fully knew and understood. The lady told Maulvi Saveed-ud-din the terms on which she had compromised the suit and asked him to prepare the necessary draft. Bodh Krishna Jha came on the 20th November, 1924. Ram Bahadur, a clerk of Ram Krishna Jha, who was looking after the case of the plaintiff also reached Monghyr on the same day. Bodh Krishna Jha and Ram Bahadur Singh actively took part in the preparations of the draft of the compromise, and they were not witnesses of truth when they depose that they were watching the events from distance. Bodh Krishna Jha actually put up in the house where the lady was staying. The lady's version that Bodh Krishna Jha only came to take Rs. 20,000 which was intended to be paid to Ram Krishna Jha and that he took no part in the compromise is false. A draft was prepared by Bodh Krishna Jha and Ram Bahadur Singh in consultation with Maulvi Sayeed-ud-din, and possibly of Babu Hito Rai, another pleader of the plaintiff. At that stage, the lady wanted some additional terms, viz., that the arrears of maintenance should be paid to her by instalments, that she should get a house at a place of pilgrimage, and a conveyance. These terms were ultimately agreed to by the defendant and embodied in the draft, and this draft in the completed form was read over to the plaintiff, and Exhibit F is the copy of that draft, except the clause about the personal exemption of Mr. Savi, the executor of the estate of the deceased Ugrah Mohan Thakur, which

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was added later on at the instance of Mr. Savi and agreed to by the lady. Bodh Krishna and Balbhadra (a man of the defendant's) went to Bhagalpur with this draft to obtain the consent of Mr. Savi. Mr. Savi at first refused, as he thought that the estate was not in a position to bear the burden of so much of maintenance of the plaintiff, but he ultimately agreed if a clause of personal exemption for him was added to it. This was agreed to by the lady, and the petition of compromise with this clause added was duly fair-copied at the house of Rai Bahadur Lakshmi Prasad Singh in the presence of Bodh Krishna Jha. In the meantime the lady had left her residence and had gone to the railway station. The petition was taken there, and she signed it there, after reading it and after fully understanding the contents. Ram Krishna Jha did come to Monghyr either on the 23rd or on the 24th of November; the former is the date according to the defendant and the latter according to the admission of the plaintiff; the actual date to our mind is not of importance. According to our finding he put up in the same house as the plaintiff, and the two had full consultations about the terms of the compromise. We believe that the petition of compromise was read by Ram Krishna Jha at the railway station, and he read it over to the lady. We disbelieve Bodh Krishna Jha when he says that he and Ram Krishna Jha came to the railway station just at the time when Rs. 20,000 was to be paid to the plaintiff, and went away soon after. These two were all along present there, and the whole transaction took place in their presence, and they participated in it; and the petition of compromise was duly signed by the lady and she also wrote out in her own handwriting a reciept for Rs. 3,000. Rs. 20,000 was made over to Ram Krishna Jha at the instance of the lady. At the instance of the Subordinate Judge, who was present at the railway station, the petition of compromise was once more read over to the lady by Baiju Mandal, and we believe that she heard

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it and understood everything of it. Her version that she could not follow what was being read, on account of the noise and on account of the fact that she was engaged in conversation with Suraj Mohan Thakur, is not true. She has intelligence, knowledge and capacity enough to understand every detail of the transaction, and she fully understood them and entered into them with all the knowledge of their effects. She is literate, knows Hindi very well, and can write it fluently. She knows a little English as well. She is fully familiar with the Court language in which the petition was written. Her story that she had forgotten Hindi and that she signed the petition on trust and on letter-for-letter dictation from Suraj Mohan is false. Her signatures on the various vakalatnamas and her verifications on the plaint and petitions falsify that story of literary incapacity. She received advice from Maulvi Sayeed-ud-din, and the advice of Mr. Ram Krishna Jha, Bodh Krishna Jha and Ram Bahadur Singh was available to her, and we believe that she did receive advice from them all, and it was with all this advice that she entered into the compromise. While the defendant has produced all the witnesses he could produce, the plaintiff has withheld important witnesses like Maulvi Sayeed-ud-din, Durga Nath, Babu Hito Roy and Mr. Ram Krishna Jha. Babu Hito Rai and Durga Nath were not in collusion with the defendant. After the compromise the lady came to Bhagalpur and there she mentioned the terms of the compromise, in a general way, to various persons who came to visit her. She was very well looked after and was quite comfortable there. In the meantime Ram Bahadur obtained a copy of the petition of compromise for her, and Bodh Krishna Jha and Ram Krishna Jha visited her at Bhagalpur during the month of December 1924. In January she went to Allahabad for *kalpabas*. Suraj Mohan went along with her and helped her comfortably to settle there, and came away after giving her Rs. 1,500. The plaintiff's story that

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Rs. 500 was given for her kitchen expenses and Rs. 1,000 was sent later through Balbhadra for the barkhi sradh of her husband is devoid of truth. So is her story that it was at Allahabad that for the first time she came to know of the terms of the petition of compromise (Exhibit A). The story that Balbhadra brought these terms to her notice at Allahabad is unworthy of credence. No fraud was practised upon her. There was in our view no opportunity even for any fraud, for during the whole course of the negotiations and the settlement of the terms of the compromise, she was all along accompanied and surrounded by several of her admitted wellwishers and advisers and those who were looking after her case. We have also found on the evidence on the record that the defenadant has discharged the onus, if it lay upon him, of showing that the compromise was fully understood by her when she signed it; in other words, that her physical act of execution was accompanied by the requisite mental act. The compromise was in every way fair and reasonable. We have discussed the condition of the estate, and have held that the estate was not in a position to bear a maintenance allowance of Rs. 1,000 for 14 or 15 years from the death of Ugrah Mohan Thakur. There was very little chance of the plaintiff's success in her suit on the ground that she had lost the Bhagalpur case on account of the fraud of her karpardaz; nor was there any chance of her success on the ground of the invalidity of the will under the Mithila law, which, it is claimed for her, allows a wife to force a partition upon her husband, and under which it is claimed that a gift of his entire property by a man having a wife is invalid. The compromise was not without consideration, nor was it for inadequate consideration; the consideration which the lady received for abandoning her claims to the estate, jewellery and gardens was ample under the circumstances of the case. We have also held that the compromise is perfectly lawful, that it will not contravene section 42 of the Specific Relief

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Act to pass a decree in accordance with it, and that an executable decree can be passed in the suit. A contract to compromise a suit is specifically enforceable in the suit itself by a proceeding under Order XXIII, rule 3, and if the Court finds that a suit has been compromised by a lawful agreement, it is bound to specifically enforce that agreement by recording the compromise and passing a decree on the basis of it. The provisions of Order XXIII, rule 3, of the Code are mandatory. The contract of compromise was not rescinded on account of any default of the defendant. Defendant has all long been ready and willing to perform his part of the obligations embodied in the compromise, viz., to submit to a decree for past and future maintenance, for a house and conveyance. We have held that till the repudiation petition was filed by the plaintiff on the 7th April, the defendant was all along carrying out the terms of the decree itself. The compromise is not unlawful on account of the other defendants not joining in it; and the abandonment of her claim to the shebaitship of the trusts created by Madan Mohan Thakur and Ugrah Mohan Thakur is not illegal. Our finding is that all the essential terms of the compromise are neither vague nor uncertain. Two terms only, viz., those about Suraj Mohan being obedient to the lady and looking after her, and about the interest on the arrears of maintenance being spent on scholarships and religious works in consultation with the defendants, are certainly unenforceable, but they are severable parts of the contract, and the defendant has elected to forego the condition that he is to be consulted as regards the expenditure. The compromise is not void on account of Mr. Savi, who was the executor of the estate of Ugrah Mohan Thakur, not having obtained the permission of the Probate Court. He was fully empowered to compromise. Even if such permission be considered necessary, that would only make the compromise voidable at the option of a person interested in the property. The only person so interested under the will is Suraj Mohan

Thakur who wants to abide by the compromise and was himself a party to it. Enquiry into the genuineness and validity of the compromise is not barred on the ground of res judicata; the petition of compromise did not require registration; and finally, in our opinion, the defendant has not waived his rights under the compromise, and is entitled to have the compromise recorded under Order XXIII, rule 3.

These being our findings, the plaintiff's appeal must be dismissed with costs. As this is a miscellaneous appeal, it is necessary for us, under the rules of the Court, to fix the hearing fee. Though a miscellaneous appeal, the hearing has occupied a large number of days, and the time occupied in the preparation and hearing of the appeal has not been less than would have been necessary in an appeal from an original decree. The usual practice in such cases, where an ad valorem fee is not prescribed, is to fix a daily hearing fee; but in our opinion this is a case in which it will cause some hardship to the appellant to fix a daily fee. In our opinion the ends of justice will be met if we fix the hearing fee as if this were an appeal from an original decree in the suit itself, and we fix the maximum hearing fee which is ordinarily allowed in appeals from original decrees, viz. Rs. 5,000. Out of this amount, Rs. 250 will go to the respondents who are the heirs of Mr. Savi, deceased, and have also entered appearance in this case, and the rest, viz. Rs. 4,750 will go to the respondent Suraj Mohan. The other respondents must bear their own costs.

We now take up the cross-objection of the respondent Suraj Mohan. It was directed against two parts of the judgment of the learned Subordinate Judge, one in connection with his remarks about the debuttar property, which we have already dealt with. The observations of the learned Subordinate Judge are wrong and should be treated as such. The other objection is directed against his order not allowing costs to the respondents. The learned Subordinate

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Judge has given no reason for not awarding costs against the plaintiff. Possibly, he considered that the lady had no means of her own, and any costs awarded against her would have to come out of her maintenance allowance. Ordinarily, the lady was entitled to our sympathy. Her married life was apparently not very happy. She was an orthodox Hindu, while her husband had become more or less westernised, and there are indications that she was to some extent neglected —to put it mildly—in favour of a mistress with whom the deceased was living. In her husband's time, though she was given all the honours of the lady of the house, the allowance given to her was not very liberal. By his will her husband left her a very small allowance of Rs. 100 per month. In these circumstances, if she took into her head to fight the will of her husband, one might have excused her; but she had no justification for carrying the litigation on after the compromise with Suraj Mohan, a young lad, who admittedly used to look upon her almost as a mother. We have said that, according to the plaintiff herself, the boy went to Simaria Ghat and lay prostrate at her feet. He agreed to all the terms the lady desired for the compromise, paid her Rs. 20,000 which she made over to Mr. Ram Krishna Jha, brought her to Bhagalpur and admittedly looked after her there satisfactorily. When she went to Allahabad, the boy accompanied her, and she was comfortably lodged there and given Rs. 1,500. Her maintenance, as we have held, was overpaid. Unfortunately, at Allahabad, obviously under evil advice, she thought of starting the fight once more. In our opinion this was entirely unjustified—the respondent not unnaturally characterised it before us as a blackmailing attempt and as another turn of the screw. The plaintiff and her friends thought of extorting more terms from the inexperienced youth Suraj Mohan. The fight was carried on with bitterness, and some applications were distinctly vexatious. The trial was protracted by introducing issues which did not directly arise in the case. The Court, of

course, could not at that stage of the suit prevent it, but in the end it becomes clear that a number of matters were introduced which were not essential for the proper determination of the narrow issue involved, viz., the genuineness and validity of the compromise. The plaintiff attempted to substantiate her case by a large number of false statements. She went the length of saying that while she could read and write Hindi and a little English during the lifetime of her husband she had forgotten everything since then. Her hand-writing and its fluency clearly show this to be untrue. She further attempted to support her case by false witnesses and by withholding from the witness-box important witnesses like Durga Nath Jha, Maulvi Sayeed-ud-din, and last but not least, Mr. Ram Krishna Jha. By these means she unnecessarily prolonged the case. Charges of fraud against various persons were recklessly made, and in the case of Babu Hito Rai easily withdrawn. These being our findings, we feel that the costs of the Court below cannot properly be withheld from the respondent. The hearing of this matter after the case was sent back by this Court on the 8th of June, 1926, was protracted. There were 27 contested hearings in the interlocutory stage and twenty hearings in the main hearing of the case. The maximum fee allowable in miscellaneous matters in the lower Courts is, ordinarily, Rs. 150 only. This amount will be absurdly insufficient in this case. Discretion has been left to the Court and, in our opinion, a daily fee of Rs. 100 for each hearing at the final stage, or altogether Rs. 2,000, and Rs. 50 per day for the contested hearings during the interlocutory stage, will meet the ends of justice. This brings the cost to a total of Rs. 3,350. The cross-objection must, therefore, be allowed as indicated above.

It only remains for us to dispose of an objection which was raised by Mr. Ghose, one of the learned Advocates appearing for respondent no. 2, as to our

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competency to proceed with this appeal. The contention is based on these facts: The plaintiff, after the order to record the compromise was passed by the Court below, preferred two appeals: one, against the order recording the compromise, and the other against the decree which was passed in consequence of that order. The appeal against the decree was accompanied by a petition for permission to appeal in forma pauperis, as the plaintiff had instituted her suit as a pauper. Two appeals, namely, the present miscellaneous appeal against the order recording the compromise and the appeal against the original decree, were preferred as the plaintiff was apparently in doubt about the correct remedy open to her, in consequence of a decision of the Calcutta High Court in *Bengal Coal Company, Limited* v. *Apcar Colliery, Limited*(1) to the effect that an order recording a compromise followed by a decree merges into the decree, and that it is the decree that is appealable, and not the order. The appeal against the order was, however, admitted by a Bench of this Court [under a judgment, dated the 17th December, 1928—*Srimati Sabitri Thakurain* v. *F. A. Savi*(2)], and it was held that an appeal lay against the order as expressly provided in the Civil Procedure Code, Order XLIII, rule 1(*m*), and it was indirectly held that no appeal lay against the decree itself, being barred under section 96(*3*) of the Code. The appeal against order having been admitted, it was proceeded with and we are now disposing of it. Plaintiff's application for permission to appeal as a pauper against the decree itself was kept pending till the disposal of this appeal. When the argument in this appeal was completed, we took up that application, and being clearly of opinion that no appeal lay against the decree, we rejected it. As it is not usual, while refusing such applications, to give reasons, we did not do so; but, in fact, the reason was mainly that no appeal lay at all. The

(1) (1924) 29 Cal. W. N. 928.
(2) (1928) I. L. R. 8 Pat. 528.

same view had been taken by implication, as we have already said, in this very case by a Bench of this Court, and also in the case of *Govindaswami Kadavaran* v. *Kaliaperumal Munayathiriyan*(1), where Coutts Trotter, J. held that no appeal lay against a decree passed upon compromise, even if the compromise be disputed. For a consent decree to come within the prohibition of section 96(*3*) of the Code it is not necessary that the consent should continue till the passing of the decree. This also appears from a recent decision of their Lordships of the Privy Council in an appeal from a decision of the Judicial Commissioner of the Central Provinces (P. C. Appeal no. 67 of 1929). When we refused to grant leave to the plaintiff to appeal as a pauper, the plaintiff's Advocate intimated to us that his client had no intention of paying the court-fees and pressing the appeal. We accordingly dismissed it on that very day, i.e. 22nd of August, 1932. There being no intention of laying before us a properly stamped appeal, the appeal was bound to be dismissed or rejected on that ground alone and there could be nothing said about whether such an appeal at all lies. On these facts the contention of Mr. Ghosh has been that, as we have dismissed the appeal against the decree, the present appeal against the order cannot proceed, because if we were to allow this appeal, it would mean the consequential setting aside of the decree. We find no force in this contention. As we have said, the application to sue as a pauper was rejected on the ground that no appeal lay against a decree passed upon compromise, being prohibited by the Code; and we dismissed the appeal as no court-fee was paid. Matters thus are on the same footing as if no appeal against the decree had been presented, as in fact none could be properly presented under the law. The dismissal of the appeal, on the grounds stated above, does not preclude us from proceeding to

(1) (1920) 66 Ind. Cas. 837.

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determine the appeal against the recording of the compromise.

Our thanks are due to the bar for the great assistance they have so willingly rendered to us; one and all they have been of great use to us.

The result is that the appeal of the plaintiff against the order recording the compromise is dismissed with costs. We fix the hearing fee at Rs. 5,000, out of which Rs. 250 will go to Mrs. Savi and Miss Mouna Savi, respondents Nos. 1 and 2, and the remaining Rs. 4,750 to respondent Suraj Mohan. These respondents will also get their other costs incurred by them in this appeal. The other respondents will bear their own costs. The cross-objection of Suraj Mohan is allowed. The observation or finding of the learned Subordinate Judge in respect of the debuttar properties is set aside, Suraj Mohan is allowed all the costs incurred by him in the Court below, since the time the matter was sent back to that Court by the order of this Court, dated the 8th of June, 1926; pleader's fee Rs. 3,350. A decree for the costs of lower Court will be prepared in the Court and will be incorporated in the decree to be prepared in this appeal.

Appeal dismissed.
Cross-objection allowed.

APPELLATE CIVIL.

Before Khaja Mohamad Noor and Scroope, JJ.

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January, 20, 23, 24. February, 3.

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 66, *scope of—suit by real owner against certified purchaser*

* Appeal from Appellate Decree no. 286 of 1930, from a decision of H. Ll. L. Allanson, Esq., C.I.E., I.C.S., District Judge of Gaya, dated the 20th November 1929, reversing a decision of Maulavi Amir Hamza, Subordinate Judge of Gaya, dated the 31st March, 1928.

for declaration of title and confirmation of possession, whether maintainable—deed of relinquishment, whether alone can pass title.

Per KHAJA MOHAMAD NOOR, J.—The general result of the case law on section 66, Code of Civil Procedure, 1908, and on the corresponding section of the old Codes is that a suit of a plaintiff, who bases it on the ground that he was the real purchaser at a court sale and that the certified purchaser was not really so, must fail.

But if the real owner is in possession of the property and the certified purchaser wants to take advantage of his name being in the sale certificate and brings the suit on that basis the real owner can successfully defend it on the ground of his being the real purchaser.

If, however, the plaintiff does not base his suit upon the title which he has on account of his being the real purchaser at the court sale, but on some other title subsequently acquired, his suit does not come within the mischief of section 66 of the Code.

Per SCROOPE, J.—For the application of section 66 it is immaterial whether the plaintiff, the real owner, is in possession and seeks a confirmation of possession or whether he is out of possession and seeks to recover it.

Bishun Dial v. Ghaziuddin(1), *Hanuman Prashad Thakur* v. *Jadu Nandan Thakur*(2) and *Umashashi Debi* v. *Akrur Chandra Mazumdar*(3), followed.

Sasti Churn Nundi v. *Annopurna Shonoka*(4) and *Monappa* v. *Surappa*(5), dissented from.

Musammat Buhuns Kowar v. *Lalla Buhooree Lal*(6), *Lokhee Narain Roy Chowdhry* v. *Kalypuddo Bandopadhya*(7), *Abdul Jalil Khan* v. *Obaid Ullah Khan*(8) and *Patrachariar* v. *T. R. M. S. Ramaswami Chettiar*(9), distinguished.

(1) (1901) I. L. R. 23 All. 175.
(2) (1915) I. L. R. 43 Cal. 20.
(3) (1925) I. L. R. 53 Cal. 297.
(4) (1896) I. L. R. 23 Cal. 699.
(5) (1886) I. L. R. 11 Mad. 234.
(6) (1872) 14 Moo. I. A. 496.
(7) (1875) L. R. 2 I. A. 154.
(8) (1929) I. L. R. 51 All. 675; L. R. 56 I. A. 330.
(9) (1918) 49 Ind. Cas. 734.

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Title to land cannot pass by admission where the statute requires a deed.

Therefore a *bazidawa*, or a deed of relinquishment, executed by an alleged *benamidar* in favour of the real owner, and containing a mere admission of title with an undertaking not to interfere with the latter's possession, cannot alone pass title from the *benamidar* to the real owner.

Jadu Nath Poddar v. *Rup Lal Poddar*(1) and *Bishan Dial* v. *Ghaziuddin*(2), followed.

Balaram v. *Naktu*(3), distinguished.

Raja Bhupendra Narayan Sinha Bahadur v. *Rajeswar Prasad Bhakat*(4) and *Govind Prasad* v. *Jagdeep Sahai*(5), referred to.

Appeal by the plaintiffs.

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

Manuk and *A. N. Lal*, for the appellants.

P. R. Das and *Satyadeva Sahay*, for the respondent.

SCROOPE, J.—The plaintiffs brought the suit out of which this appeal arises for a declaration that the disputed properties were purchased by the defendant at an auction sale on the 17th March, 1920, in an execution case as an agent of the plaintiffs for the plaintiffs and with the money of the plaintiffs and they also sought for a declaration that they were the owners of the disputed properties and were in possession of them and they sought for confirmation of their possession. Their case was that the defendant had been their servant or munib and used to look after their litigation, and that they had sent him to court with instructions to get their pleader to bid for the property of one Kailaspati Singh which was up for

(1) (1906) I. L. R. 33 Cal. 967.
(2) (1901) I. L. R. 23 All. 175.
(3) (1928) 108 Ind. Cas. 11, P. C.
(4) (1927) 106 Ind. Cas. 117.
(5) (1922) 77 Ind. Cas. 252.

sale in court in execution proceedings on foot of a mortgage decree obtained by the plaintiffs against Kailaspati Singh. The defendant, it is alleged, could not find the pleader and purchased the property in his own name; but it is the plaintiffs' case that they paid the earnest money and obtained the sale certificate in the name of the defendant and got his name registered in Register D and have all along been in possession of the properties, subsequently in 1925 defendant executed a *bazidawa* in favour of the plaintiffs; but when the plaintiffs sought for mutation in the land registration department, defendant objected; with the result that the application of the plaintiffs was rejected. There were also proceedings under section 145 of the Code of Criminal Procedure in respect of certain khud kasht lands within the property which ended adversely to the plaintiffs: hence the suit.

The case of the defendant was that he had purchased the property for himself, paid the money and had been in possession ever since and that the bazidawa deed was a nominal transaction to conceal the defendant's ownership of the property. The Subordinate Judge of Gaya decreed the suit finding that the defendant purchased the property as agent of the plaintiffs and that the plaintiffs had been in possession ever since and he held that the bazidawa deed was a genuine transaction; and he also found that section 66 of the Code of Civil Procedure was not a bar to the suit, defendant having purchased the property not as a mere *benamidar* but as an agent. The District Judge of Gaya, however, reversed the decision and dismissed the suit holding that the defendant purchased the property as *benamidar* for the plaintiffs whose servant he was and that section 66 is therefore a bar to the suit.

Mr. Manuk, the learned Advocate for the appellant-plaintiffs, now in appeal faced with the finding of fact that the defendant purchased the

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property as *benamidar* and in order to get over the difficulty in which section 66 places him on this finding, has first taken up, what in my opinion, is an entirely unarguable position, namely, that his suit is not a suit for declaration of his title. This cannot possibly be maintained in face of paragraph 12 of the plaint which runs as follows:

> "That these plaintiffs are still in possession of the said mauza but the said facts have caused defect in their title, hence they seek relief in court";

vide also the prayer portions of the plaint:

> "(*i*) The Court may be pleased to hold and declare that the defendant purchased the disputed mauzas as agent of and for the plaintiffs and with their money at a public sale held on the 17th March 1920 in execution case no. 599 of 1920 of the 1st Court of Sub-Judge at Gaya.
>
> "(*ii*) The Court may be pleased to adjudicate and hold that in the above circumstances and also on account of execution of the deed of relinquishment of claim dated the 5th August 1925 the said properties belong to these plaintiffs and that they are in possession of the same.
>
> "(*iii*) The possession and occupation of the plaintiffs over the said properties may be confirmed but if for any reason the plaintiffs be considered to be out of possession then possession over the same may be awarded to them".

At one stage the learned Advocate argued that it was merely a suit for confirmation of possession; but obviously in the face of the land registration decision and the section 145 case plaintiffs cannot be held to be in possession for as to the concurrent findings of the courts below that they are in possession what they mean is that they were in possession up to the time of these proceedings. The suit thus becomes one in ejectment and they have therefore to establish their title. Then it was contended that it would suffice if the plaintiffs obtained a declaration that the defendant was not to interfere with their possession; and again that the suit was one for specific performance of contract but in my opinion all these contentions are equally unsustainable and it is unnecessary to labour the point further.

The second branch of the argument for the plaintiff-appellants merits more consideration: it is contended that assuming the suit was a title suit it did not fall within the mischief of section 66 of the Code of Civil Procedure because the appellants were in possession and that they have acquired a title by this fact plus the fact of the deed of relinquishment in their favour and the fact that the purchase money was theirs: in fact a title by waiver is set up and Mr. Manuk relies very strongly on certain observations of their Lordships of the Privy Council in *Mussammat Buhuns Kowar* v. *Lalla Buhooree Lal*(1) and *Lokhee Narain Roy Chowdhry* v. *Kalypuddo Bandopadhya*(2). I emphasise the word "observations" because the facts of these two cases are not on all fours with the present case, both the suits having been brought by the certified purchaser and the Privy Council held that section 66 was no bar to the true owner as defendant setting up his title: here the alleged true owner is the plaintiff. So far as the question of waiver is concerned it is dealt with in both these decisions and their effect is thus summarised by Sir Arthur Strachey, C.J., in *Bishun Dial* v. *Ghazi-ud-din*(3) "they say that the former decisions that where the real owner has been permitted to have or retain possession by the ostensible purchaser the latter cannot insist on his certified title to recover, do not rest on the ground of waiver but upon the legality of benami transaction except in so far as such transactions are restricted by some express statutory provisions.....they also say that the mere permission to hold possession cannot alone give or transfer a title from the benamidar to the real owner." Mr. Manuk's argument based on waiver thus receives no support from either of these decisions nor does the Privy Council decision in *Abdul Jalil Khan* v. *Obaid Ullah*

(1) (1872) 14 Moo. I. A. 496 (509).
(2) (1875) L. R. 2 I. A. 154.
(3) (1901) I. L. R. 23 All. 175.

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Khan(1) help the appellants. In that case the true owner had a title by limitation and the suit was decided on that basis. It is true that their Lordships expressly declined to decide what would have been the result if the true owner had been in possession for less than 12 years. Their Lordships dealing with this hypothesis confined themselves to observing that in such a case he will no doubt have to aver and prove as part of his cause of action that the auction purchase was made on his behalf; "but that is not the case here," says the judgment, "and their Lordships express no opinion about this question as it has not been argued before them." So far then as the learned Advocate seeks to take the case out of section 66 by the fact that he is in possession, the weight of the case law is clearly against him. *Sastichurn Nundi* v. *Annopurna*(2) is a case in his favour but that decision must be regarded as obsolete and no longer good law as it was not followed in two later Calcutta decisions, namely, *Hanuman Prasad Thakur* v. *Jadu Nandan Thakur*(3) and *Umashashi Debi* v. *Akrur Chandra Mazumdar*(4) as well as in *Bishan Dial* v. *Ghazi-ud-din*(5). As was pointed out in both these Calcutta decisions, if *Sastichurn Nundi* v. *Annopurna*(2) is good law, then its effect is practically to repeal section 66 and the same objection applies to following *Monappa* v. *Surappa*(6). In my opinion for the application of section 66 it is immaterial whether the plaintiff is in possession and seeks a confirmation of possession or whether he is out of possession and seeks to recover it.

As to *Patrachariar* v. *T. R. M. S. Ramaswami Chettiar*(7) that was a case of a paid agent using his master's money and has been rightly distinguished

(1) (1929) I. L. R. 51 All. 675, P. C.
(2) (1896) I. L. R. 23 Cal. 699.
(3) (1915) I. L. R. 43 Cal. 20.
(4) (1925) I. L. R. 53 Cal. 297.
(5) (1901) I. L. R. 23 All. 175.
(6) (1886) I. L. R. 11 Mad. 234.
(7) (1918) 49 Ind. Cas. 734.

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by the learned District Judge as not applying to the facts of the present case.

Finally Mr. Manuk argued that he still has the *bazidawa* to fall back on and that it operates as a conveyance and also that it amounts to an estoppel against the defendant as in it he undertook not to interfere with the plaintiffs' possession. That a *bazidawa* can pass title in such a case is according to Mr. Manuk the result of the judgment of their Lordships of the Privy Council in *Balaram* v. *Naktu*(1). In that judgment, he again contends, there are certain observations which support his assertion that the *bazidawa* deed gives him a title and puts him on a better footing than if he merely had to relv on his possession. That was a suit for specific performance of a contract for sale based on a certain letter and the Judicial Committee held that the suit is barred by section 66 of the Code of Civil Procedure. As to the observations on which Mr. Manuk relies, they were made in the following circumstances. Their Lordships had under consideration the authenticity of a certain letter on which plaintiff based his claim for specific performance of the agreement and in considering the genuineness of that letter they were taking into consideration as one of the tests, the fact that the defendant had not executed a conveyance or deed of release in respect of the village [*vide* page 14 of the report in *Balaram's* case(1)]. Mr. Manuk argues from this discussion that a conveyance and a deed of release are on the same footing but it is clear their Lordships were not considering the matter from that point of view; they were only applying a test of the genuineness of the deed. It is well established that title cannot pass by a mere admission which is what the *bazidawa* contains with an undertaking not to interfere with plaintiffs' possession: *vide*, for instance, *Jadu Nath Poddar* v. *Rup Lal Poddar*(2). "It is well settled", says Mukherjee, J. in that

(1) (1928) 108 Ind. Cas. 11, P. C.
(2) (1906) I. L. R. 33 Cal. 967.

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case, " that title to land cannot pass by admission where the statute requires a deed "; and the same view in effect was taken in the case to which I have referred already in *Bishan Dial* v. *Ghazi-ud-din*(1). Sir Arthur Strachey, C.J. there observed, " in cases arising after the passing of the Transfer of Property Act and subject to its provisions, it is more than ever true that the mere permission to hold possession cannot alone give or transfer a title from the benamidar to the real owner, nor do I see how, in the case of property exceeding Rs. 100 in value, such a transfer could legally be effected except by means of a registered instrument ". Two other cases may be referred to also in this connection, namely, *Bhupendra Narayan Sinha Bahadur* v. *Rajeswar Prasad Bhakat*(2) and a decision of this court in *Govind Prasad* v. *Jagdeep Sahai*(3); appellants, therefore, can get no benefit from this deed of relinquishment.

So far as estoppel is concerned, the matter seems to me to be clear; it is not a case of estoppel. Plaintiffs were not induced to change their position in any way by the execution of the bazidawa. It is true that the result of the decision may, on the facts found, be that the defendant acquires a valuable property by fraud, but the plaintiffs have only themselves to thank for the result which is what the legislature intended; and the case serves as a useful illustration of the dangers of indulging in benami transactions. In my opinion, therefore, the decision of the learned District Judge is quite correct and I would dismiss the appeal with costs.

KHAJA MOHAMAD NOOR, J.—I entirely agree. I would, however, like to add a few remarks of my own.

The general result of the case law on section 66 of the Civil Procedure Code and on the corresponding

(1) (1901) I. L. R. 23 All. 175.
(2) (1927) 106 Ind. Cas. 117.
(3) (1922) 77 Ind. Cas. 252.

section of the old Codes is that the suit of a plaintiff, who bases it on the ground that he was the real purchaser at a court sale and that the certified purchaser was not really so, must fail. But if the real owner is in possession of the property and the certified purchaser wants to take advantage of his name being in the sale certificate and brings the suit on that basis, the real owner can successfully defend it on the ground of his being the real purchaser. In my opinion, under the law, as was contended by Mr. Manuk, the title is with the real owner, but he is debarred under section 66 of the Civil Procedure Code to make that title a ground of a suit as a plaintiff, though that title is a good defence in a suit brought by the certified purchaser. Furthermore, if the plaintiff does not base his suit upon the title which, in my opinion, he undoubtedly has on account of his being the real purchaser at the court sale, but on some other title subsequently acquired, his suit does not come within the mischief of section 66 of the Civil Procedure Code. If, for instance, the plaintiff continues in possession for more than 12 years, this possession by itself gives him a title independent of the title which he had on account of his being the real purchaser at the court sale, and if he is subsequently dispossessed his suit based upon this possessory title will, as was pointed out in the case of *Abdul Jalil Khan* v. *Obaid Ullah Khan*(1), succeed. In this particular case Mr. Manuk has attempted to show that his suit is not based upon the ground of the plaintiff being the real purchaser at the court sale but is based upon something which happened since that sale, namely, the possession and the *bazidawa*. The difficulty in the way of Mr. Manuk is, first of all, that the plaint clearly shows that the suit was based upon the ground that the plaintiff was the real purchaser at the court sale, and therefore was based on the original title acquired at the court sale, and not upon any title subsequently acquired, as was the case in *Muhammad Abdul Jalil*

(1) (1929) I. L. R. 51 All. 675, P. C.

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Khan v. *Muhammad Obaid Ullah Khan*(1), in which the title was acquired subsequent to the sale by 12 years' possession. Assuming, however, that we can read the plaint as Mr. Manuk asks us to read, none of these two facts, namely, the possession or the *bazidawa* or both, is sufficient to entitle the plaintiff to get a decree for possession. As has been pointed out by my learned brother, neither the *bazidawa* nor the possession for less than the statutory period creates any title. Therefore, if the plaintiff can succeed, he can succeed only on the ground that he was the real purchaser at the court sale, and this he cannot do on account of the express prohibition of section 66.

I, therefore, agree in holding that the appeal fails and must be dismissed with costs.

Appeal dismissed.

R. 30 Pat. 366.

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v.

PATHAK DWARKA SINGH.

J. C.*

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February, 14.

On Appeal from the High Court at Patna.

Sale for Rent—Rent Decree—Recorded Tenant not before Court—Jurisdiction of Civil Court to set aside Sale—Tenant not entered in Sherista—Chota Nagpur Tenancy Act (Ben. Act VI of 1908), sections 208, 211, 214.

In order to justify a sale of a tenure under section 208 of the Chota Nagpur Tenancy Act, 1908, all parties interested in the tenure must be joined as defendants in the rent suit, or be sufficiently represented. Cases decided on the construction of section 159 of the Bengal Tenancy Act, as regards this point are equally applicable to the construction of section 208 of the Chota Nagpur Tenancy Act. Where all the parties are not

* PRESENT: Lord Thankerton, Sir George Lowndes, and Sir Dinshah Mulla.

(1) (1929) I. L. R. 51 All. 675, P. C.

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joined or represented section 211 does not apply, and the Revenue Court has no jurisdiction to order a sale, consequently section 214 does not preclude the Civil Court from entertaining a suit to set it aside.

That a recorded tenure-holder has not got her name entered in the landlord's sherista, nor paid rent, nor been recognized by him as a tenure-holder, are not circumstances which justify him in selling if she has not been joined or represented in the rent suit.

Chamatkari Dasi v. *Triguna Nath Sardar*(1) and *Chandra Nath Tewari* v. *Protap Udai Nath*(2), approved.

Profulla Kumar Sen v. *Salimulla*(3), doubted.

Decree of the High Court, *Pathak Harbans Singh* v. *Thakur Jagdishwar Dayal*(4), affirmed.

Appeal (no. 99 of 1930) from a decree of the High Court (January 17, 1929) reversing a decree of the additional Subordinate Judge at Palamau (December 17, 1928).

The suit was instituted by the plaintiff-respondents claiming an injunction against the appellant restraining him from recovering possession of mauza Maran from them. The appellant having brought a suit in 1919 for arrears of rent of a tenure which included the village obtained a rent decree; the tenure was subsequently sold in execution under the Bengal Rent Recovery Act (VIII of 1865) and purchased by the appellant. Objection had been raised that the decree in execution of which the sale had taken place was not a rent decree within section 208 of the Chota Nagpur Tenancy Act, 1908, and that the sale was invalid. The Board of Revenue (upon appeal) dismissed the objection: The question for determination in the present suit was whether the sale was valid and whether a suit challenging its validity could be entertained by the Civil Court.

(1) (1913) 17 Cal. W. N. 833.
(2) (1913) 18 Cal. W. N. 170.
(3) (1918) 23 Cal. W. N. 590.
(4) (1929) I. L. R. 8 Pat. 620.

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The facts and the material statutory provisions appear from the judgment of the Judicial Committee.

The trial Judge held that the sale was valid and accordingly dismissed the suit. On appeal the High Court, by a judgment delivered by Das, J. and concurred in by James, J. [*Pathak Harbans Singh* v. *Thakur Jagdishwar Dayal*(1)] held that the sale was invalid and that as the rent decree was made without jurisdiction the suit was maintainable; accordingly the suit was decreed.

1933 Jan. 12, 26.—*Sir Dawson Miller, K.C.* and *Wallach* for the appellant referred to *Doolar Chand Sahoo* v. *Lala Chabeel Chand*(2), *Bissessur Lall Sahoo* v. *Luchmessur Singh*(3), *Jeo Lal Singh* v. *Gunga Pershad*(4), *Prafulla Kumar Sen* v. *Salimulla*(5), *Nitayi Bihari Saha Paramanick* v. *Hari Govinda Saha*(6).

G. D. McNair, for the respondents referred to *Kesha Prasad Singh* v. *Shamnandan Rai*(7), *Berardar Singh* v. *Bacha Mahto*(8), *Chamatkari Dasi* v. *Triguna Nath Sardar*(9), *Chandra Nath Tewari* v. *Protap Udai Nath*(10), *Jagan Mohan Sarkar* v. *Brojendra Kumar Chakrabarti*(11).

February 14.—The judgment of their Lordships was delivered by—

LORD THANKERTON.—This is an appeal from a decree of the High Court of Judicature at Patna, dated the 17th January, 1929, which reversed a decree

(1) (1929) I. L. R. 8 Pat. 620.
(2) (1878) L. R. 6 I. A. 47.
(3) (1879) L. R. 6 I. A. 233.
(4) (1884) I. L. R. 10 Cal. 996.
(5) (1918) 23 Cal. W. N. 590.
(6) (1899) I. L. R. 26 Cal. 677.
(7) (1925) I. L. R. 5 Pat. 233.
(8) (1919) 5 Pat. L. J. 32.
(9) (1913) 17 Cal. W. N. 833.
(10) (1913) 18 Cal. W. N. 170.
(11) (1925) I. L. R. 53 Cal. 197 (F.B.).

of the Additional Subordinate Judge of Palamau, dated the 17th December, 1925, and decreed the plaintiffs' suit with costs.

The appellant, who is defendant no. 1 in the suit, is the proprietor of the Lokiya Narainpur estate, which includes villages Maran, Rouni, Bedra and an 8 annas share of Chowreah. The rule of primogeniture obtains in the appellant's family. At some time prior to 1865 his ancestor made a khorposh grant to the ancestor of original defendant no. 2, of defendants nos. 3 and 4, and of Maheshanand, the deceased husband of defendant no. 5. Original defendant no. 2 died pending suit and his two sons were substituted. Defendants nos. 2, 3 and 4 had an 8 annas share in the khorposh subjects and Maheshanand had the remaining 8 annas share.

The contesting respondents in this appeal are the plaintiffs in the suit, and they are in possession of mokarrari rights in mauza Maran, which forms part of the khorposh lands, under leases executed in 1865 in favour of their predecessors-in-title by the predecessors-in-title of defendants nos. 2, 3 and 4.

About 1910 Maheshanand died without issue but leaving a widow, defendant no. 5. The name of the latter was entered in the record-of-rights, which was completed in 1920, as the holder of an 8 annas share of the khorposh lands, but she did not take any steps to have her name entered in place of that of her deceased husband in the sherishta of the landlord, as prescribed by section 11 of the Chota Nagpur Tenancy Act, nor did she pay any rent to him in respect of the tenure.

In 1919 the appellant brought a suit in the Court of the Munsif Deputy Collector, Palamau, against defendants 2, 3 and 4 in the present suit for arrears of rent in respect of the khorposh tenure for the years 1916—1919, and obtained a decree for these arrears on the 26th February, 1920. Present defendant

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no. 5 was not joined as a defendant in that suit. In execution of the decree the tenure was put up for sale and was purchased by the present appellant, the decree-holder, on the 15th September, 1922. The sale was confirmed on the 25th October, 1922, and, on the 7th December, 1922, the appellant obtained a sale certificate under section 11 of the Bengal Rent Recovery Act (VIII of 1865). In course of the proceedings under that section for putting the appellant into possession, some of the plaintiffs in the present suit took objection on the ground that the decree in execution of which the tenure had been put up for sale was not a rent decree and that what had passed by the auction was only the interest possessed by the defendants called in that suit. The Deputy Commissioner sustained the objection but the Commissioner reversed that decision, and the Board of Revenue upheld the Commissioner's decision on the ground that the decree was a rent decree and that the sale was a sale of the tenure under section 208 of the Chota Nagpur Tenancy Act.

The present suit was accordingly instituted on the 2nd August, 1924, seeking a permanent injunction restraining the appellant from recovering possession of mouza Maran from the plaintiff-respondents.

Though the allegations of fraud against the appellant were held by the Subordinate Judge to have failed, and they have not been persisted in, there can be no doubt that, when he obtained the decree of 1920, the appellant was fully aware of the interest of defendant no. 5 in the khorposh lands.

In the first place, the appellant maintains that the failure of defendant no. 5 to have her name entered on the sherishta, along with the fact that she had never paid rent or been recognised by him as a tenure-holder, entitled him to proceed to the sale of the tenure under section 208 without joining her as a defendant. The Subordinate Judge accepted this

view and dismissed the suit, but this contention was rejected by the High Court. Their Lordships agree with the High Court. No such sanction as forfeiture of rights in the tenure in respect of failure to comply with the provisions of section 11 is provided by the Act; such failure only affects the transferee's power to recover rent from his under-tenants as provided in sub-section 4.

Their Lordships agree with the High Court that in order to justify a sale of the tenure under the provisions of section 208 of the Chota Nagpur Tenancy Act, all parties interested in the tenure must be joined as defendants in the rent suit, or be sufficiently represented by parties joined as defendants. In their Lordships' opinion, the cases decided on the construction of section 159 of the Bengal Tenancy Act, 1885, as regards this point are equally applicable to the construction of section 208 of the Chota Nagpur Tenancy Act. In particular, reference may be made to the judgment of Jenkins, C.J., in *Chamatkari Dasi* v. *Triguna Nath Sardar*(1), in which he refers to the earlier cases. The principle of these decisions was accepted as applicable to a sale under section 208 of the Chota Nagpur Tenancy Act in *Chandra Nath Tewari* v. *Protap Udai Nath*(2). The decision in *Profulla Kumar Sen* v. *Nawab Sir Salimulla Bahadur*(3) in which there appears to have been no citation of authority, is difficult to reconcile with the above cases, and must be doubted. The appellant relied on certain passages in the judgment of this Board in *Doolar Chand Sahoo* v. *Lalla Chabul Chand*(4). The sale in that case was clearly not a sale under the Bengal Tenancy Act, 1869, and the present question did not arise for decision; any incidental references to a sale under the Act of 1869 cannot be regarded as a considered decision on the present

(1) (1913) 17 Cal. W. N. 833.
(2) (1913) 18 Cal. W. N. 170.
(3) (1918) 23 Cal. W. N. 590.
(4) (1875) L. R. 6 I. A. 47.

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question. The question of representation does not arise in the present case, for the appellant does not maintain that the defendants joined in the rent suit of 1919 in any way represented the interest of the present defendant no. 5.

There can be no doubt that the sale in the present case purported to take place by virtue of sub-section 1 of section 208 of the Chota Nagpur Tenancy Act, which—so far as material—provides as follows :—

" When a decree passed by the Deputy Commissioner under this Act is for an arrear of rent due in respect of a tenure or holding, the decree-holder may apply for the sale of such tenure or holding, and the tenure or holding may thereupon be brought to sale, in execution of the decree, according to the provisions for the sale of under-tenures contained in the Bengal Rent Recovery (Under-tenures) Act, 1865, and all the provisions of that Act, except sections 12, 13, 14 and 15 thereof, shall as far as may be apply to such sale."

It may be noted that, under section 16 of the Act of 1865, the purchaser at the sale of the under-tenure is to acquire it free from all incumbrances created by the under-tenure holders without the landlord's written consent or ratification. Hence the plaintiffs' concern to get rid of any sale under section 208.

The appellant challenges the jurisdiction of the Civil Court to interfere with the sale that has taken place, and bases this contention on section 214 of the Chota Nagpur Tenancy Act, which, so far as material, provides as follows :—

" 214. No suit or application shall be entertained by any Court to set aside or to modify the effect of—(*a*) any sale made under this Act, save under section 211, section 212 or section 213, or on the ground of fraud or want of jurisdiction."

Sections 212 and 213 have no bearing in the present case, but section 211, which requires consideration, is as follows :—

" 211. (1) If, before the day fixed for the sale of any tenure or holding in pursuance of section 208, a third party appears before the

Deputy Commissioner and alleges that he, and not the person against whom the decree has been obtained, was in lawful possession of, or had some interest in, the tenure or holding when the decree was obtained, the Deputy Commissioner shall examine such party according to the law for the time being in force relating to the examination of witnesses; and if he sees sufficient reason for so doing, and if such person deposits in Court or gives security for the amount of the decree, the Deputy Commissioner shall stay the sale, and shall, after taking evidence, adjudicate upon the claim;

Provided that no such adjudication shall be made if the Deputy Commissioner considers that the claim was designedly or unnecessarily delayed:

Provided also that no transfer of a tenure shall be recognised unless it has been registered in the office of the landlord or sufficient cause for non-registration is shown to the satisfaction of the Deputy Commissioner.

* * * *

"(2) The party against whom judgment is given by the Deputy Commissioner under subsection 1 may, at any time within one year from the date of the judgment, bring a suit in the Civil Court to establish his right, and if the sale has been held, to have it set aside on payment by him of the amount of the decree."

This section clearly relates to a case where parties interested in the whole 16 annas of the tenure have been joined as defendants, but a third party claims an interest in room and place of one or more of the defendants; it would not apply in the present case, where the whole interest is not covered by the parties joined as defendants, and the party omitted should have been joined in addition.

In order to take advantage of section 214 the appellant must first establish that the sale was a sale made under Chapter XVI of the Act, which includes sections 135 to 229, which in effect is a question of jurisdiction. [Under Chapter XVI of the Act a statutory jurisdiction is conferred on the Revenue Courts, but that jurisdiction must be exercised within the statutory powers conferred. If then, as already stated, it is not competent to order a sale of the tenure under section 208 unless the whole interests in the tenure are represented before the Court, it is clear that the order for sale of the tenure in the present case was *ultra vires* of the Revenue Court, and it follows that

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the sale was not " made under this chapter " and was outside the jurisdiction of that Court. This view is confirmed by an examination of the terms of the decree of 1920 for arrears of rent, for the claim decreed is " on account of arrears of rent and cesses with interest in respect of khorposh *held by the defendants* in mauza Madan, Bidra, Rano and Chareya," and the decree is thus only apt to attach the interest of the defendants in the tenure, and is no sufficient warrant for a sale of the whole tenure under section 208.

Accordingly, their Lordships are of opinion that the jurisdiction of the Court is not excluded by section 214, as the sale under section 208 was *ultra vires;* and that, consequently, the incumbrances on the tenure were not affected.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court of the 17th January, 1929, should be affirmed, and that the appeal should be dismissed with costs.

Solicitors for appellant:—*H. S. L. Polak and Company.*

Solicitors of respondents:—*W. W. Box and Company.*

PRIVY COUNCIL.

J. C.* 1933.

March, 30.

RAJA RAN BAHADUR SINGH

v.

NAGARSETH KASTURBHAI MANI.

On Appeal from the High Court at Patna.

Chota Nagpur Incumbered Estates Act (VI of 1876), sections 11, 18—Scheme not contemplating Sale—Sale without fresh Scheme—Sale by Manager—Intervention of Commissioner and Revenue authorities.

* PRESENT: Lord Tomlin, Sir John Wallis and Sir George Lowndes.

Section 18 of the Chota Nagpur Incumbered Estates Act, 1876, as amended in 1909, prohibits a sale of part of an estate under the Act until a scheme has been approved by the Commissioner under section 11, but does not require a fresh scheme to be prepared and approved to justify a sale not contemplated in the approved scheme if in the opinion of the Commissioner and the Manager a sale is expedient in the interests of the estate.

Section 18 requires that a sale shall be by the Manager, and upon such terms as he thinks fit, but a sale made by him on terms sanctioned by the Commissioner is not invalid because the Commissioner and the superior Revenue authorities have had a controlling voice in considering and negotiating the matter.

Hukum Chand v. *Ran Bahadur Singh*(1), distinguished.

Decree of the High Court affirmed.

Appeal (no. 125 of 1930) from a decree of the High Court (April 4, 1929) affirming a decree of the Additional Subordinate Judge of Hazaribagh (March 21, 1923).

The suit was instituted by the appellants against respondent no. 1 respondent no. 2, the Raja of Nawagarh, being afterwards added as defendant no. 2.

The main question for determination was whether a sale deed executed on March 9, 1918, by the Manager of the property of the Raja of Palganj appointed under the Chota Nagpur Incumbered Estates Act, 1876, was valid and binding upon the Raja.

The facts appear from the judgment of the Judicial Committee.

Both Courts in India held that the sale was valid.

1933. March 6, 7.—*De Gruyther, K.C., Hyam* and *Champatrai Jain,* for the appellants.

Dunne, K.C. and *Wallach,* for respondent no. 1.

(1) (1924) I. L. R. 3 Pat. 625; L. R. 51 I. A. 208.

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The arguments for the appellant appear from the judgment here reported; counsels for the respondent no. 1 were not called upon.

March 30.—The judgment of their Lordships was delivered by—

SIR JOHN WALLIS.—The subject of this appeal is the Pareshnath Hill in the Hazaribagh District of Chota Nagpur, which has for many hundred years been held sacred by both branches of the Jain religion, the Swetambaris and the Digambaris, and has unfortunately been the subject in the last twenty years of no less than four suits, of which two, *Hukum Chand* v. *Ran Bahadur Singh*(1) and *Maharaj Bahadur Singh* v. *Seth Hukum Chand*(2), have already been dismissed by His Majesty in Council affirming the decision of the Courts below, while the appeals in this and the remaining suit now await decision.

The present suit was instituted on June 24th, 1920, by the Raja of Palganj and the Digambaris, who had obtained from the Raja a permanent lease of the Hill on January 4th, 1919, to recover possession and mesne profits from the Swetambaris, in whose favour a deed of sale had been executed on March 9th, 1918, by the Manager of the Palganj estate under section 18 of the Chota Nagpur Encumbered Estates Act, 1876, on the ground that the sale was illegal, invalid and inoperative on eighteen grounds set out in paragraph 20 of the plaint. All these grounds were rejected by both the lower Courts, but before coming to them their Lordships will refer to the defendants' plea *in limine* that the suit was barred by reason of a compromise entered into in another suit.

On October 6th, 1917, the Commissioner of Chota Nagpur had sanctioned the sale of the Hill to the defendants under section 18 of the Act, subject to his approval of the sale deed. On January 4th, 1918, an

(1) (1924) I. L. R. 3 Pat. 625; L. R. 51 I. A. 208.
(2) (1925) 24 All. L. J. 100.

appeal by the Raja of Palganj, represented by the Manager, came on for hearing before the High Court of Patna from a decree of the Subordinate Court of Hazaribagh in a suit brought against him by the Raja of Nawagarh claiming an undivided half share of the Pareshnath Hill. On January 31st, the hearing of the appeal was adjourned at the suggestion of the Court with a view to a compromise, and on February 4th both parties filed a petition stating that the suit had been compromised on the terms that they should each of them dispose of their interests in the Pareshnath Hill to the Swetambaris on terms already settled, that all questions of ownership in the Hill should be left undetermined, and that the boundaries between the Hill and the Nawagarh estate should be demarcated. Under this compromise the Raja of Palganj's interest in the Hill was to be sold to the Swetambaris on the terms already sanctioned by the Commissioner.

At the same time the Swetambaris who were not parties to the suit presented a petition agreeing to these terms. It was ordered to be recorded, and the petition was adjourned to allow of the conveyances being executed and the boundary demarcated. On February 26th the Raja of Nawagarh executed a permanent lease in favour of the Swetambaris, and on March 9th, as already stated, the Manager of the Palganj estate, pursuant to the sanction of the Commissioner of Chota Nagpur, dated March 4th, executed the deed of sale which is now in question. Finally, on November 19th, 1919, after the report of the demarcating officer had been received, the High Court passed a decree allowing the appeal in terms of the compromise petition and the map annexed to the decree.

On these facts the Subordinate Judge held at the trial that the sale and lease executed by the parties to the suit pursuant to the compromise were merged in the compromise decree and that therefore the sale could not be questioned in this suit. He accordingly

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dismissed the suit. The High Court, after calling for findings on the other issues which the Subordinate Judge had left undecided, held that the agreements for sale and lease were outside the scope of the suit, that the only terms within it were the agreement to leave the claims of the parties to the Hill unsettled and the provision for a demarcation of the boundary between the Hill and the Nawagarh estate, and that therefore the compromise decree could not be taken to have decided the question of the validity of the sale deed and was not a bar to the present suit. They proceeded to deal with the case on the merits, and held, agreeing with the finding of the second Subordinate Judge on the remaining issues, that the plaintiffs' suit failed.

Their Lordships have not heard the respondents' objections to the High Court's ruling as to the effect of the compromise, as after hearing the appellants' case fully argued, they considered it unnecessary to call upon the other side. They will therefore confine themselves to giving their reasons for agreeing with both the Courts below that the plaintiffs' suit fails upon the merits.

Their Lordships will first deal with two of the legal objections to the sale, that the terms of sale were not settled by the Manager *himself* but by the Revenue authorities, and that the sale was not effected in pursuance of the scheme required by the Act. The former objection, as pointed out by the High Court, was not specifically raised in the objections pleaded, and was probably suggested by the decision of this Board in *Hukum Chand's* case(1) which was not given until four years after the filing of the plaint. The Manager, however, gave evidence about it in 1928, when the case was remanded, and it has been dealt with by both the lower Courts.

(1) (1924) I. L. R. 3 Pat. 625; L. R. 51 I. A. 208.

Section 18 of the Act as amended in 1909 is as follows :—

18. After a scheme has been approved by the Commissioner under section 11, the Manager shall, subject to the sanction of the Commissioner, have power,—

(*a*) to demise by way of mortgage the whole or any part of such property for a term not exceeding twenty years from the date of publication of the order under section 2, or

(*b*) to sell by public auction or by private contract, and upon such terms as the Manager thinks fit, such portion of such property as may appear expedient,

for the purpose of raising any money which may be required for the settlement of the debts and liabilities to which the holder of the property is subject, or with which such property or any part thereof is charged, or,

(*c*) to borrow money, at such rate of interest as appears reasonable to the Board of Revenue,

for the aforesaid purpose or for the purpose of meeting the costs of such repairs and improvements of the property as appear necessary to the Manager and are approved by the Commissioner.

As regards the objection that the sale was not effected in pursuance of the scheme required by the Act, section 11 requires the Manager to prepare and submit to the Commissioner a schedule of debts and a scheme for the settlement thereof, and such scheme, when approved by the Commissioner, is to be carried into effect. The object of the Act being to save the estate from sales in execution at the suit of creditors, it was only natural that the power to mortgage or sell or borrow money subject to the sanction of the Commissioner should not come into force until the scheme for the settlement of the debts and liabilities of the estate had been approved. A scheme was drawn up in this case which provided for the liquidation of the debts out of income by the year 1918, but it proved quite unworkable, and, as stated in the Manager's final report, the bulk of the debts was eventually discharged out of the proceeds of the sale in 1918 which is the subject of this suit. In their Lordships' opinion section 18 only prohibits a sale until a scheme has been prepared and approved, and does not require the preparation of any further scheme to justify a

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sale which in the opinion of the Commissioner and the Manager may be expedient in the interests of the estate.

With regard to the objection that the sale and the terms thereof were not settled by the Manager but by the Revenue authorities, under section 18 the Manager is empowered to sell " by public auction or private contract, and upon such terms as the Manager thinks fit," but this power is to be exercised subject to the sanction of the Commissioner, all of whose orders and proceedings under the Act are subject to the supervision of the Board of Revenue, who may revise, modify or reverse them (section 21A of the Act as amended in 1909). In *Hukum Chand's* case(1) the Manager was not shown to have had any part in entering into the alleged contract for sale which was held to be invalid and the observations and judgment of the Board must be read with reference to that state of facts.

In the present case, according to the Manager's evidence, which has been accepted by both the lower Courts, an offer by the Swetambaris was communicated to him by the Deputy Commissioner, and, after full discussion, was submitted to the Commissioner with a recommendation that a sale would be preferable to a lease. The matter was most carefully considered by the Commissioner, the Board of Revenue and the Local Government, and on October 6th, 1917, after further negotiations with the Swetambaris a sale on certain terms was sanctioned by the Commissioner subject to his approval of the sale deed. The next thing was that in February, 1918, after consulting the Legal Remembrancer and the Secretary to the Board of Revenue, the Manager, as already stated, entered into the compromise which provided for a sale to the Swetambaris on the terms sanctioned by the Commissioner. The sale deed was then drawn up by a Calcutta firm of solicitors on the Manager's instructions, and after it had been sanctioned by the

(1) (1924) I. L. R. 3 Pat. 625; L. R. 51 I. A. 208.

Commissioner on March 4th, 1918, was executed by the Manager on March 9th, 1918. In their Lordships' opinion the Commissioner and the superior Revenue authorities, if they chose to intervene, were entitled to have a controlling voice in any sale under the Act, and a sale by the Manager on terms sanctioned by the Commissioner was a sale which satisfied the requirements of section 18. As observed by Ross, J., "It is idle to suggest that the Manager could or should have acted on his own responsibility, nor does the statute contemplate such a course. The provision requiring the sanction of the Commissioner lets in the negotiations pursued in this case, and such negotiations seem to be contemplated in the decision in *Hukum Chand's* case(1). It cannot be said that the Manager is not a voluntary agent because the scope of his action is limited by the statute, and it seems to me that there is nothing in the correspondence to show that the Manager did not perform the part in this transaction which the statute assigns to him. As regards the Manager's position under the statute it is not immaterial to note that section 20 empowers the Commissioner to replace him at any time."

The only other objection to which their Lordships think it necessary to refer is set out in paragraph 20(*h*) of the plaint as follows :—

"In that the said sale inclusive of mineral, jungle and all other rights of the plaintiff no. 1 therein for the inadequate sum of Rs. 2,50,000 and otherwise upon the terms contained in the said conveyance was an illegal and to the knowledge of the defendant, a *mala-fide* exercise, and in any event not a reasonable or *bona-fide* exercise of the statutory power of sale vested in the said Manager, and in fact the said sale was demonstrably injurious to the interest of plaintiff no. 1."

Both the lower Courts have arrived at concurrent findings, with which their Lordships see no reason to interfere, that these allegations are not made out, and that, on the contrary, the discretionary power of sale conferred by the statute would appear to have been

(1) (1924) I. L. R. 3 Pat. 625; L. R. 51 I. A. 208.

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exercised in the best interests of the estate and that it is not shown that any better price could have been obtained.

Their Lordships will therefore humbly advise His Majesty that the appeal fails and should be dismissed with costs.

Solicitor for appellants:—*Barrow, Rogers and Nevill.*

Solicitor for respondent no. 1:—*H. S. L. Polak and Company.*

PRIVY COUNCIL.

J. C.* 1933.

April, 4.

AMARENDRA MANSINGH

v.

SANATAN SINGH.

On Appeal from the High Court at Patna.

Hindu Law—Adoption—Widow's Power of Adoption—Death of natural Son unmarried—Son attaining over 20 years—Property not vested in Widow—Limits to exercise of Power—Religious Efficacy.

A Hindu governed by the Benares school of the Mitakshara law was survived by an infant son and by a widow, to whom he had given authority to adopt in the event of the son dying. The son succeeded to the impartible zamindari held by his father, but died unmarried at the age of twenty years and six months. Thereupon the widow, the son's mother, made an adoption to his father. By a custom of the family females were excluded from inheriting. In a suit claiming inheritance against the adopted son:—

Held, that as the natural son had left no son to continue the line nor a widow to provide for its continuance by an adoption, the adoption by his mother was valid, although the zamindari was not vested in her, and although the son had attained the age above stated.

* PRESENT: Lord Atkin, Lord Thankerton, Lord Macmillan, Sir John Wallis, and Sir George Lowndes.

Review of the authorities as to the limits to the exercise of a power to adopt possessed by a Hindu widow.

Pratapsingh Shivsing v. *Agarsingji*(1), followed.

Observation in *Madana Mohana Deo* v. *Purushotthama Deo*(2), explained.

Venkappa Bapu v. *Jivaji Krishna*(3), and *Ramchandra* v. *Shamrao*(4), approved; *Bhimabai* v. *Tayappa*(5), doubted.

Decree of the High Court, *Amarendra Mansingh* v. *Banamali Singh*(6), reversed.

Appeal (no. 32 of 1932) by special leave from a decree of the High Court (January 29, 1930) affirming a decree of the Subordinate Judge of Cuttack (November 30, 1925).

The suit was instituted by Banamali, since deceased and represented by the respondents, claiming by inheritance an impartible zamindari in Orissa upon the death of Raja Bibhudendra, who died in December, 1922, unmarried and at the age of twenty years and six months. The plaintiff alleged that according to the custom of the family females were excluded from inheritance, and that an adoption of the first appellant, Amarendra, made a week after the death of Raja Bibhudendra by the second appellant, Rani Indumati, his mother, was invalid. It was not disputed in the appeal that if the custom alleged was established, and if the adoption was invalid, the plaintiff was entitled to inherit the property as the nearest sapinda. The parties were governed by the Benares school of the Mitakshara law. The zamindari was claimed on the basis that it was separate property, and it was treated throughout as being so.

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(1) (1919) I. L. R. 43 Bom. 778; L. R. 46 I. A. 97.
(2) (1918) I. L. R. 41 Mad. 855, 860; L. R. 45 I. A. 156, 161.
(3) (1901) I. L. R. 25 Bom. 306.
(4) (1902) I. L. R. 26 Bom. 526.
(5) (1913) I. L. R. 37 Bom. 598.
(6) (1930) I. L. R. 10 Pat. 1.

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The facts appear more fully from the judgment of the Judicial Committee.

Both Courts in India found that the custom alleged was established and that the adoption was invalid. The adoption was held to be invalid mainly on the ground that Rani Indumati could not exercise her power to adopt so as to divest the estate vested in the plaintiff. The judgments delivered in the High Court by Jwala Prasad and Scrope, JJ. appear from the report in *Amarendra Mansingh* v. *Banamali* Singh(1).

1933. Jan. 31; Feb. 2, 3, 6, 7, 9, 10. *Sir Dawson Miller*, *K. C.* and *Jinnah* for the appellants.

De Gruyther, *K. C.* and *Wallach* for the respondent no. 1 (the eldest son of Banamali, deceased).

The contentions of the parties, and the principal authorities relied on, appear from the judgment of their Lordships. In addition to cases there mentioned reference was made to *Shamchunder* v. *Narayi Dibeh*(2), *Ram Soondur Singh* v. *Surbanee Dossee*(3), and *Faizuddin Ali Khan* v. *Tincowri Saha*(4). With regard to *Pratapsigh Shivsing's* case(5) the respondent contended that the decision was based upon the view that under the *jivai* grant an adopted son was a son, and that consequently the reverter was not absolute but provisional upon no adoption being made.

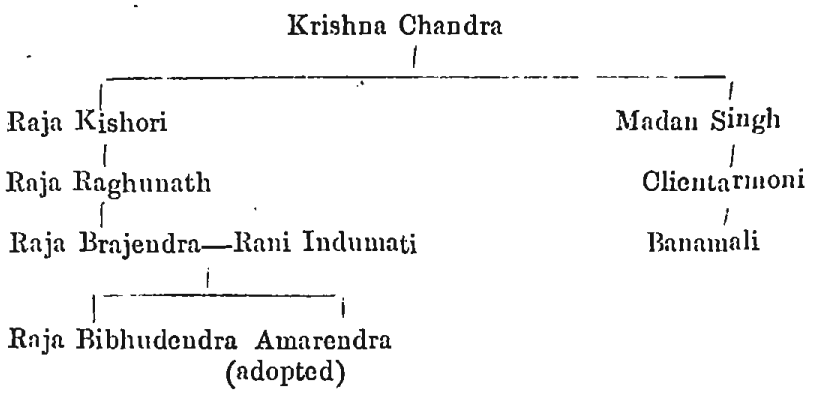
April 4. The judgment of their Lordships was delivered by—

SIR GEORGE LOWNDES.—This appeal raises an important question with regard to the validity of an adoption by a Hindu widow.

The facts upon which the decision turns may be stated quite shortly. The issue involved is as to the right of succession (using the word in its widest significance) to the Dompara Raj, an impartible

(1) (1930) I. L. R. 10 Pat. 1.
(2) (1807) 1 Sel. Rep. 279.
(3) (1874) 22 Suth. W. R. 121.
(4) (1895) I. L. R. 22 Cal. 565.
(5) (1919) I. L. R. 43 Bom. 778; L. R. 46 I. A. 97.

zamindari in Orissa. The early history of the Raj is dealt with at length in the judgments below, and it is unnecessary to refer to it for the purposes of this appeal. The parties are *kshatriyas* by caste, and are governed, apart from special family custom, by the Benares school of the Mitakshara law. The following pedigree will show the relationship of the persons to whom reference will have to be made, the successive holders of the estate being denominated by the title of Raja:—



On the 20th July, 1898, Raja Brajendra, being then without issue, executed a deed of which the following are the important clauses:

1. God forbid if I die without leaving any issue or if the son born of my loins or my adopted son die without leaving a son after my death, then my Rani Srimati Indumati Patmahadei shall be competent to adopt a son in accordance with rules laid down below.

4. God forbid if the sons adopted by the said Rani die, then the said Rani shall be competent to adopt sons one after the other from the Raj family of the same caste (as ours) in the aforesaid manner.

The deed was duly registered, and no dispute arises as to either its authenticity or interpretation.

Some time in or about the year 1902 a son was born, Raja Bibhudendra, who succeeded to the estate on his father's death in 1903. It then came under the superintendence of the Court of Wards, and so remained till the death of Bibhudendra which occurred on the 10th December, 1922. He died unmarried at

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the age of 20 years and 6 months, and was therefore in the view of the law a minor: section 3 of the Indian Majority Act, 1875, as amended by Act VIII of 1890. He was also incompetent, without the consent of the local government, either to adopt or to authorise an adoption to him: section 61 of Bengal Act IX of 1879. A week later, on the 18th December, his mother, Rani Indumati, adopted Amarendra, who was then (and still is) a minor. The Court of Wards remained in possession of the estate, apparently on his behalf. It was then claimed by Banamali, a sapinda of Bibhudendra several degrees removed, who disputed the validity of the adoption. He filed his suit on the 23rd June, 1924, in the Court of the Subordinate Judge of Cuttack, impleading Amarendra and the Rani, and succeeded in both the Courts in India. Various matters were raised at the trial which are not now in issue, the only questions before the Board being as to the existence of a family custom by which females are excluded from succession, and as to the adoption. The parties are agreed that if the custom is established and the adoption inoperative, Banamali was entitled to the estate as the nearest reversioner. He died pending the appeal to the High Court and is now represented by the respondents.

The suit was tried jointly with another suit in which one Ramchandra Mardaraj Singh asserted a superior title to the estate as the second son of Brajendra by a subordinate wife. His suit failed before the Subordinate Judge, and an appeal filed by him was dismissed for want of prosecution. No further reference will be necessary to his claim.

On the question of custom, both the Subordinate Judge and the High Court have held it to be sufficiently proved, though the jugdments differ as to the weight to be attached to different parts of the evidence. Their conclusions on this head have been attacked in some detail before the Board, but their Lordships, following their usual practice, are not

disposed to interfere with concurrent findings upon what is essentially a question of fact. That there is evidence upon which these findings could legitimately be based is undeniable, and no sufficient reason has been shown for a reconsideration of the question here.

It was also held by both Courts that the adoption of Amarendra was invalid, with the result that the claim of Banamali was decreed. It is upon this issue that the main contentions of the parties have centred before the Board. The argument has been exhaustive, and their Lordships have already expressed their obligations to counsel on both sides for the valuable assistance they have afforded.

On this question it was alleged in the plaint that the Rani's power of adoption was extinguished on Bibhudendra's death, in as much as he had then attained full age and full legal capacity to continue his line, and that the adoption could not divest the estate which had vested eight days previously by inheritance in Banamali as the nearest collateral heir of the last male holder. The latter contention was accepted as decisive by the Subordinate Judge, who passed a decree dated the 30th November, 1925, in his favour. The learned Subordinate Judge also expressed the opinion that Bibhudendra at the time of his death had "attained full age and legal capacity to continue his line," but this does not appear to have been the basis of his judgment.

In the High Court separate judgments were delivered by Jwala Prasad and Scroope JJ., who concurred generally with the conclusions of the Subordinate Judge. The authorities were exhaustively dealt with in both Courts. Their Lordships think that nothing would be gained by referring to these judgments in greater detail. It is from no disrespect to the learned Judges that they refrain from doing so, but only to avoid undue lengthening of what must, in

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any case, be a lengthy examination of authorities and arguments. They will, they believe, be found to have dealt with all the relevant considerations.

Before the Board these contentions were elaborated by counsel for the first respondent who alone appeared. First it was said that treating Banamali as a separated sapinda claiming strictly by inheritance —the basis upon which the claim was laid in the plaint —the authorities established that when once the estate had vested in an heir of the last male holder, other than the adopting widow, the power of adoption was at an end. If this were the true view, inasmuch as the Rani was precluded by the custom from inheriting to her son Bibhudendra, she could no longer adopt.

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In the second place, it was said that where the husband from whom the power to adopt was derived left a son to succeed him, and that son attained full legal capacity to continue the line, the power of his mother was equally at an end, and that this would be the case whether the family was separate or joint.

The two lines of reasoning are, their Lordships think, distinct. The first approaches the question from the point of view of rights in property: the second from what may be regarded as the religious and ceremonial side. Both are said to have the sanction of decisions of the Board.

For the appellant it is contended that the first proposition enunciated is altogether unsound, the power to adopt not being dependent in any way on the vesting of property, and as to the second, that the rule upon which reliance is placed, if properly interpreted, does not apply to the facts of the present case.

Their Lordships think that in dealing with the arguments which have been addressed to them, it is important to bear in mind the essential features of the doctrine of adoption among orthodox Hindus, as they

are conscious that these may have been to a certain extent blurred by the mass of case law which has been accumulated in the last three-quarters of a century.

The origin of the custom of adoption is lost in antiquity, and may well have been no more than the natural desire for a son as an object of affection, a protector in old age, and at the last an heir. However this may be, it is certain that through all the centuries which have seen the spread of Brahminical influence, and among all classes which have come under its sway, a peculiar religious significance has attached to the son. He is so essential to the spiritual welfare of the souls of his immediate ancestors that an extensive class of subsidiary sons was admitted to the family, all of whom could perform the necessary ceremonies, though only some of them were allowed full rights of inheritance. Of these among the orthodox classes, only the adopted son is now recognised, but he, in the absence of an *aurasa*, or natural born son, is clothed with all the attributes of a son, and is from the date of his adoption regarded as having been born in his adoptive family.

The 9th chapter of Manu's Code, which has always been regarded as of paramount authority, is instinct with this doctrine. The father by the birth of a son discharges his debt to his progenitors (v. 106); through him he attains immortality (v. 107); by a son a man obtains victory over all people; by a son's son he enjoys immortality: and afterwards by the son of that grandson he reaches the colar abode (v. 137); a son is called *Putra* because he delivers his father from Put (v. 138). In the Dharma Sutra of Baudhayana, which is probably older than the Christian era, the formula prescribed for adoption is " I take thee for the fulfilment of my religious duties: I take thee to continue the line of my ancestors " (Bau.: vii, 11, Sacred Bks. of the East, Vol. xiv, 335).

In their Lordships' opinion, it is clear that the foundation of the Brahminical doctrine of adoption

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is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites. And it may well be that if this duty has been passed on to a new generation, capable itself of the continuance, the father's duty has been performed and the means provided by him for its fulfilment spent: the "debt" he owed is discharged, and it is upon the new generation that the duty is now cast and the burden of the "debt" is now laid.

It can, they think, hardly be doubted that in this doctrine the devolution of property, though recognized as the inherent right of the son, is altogether a secondary consideration. So Sir James Colvile, in delivering the judgment of the Board in *Raghunada* v. *Brozo Kishoro*(1), (a case to which further reference will be made later) observes:—

> "a distinction which is founded on the nature of property seems to belong to the law of property, and to militate against the principle which Mr. Justice Holloway has himself strenuously insisted upon elsewhere, viz., that the validity of an adoption is to be determined by spiritual rather than temporal considerations: that the substitution of a son of the deceased for spiritual reasons is the essence of the thing, and the consequent devolution of property a mere accessory to it."

Having regard to this well-established doctrine as to the religious efficacy of son-ship, their Lordships feel that great caution should be observed in shutting the door upon any authorised adoption by the widow of a sonless man: see in this connection *Suryanarayana* v. *Venkataramana*(2). The Hindu law itself sets no limit to the exercise of the power during the lifetime of the decree, and the validity of successive adoptions in continuance of the line is now well recognized. Nor do the authoritative texts appear to limit the exercise of the power by any considerations of property. But that there must be some limit to its exercise, or at all events some conditions in which it would be either contrary to the spirit of the Hindu

(1) (1876) I. L. R. 1 Mad. 69, 82; L. R. 3 I. A. 154, 192.
(2) (1906) I. L. R. 29 Mad. 382, 388; L. R. 33 I. A. 145, 153.

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doctrine to admit its continuance, or inequitable in the face of other rights to allow it to take effect, has long been recognized both by the Courts in India and by this Board, and it is upon the difficult question of where the line should be drawn, and upon what principle, that the argument in the present case has mainly turned.

In support of his first line of reasoning, based upon the vesting of property in an heir other than the adopting widow, counsel for the first respondent relied upon the often quoted judgment delivered by Lord Kingsdown in *Bhoobun Moyee Debia's* case(1). There one Gour Kishori died leaving a son Bhowanee, and a widow Chundrabullee Debia to whom he gave authority to adopt in the event of Bhowanee's death. Bhowanee died at the age of 24 without issue, but leaving a widow Bhoobun Moyee, who succeeded by inheritance to his property. Chundrabullee then adopted Ram Kishore who sued Bhoobun Moyee for the recovery of the estate. It was held by the Board that his claim failed. The parties being governed by the Dayabhaga law, Bhoobun Moyee would have succeeded to Bhowanee's property in preference to Ram Kishore, even if he had been a natural born son of Gour Kishore, and the Board held that it was " contrary to all reason and to all the principles of Hindu law " that he should displace the rightful heir. It is not so much the actual decision in this case that is relied on as certain dicta in the judgment and the implications which have been held to arise from it. " The question is " said Lord Kingsdown (p.311) " whether the estate of his son being unlimited and that son having married and left a widow his heir, *and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption who is to defeat that estate.....*" From this it is argued that it was upon the vesting of the property that the determination of the power of adoption depended,

(1) (1865) 10 Moo. I. A. 279.

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and that this view is confirmed by subsequent decisions of the Board to which reference must be made.

After the death of Bhoobun Moyee, Ram Kishore got possession of the property and if his adoption was good he was undoubtedly the next heir. His title, however, was disputed by a distant collateral and the validity of his adoption was the subject of another suit. The Bengal High Court upheld the title of Ram Kishore, considering that the Board in the previous case had only affirmed the prior right of inheritance of Bhoobun Moyee, and had not held the adoption to be invalid. This case again came before the Board [*Pudmakumari Debi* v. *Court of Wards*(1)], and the decision of the High Court was reversed, the opinion of their Lordships being that upon the vesting of the estate in the widow of Bhowanee the power of adoption was at an end and incapable of execution, and that this was what the Board had held in the previous case.

These authorities were again considered in a case from Madras: *Thayammal* v. *Venkatarama*(2), the decision in which is also relied on by the respondents. The question there was as to the right of succession to the estate of one Kuttisami who had died without issue leaving his widow Thangammal as his heir. After his death his mother, Thayammal with the permission of the sapindas, adopted a son to the father of Kuttisami. The validity of the adoption was disputed on the ground that "the survival of the son's widow and the vesting of the estate in her put an end to the right of Thayammal, his mother, to adopt a son to his father." Their Lordships were of opinion that this objection was fatal to the adoption, and that the learned Judges of the High Court who had so decided, were correct in considering that the case was governed by the authorities above refered to.

(1) (1881) I. L. R. 8 Cal. 302; L. R. 8 I. A. 229.
(2) (1887) I. L. R. 10 Mad. 205; L. R. 14 I. A. 67.

Thayammal's case(1) was followed in *Tarachurn Chatterji* v. *Sureshchander Mookerji*(2) where Sir Richard Couch observes " On the son's death after coming of age of leaving Matangini his widow, Madhub Chunder's wife would not have power to adopt a son, *the estate of Kali Churn having become vested in his widow.*"

So far then, their Lordships think, it was well established that a power of adoption in a mother was extinguished when her son had died leaving a widow to whom the son's estate passed by inhertance. But though undoubtedly certain passages in the judgments relied on seemed to suggest that it was the succession to the estate by the son's widow that was the determining factor, and, as was stated by a learned Hindu judge in 1900 " the whole current of recent decisions has been to base this limitation solely on the question whether the widow's act of adoption derogated from her own rights or the vested rights of others " [per Ranade, J. in *Venkappa Bapu* v. *Jivaji Krishna*(3)], yet it was never so laid down by the Board in precise terms. The dominant consideration may have been the right of property, and equitable claims may not have been without their influence, but the religious and ceremonial side was not altogether ignored. In *Bhoobun Moyee's* case(4) Lord Kingsdown evidently relied upon the fact that Bhowanee had died at an age which enabled him to perform—and it was to be presumed that he had performed—all the religious services which a son could perform for a father, and he refers to the doctrine of Hindu law that the husband and wife are one, and that in the widow a half of the husband survives. It is at least material that in each of the other cases it was the existence of the son's widow that stood in the way of the adoption, and that in none of them was there any suggestion that the

(1) (1887) I. L. R. 10 Mad. 205; L. R. 14 I. A. 67.
(2) (1889) I. L. R. 17 Cal. 122; L. R. 16 I. A. 166.
(3) (1900) I. L. R. 25 Bom. 306, 312.
(4) (1865) 10 Moo. I. A. 279.

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same rule would apply if the heir in whom the property had vested were someone other than her. Moreover, in dealing with the successions in a joint family it is clear under the decisions of this Board that the vesting in another co-parcener does not put an end to the power of adoption : see *Sri Raghunada* v. *Sri Brozo Kishoro*(1); *Bachoo* v. *Mankorebai*(2); *Yadao* v. *Namdeo*(3). That this is so has not been questioned in the present case. Indeed, as their Lordships understood the argument of counsel for the first respondent, the joint family cases were rather relied on as emphasising the importance of " vesting " in the case of separate property.

It must also, their Lordships think, be taken as settled law that where the son dies in infancy, or before attaining what is often referred to as " ceremonial competence," leaving his mother as his heir, her power of adoption is still exerciseable : *Vellanki Venkata Krishna Rao* v. *Venkatta Rama Lakshmi*(4); *Verobhai Ajubhai* v. *Bai Hiraba*(5); *Mallappa* v. *Hanmappa*(6). This again has not been disputed, and it is plain that if it were not so, successive adoptions would be impossible. It will, however, be necessary to consider the limits of this particular doctrine later on.

Tarachurn Chatterji's case(7), was decided in 1889, and during the next thirty years little further light is thrown upon the question now under consideration by decisions of this Board. In the Indian Courts, however, the effect of the earlier authorities was constantly under discussion, and various attempts were made to arrive at the true principle, the opinions

(1) (1876) I. L. R. 1 Mad. 69; L. R. 3 I. A. 154.
(2) (1907) I. L. R. 31 Bom. 373; L. R. 34 I. A. 107.
(3) (1921) I. L. R. 49 Cal. 1; L. R. 48 I. A. 513.
(4) (1876) I. L. R. 1 Mad. 174; L. R. 4 I. A. 1.
(5) (1903) I. L. R. 27 Bom. 495; L. R. 30 I. A. 234.
(6) (1919) I. L. R. 44 Bom. 297.
(7) (1889) I. L. R. 17 Cal. 122; L. R. 16 I. A. 166.

of judges deeply versed in the Hindu law inclining now to what may be for convenience called the secular theory and now to the religious.

Nothing would be gained, in their Lordships' opinion, by attempting a critical examination of these cases in view of two recent pronouncements of this Board to which reference must now be made. It will, however, be necessary first to recite a decision in 1902 of the Full Court in Bombay—*Ramchandra* v. *Shamrao*(1). The question in this case was as to the validity of an adoption by the grandmother of the last male holder who had died unmarried and without issue. It was not disputed that the grandmother was his heir, and it was contended that, inasmuch as by the adoption she divested no estate but her own, the the adoption was valid. The Court held that it was invalid, on the ground that the penultimate owner, the son, had himself left a son, by reason of which fact the grandmother's power of adoption had come to an end. The judgment of the Full Court which was delivered by Chandavarkar J., involved a careful analysis of the older decisions of the Board and the conclusion come to was that

"Where a Hindu dies leaving a widow and a son, and that son dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived."

Sixteen years later, in April 1918, the case of *Madana Mohana Deo* v. *Purushothama Deo*(2) came before a Board consisting of Lords Haldane, Dunedin and Sumner with Sir John Edge and Mr. Ameer Ali. It was by a somewhat strange coincidence, a sequel to *Raghunada* v. *Brozo Kishoro*(3), to which reference

(1) (1902) I. L. R. 26 Bom. 526.
(2) (1918) I. L. R. 41 Mad. 855; L. R. 45 I. A. 156.
(3) (1876) I. L. R. 1 Mad. 69; L. R. 3 I. A. 154.

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has already been made. In the earlier case Brojo, who had been adopted by the widow of Adikonda, was held entitled to succeed to the impartible zamindari of Chinnakimedi, notwithstanding the fact that on Adikonda's death it had passed to his undivided brother Raghunadha. Brojo held the estate from 1870 till his death in 1906. He left no issue but a widow, Ratnamala, who was alive at the date of the later litigation but was not joined as a party. On Brojo's death, possession of the zamindari was taken by Raghunadha's son Vaishnava, who died in the same year and was succeeded by his son Purushothama. In 1907 the widow of Adikonda purported to adopt Madana, who sued Purushothama for the estate. The principal question before the Board was again whether this second adoption was valid. The Full Court case from Bombay was referred to, was approved, and was held to be decisive against the adoption.

Their Lordships will pass away from this case for the moment to refer to the second case which came before the Board a few months later, and which has perhaps a more direct bearing upon the particular line of argument which they are now considering. They only pause to point out that now the case law has arrived at a point where it would be impossible to say that the sole test of the validity of an adoption is the vesting or divesting of property.

In *Pratapsing Shivsing* v. *Agarsingji Rajasingji*(1), the litigation related to a village which had formed part of an impartible estate in the Bombay Presidency, and had been the subject of a maintenance grant to a junior branch of the family. By the custom of the family such grants reverted to the estate upon failure of male descendants of the grantee. The last holder, Kaliansing, died in October, 1903, childless, but leaving a widow who some five months later

(1) (1918) I. L. R. 43 Bom. 778; L. R. 46 I. A. 97.

adopted the appellant. The respondent, the owner of the principal estate, sued for recovery of the maintenance lands on the allegation that they vested in him on Kaliansing's death, and that consequently the adoption was invalid. The Subordinate Judge dismissed the suit, but his decision was reversed by the High Court on the ground that the land having once vested in the respondent, the subsequent adoption could not divest it. If this view had been accepted by the Board, it might well have been decisive in favour of the present respondents on their first line of argument. But it was not accepted, and their Lordships think that it must be regarded as decisive the other way. Notwithstanding that the property had vested in the respondent, the adoption was held to be good, and the suit was dismissed. It was laid down in clear terms that "the right of the widow to make an adoption is not dependent on her inheriting as a Hindu female owner her husband's estate"; and this dictum is supported by reference to the two cases already cited from the third and the thirty-fourth volumes of the Indian Appeals, both of them cases of joint property which had passed by survivorship. It necessarily follows, their Lordships think, from this decision, that the vesting of the property on the death of the last holder in someone other than the adopting widow, be it either another co-parcener of the joint family, or an outsider claiming by reverter, or, their Lordships would add, by inheritance, cannot be in itself the test of the continuance or extinction of the power of adoption. If in *Pratapsing's* case(1) the actual reverter of the property to the head of the family did not bring the power to an end, it would be impossible to hold in the present case that the passing by inheritance to a distant relation could have that effect any more than the passing by survivorship would in a joint family.

For these reasons, their Lordships are of opinion that the first line of reasoning upon which the

(1) (1918) I. L. R. 43 Bom. 778; L. R. 46 I. A. 97.

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respondents seek to uphold the decision below must fail, and they think that the true principle must be found upon the religious side of the Hindu doctrine to which they have already adverted.

Much reliance was placed by counsel for the first respondent on another Bombay case, *Bhimabai v. Tayappa*(1) in which an apparently contrary result had been arrived at in 1913 by Batchelor and Shah JJ. The property in question in this case was a *watan* estate which, under the provisions of the Bombay Hereditary Offices Acts of 1874 and 1886, did not pass by inheritance to the adopting widow on the death of her unmarried son, but vested in another member of the family, and for this reason the adoption was held to be bad. Unless there is something in the nature of *watan* property which makes the decision in *Pratapsing's* case(2) inapplicable, their Lordships think that this case can no longer be regarded as authoritative.

It being clear upon the decisions above referred to that the interposition of a grandson, or the son's widow, brings the mother's power of adoption to an end, but that the mere birth of a son does not do so and that this is not based upon a question of vesting or divesting of property, their Lordships think that the true reason must be that where the duty of providing for the continuace of the line for spiritual purposes which was upon the father, and was laid by him conditionally upon the mother, has been assumed by the son and by him passed on to a grandson or to the son's widow, the mother's power is gone. But if the son die himself son-less and unmarried, the duty will still be upon the mother, and the power in her which was necessarily suspended during the son's lifetime will revive.

There is, in their Lordships' opinion, nothing in the Hindu law which is contrary to this, and nothing in previous decisions of this Board which would induce them to hold otherwise. It is, they think, in accord

(1) (1913) I. L. R. 37 Bom. 598.
(2) (1918) I. L. R. 43 Bom. 778, 792; L. R. 46 I. A. 97, 107.

with the acceptance by Mr. Ameer Ali in *Pratap-sing's* case(1) of the view that among Hindus the male line is not regarded as extinct, or a man to have died without issue until the continuation of the line by adoption is impossible. It is also in their opinion supported by Lord Haldane's judgment in *Madana Mohana's* case(2), which has been much discussed, and to which they must now return. After referring to the conclusions come to by the Bombay Full Court in *Ramchandra* v. *Shamrao*(3) the judgment proceeds :—

" Their Lordships are in agreement with the principle laid down in the judgment of the Full Court of Bombay as delivered by the learned Judge, and they are of opinoin that, on the facts of the present case, the principle must be taken as applying so as to have brought the authority to adopt conferred on Adikonda's widow to an end when Brojo, the son she originally adopted, died after attaining full legal capacity to continue the line either by the birth of a natural-born son or by adoption to him of a son by his own widow."

Whether in order to bring this principle into play it is essential that the son's widow should herself be clothed with the power of adoption is left open, and it is not necessary for their Lordships to consider this in the present case, as Bibhudendra died unmarried; the only question is as to the bearing of the passage cited on the facts now involved.

For the respondents it is contended that the Board must be taken to have held that the mother's power came to an end upon the attainment by the son of what is called ceremonial competence; that it did not depend upon his having in fact left a son or a widow, but merely upon his competence so to do. Bibhudendra, it is said, having died at the age of 20½ years, must

(1) (1918) I. L. R. 43 Bom. 778, 792; L. R. 46 I. A. 97, 107.
(2) (1918) I. L. R. 41 Mad. 855, 860; L. R. 45 I. A. 156, 161.
(3) (1902) I. L. R. 26 Bom. 526.

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be regarded as a fully " competent " Hindu for all ceremonial purposes. He had not, it is true, attained legal majority, nor could he adopt or give authority to his wife to adopt without the consent of Government, but that, it is said, is immaterial; " ceremonial competence " is all that is necessary, and that should be ascribed to every Hindu of the age of 16.

But, in the first place, their Lordships have had some difficulty in understanding exactly what this expression means. They have not been referred to any passage in the evidence bearing upon the matter, nor has any real light been thrown upon it in the argument. The respondents would apparently suggest that ceremonial competence means no more than the age of discretion, and reliance is placed upon the judgment of this Board in *Jumoona Dassya* v. *Bamasoondari Dassya*(1), where it was held that an authority to adopt given by a husband who died at the age of 15 or 16 was valid, he having attained " an age which according to the law prevalent in Bengal is to be regarded as the age of discretion." In *Verabhai Ajubhai* v. *Bai Hiraba*(2), it was contended that an adoption by a widow after the death of her son at the age of 15 or 16 was invalid on the ground that he had " attained ceremonial competence." Lord Lindley, in delivering the judgment of the Board, says :—

" A great number of authorities bearing more or less on this subject were cited, but so far as they went they appear to their Lordships to be rather in favour of than against the validity of the adoption. Certainly no authority was cited which shows it to be invalid. Assuming that it would be invalid if it were shown that Lalubha had attained ceremonial competence, their Lordships are not in a position to decide whether he had or had not attained it. There does not appear to be any fixed age at which a Hindu child attains such competence. Nor is there any proof

(1) (1876) I. L. R. 1 Cal. 289 (P.C.).
(2) (1903) I. L. R. 27 Bom. 495; L. R. 30 I. A. 234.

that Lalubha had attained such competence in fact, or that he ever acted or was treated as having attained it.

The Subordinate Judge, himself a learned Hindu, considered it to be clear that Lalubha had not attained such competence, as he died a minor and unmarried, and the High Court came to the same conclusion. Their Lordships are not prepared to say that he had attained such competence in the absence of evidence or authority to that effect."

It is, at least noticeable that no suggestion seems to have been made in that case that the age of ceremonial competence meant no more than the age of discretion, and that among the "great number of authorities cited" *Jamoona Dassya's* case(1) mentioned above, did not find a place. The contention has been raised in several other cases in India, but their Lordships have been referred to none in which it has prevailed.

An interesting note by Mr. Colebrooke is appended to the translation of the "Dattaka-Mimansa," *s.* IV, v.23, a well-recognised treatise on the law of adoption. In it he enumerates the ceremonies which are requisite in the case of the twice-born classes. Of these the best known are that of the *tonsure*, which is performed in infancy, and the *upayana*, or investiture with the sacred thread. The latter, which marks the second birth, can apparently be performed at any age between the fifth and the sixteenth years, and can therefore hardly be regarded as the test of ceremonial competence as a synonym of "full legal capacity." To these Mr. Colebrooke says, must be added "the ceremony which precedes conception and marriage, which is the last of these sacraments." He then refers to certain other postmarital ceremonies, but says that "these are not essential" (Stokes's Hindu Law Books, p. 576 note).

(1) (1876) I. L. R. 1 Cal. 280 (P.C.).

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If their Lordships can regard this as authoritative, they would be inclined to the view that full ceremonial competence could hardly be attained without marriage, but it is not necessary for them so to decide in the present case. If the question ever becomes of importance hereafter, Hindu lawyers may quite possibly be able to throw further light on the matter. It is sufficient for their Lordships to say in the present case that neither the age of discretion nor such ceremonial competence as a Hindu boy may have acquired at 16 is an adequate interpretation of "full legal capacity to continue the line," as used in the judgment of the Board in *Madana Mohana's* case(1). There is certainly nothing in the case to suggest that any question as to ceremonial competence was raised before the Board, nor, apparently, had it been considered in the High Court in that case(2).

But in the second place, their Lordships think that the words "full legal capacity" cannot be dissociated from the rest of the passage cited, and that they cannot be taken as indicating a particular moment in the son's life when the mother's power is extinguished. The qualification that follows them shows that the continuance referred to is a continuance in one of two defined ways, "*either* by the birth of a natural son, *or* by the adoption to him of a son by his own widow"; and the test is to be whether these conditions exist at the time of the son's death. The passage under consideration is, in their Lordships' opinion, clearly intended to be a re-statement in a more critical form of the conclusion to which the Bombay Court had come, and which was affirmed in the same sentence only a few lines before, viz., that the power of adoption would be extinguished on the son's death by the survival of either a grandson or the son's widow. There was no reason and, their Lord-

(1) (1918) I. L. R. 41 Mad. 855, 860; L. R. 45 I. A. 156, 161.
(2) (1915) I. L. R. 38 Mad. 1105.

ships think, no intention, to go beyond this. There is nothing in the judgment to suggest that the Board had in mind the case of a man who had died without leaving either a son or a widow, or that Lord Haldane was devising a formula which would cover such a case. It would be obvious that other considerations might come in and other authorities have to be considered.

The question had in fact arisen in Bombay very shortly before the Full Court case, and one of the Judges who sat on the Full Court had been a party to the decision. There the son had died without issue at the age of 30, his wife having predeceased him, and it was held that on his death the mother could adopt. The argument now advanced as to the attainment of full age and ceremonial competency was urged against the adoption, but was held to be of no weight: *Venkappa Bapu* v. *Jivaji Krishna*(1). It was cited along with other cases in the argument before the Full Court, but no reference was made to it in the judgment, nor is there any word to suggest that its authority was questioned. Their Lordships are certainly not prepared to hold that this and other decisions of a like nature, none of which were referred to even indirectly in Lord Haldane's judgment, were intended to be overruled by him. Moreover, in *Bhoobun Moyee's* case(2), which was the foundation of the decision in the Bombay Full Court, Lord Kingsdown made it clear that if Bhowanee Kishori, who died at the age of 24, and was evidently regarded as having attained full ceremonial competence, had not left a widow, the adoption by Chundrabullee would have been good. This dictum has stood unquestioned for well over half a century and it is too late now to suggest that it was merely *obiter*, and can be disregarded.

One more case must, their Lordships think, be referred to: *Tripuramba* v. *Venkataratnam*(3).

(1) (1900) I. L. R. 25 Bom. 306.
(2) (1865) 10 Moo. I. A. 279.
(3) (1922) I. L. R. 46 Mad. 423.

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There one Venkata Somayajube died leaving a widow and a son Subanna, who apparently succeeded to his father's estate. Subanna having died unmarried at the age of 25, his mother, with the consent of sapindas adopted. The validity of the adoption was challenged by the nearest reversioner of Subanna. The trial Judge held it to be valid. His decision was reversed by the District Judge on the ground that Subanna had attained full legal capacity to continue the line within the meaning of Lord Haldane's judgment. On second appeal to the High Court, the Chief Justice, Sir W. Schwabe, was of opinion that the passage relied on by the District Judge was merely *obiter dictum*, and he held that the only test was whether the property was vested in the adopting widow. It is unfortunate, their Lordships think, that *Pratap-singh's case*(1) was not referred to in this connection. Wallace J. thought that there could be no attainment of full legal capacity without marriage and that the mother's powers would only be brought to an end if the son left a son or a widow. "The purpose of adoption," he said, "is to perpetuate the line, and if the only son dies without leaving anyone to perpetuate the line, there seems no good reason for restricting the power of his mother to perpetuate it in the only way she can by adopting a son to her own husband." With this last citation their Lordships find themselves in complete agreement. They think that there is no foundation for the contention that a mother's authority to adopt is extinguished by the mere fact that her son has attained ceremonial competence, and they are satisfied that Lord Haldane had no question of this in mind. They are, therefore, of opinion that the second line of reasoning upon which the judgment of the High Court in the present case has been supported fails equally with the first. In their opinion, the Rani's power of adoption under her husband's authority was not exhausted at the death of Bibhudendra, and the adoption of Amarendra was valid.

(1) (1918) I. L. R. 43 Bom. 778; L. R. 46 I. A. 97.

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Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court dated the 29th January 1930, and the decree of the Subordinate Judge, dated the 30th November 1925, should be set aside, and the suit instituted by Banamali Singh dismissed. The appellants will be entitled to their costs throughout.

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Solicitors for appellants: *H. S. L. Polak and Co.*

Solicitors for respondent no. 1: *Barrow, Rogers and Nevill.*

SPECIAL BENCH.

Before Kulwant Sahay, James and Agarwala, JJ.

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April, 21, 27.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order* XXI, *rule* 90—*auction-purchaser, whether is a person "whose interests are affected by the sale".*

Held, per James and Agarwala, JJ. (Kulwant Sahay, J. *dissentiente*), that an auction-purchaser of a property in execution of a decree is a person "whose interests are affected by the sale" within the meaning of Order XXI, rule 90, Code of Civil Procedure, 1908.

Khetro Mohan Datta v. *Sheikh Dilwar*(1) and *Kartik Chandra Chatterji* v. *Nagendra Nath Ray*(2), overruled.

Bhavirisetti Gopala Krishnayya v. *Pakanati Pedda Sanjeva Reddy*(3), *Ravinandan Prasad* v. *Jagarnath Sahu*(4) and *S. N. V. R. S. Subramanian Chettyar* v. *N. L. M. Chettyar Firm*(5), followed.

* Civil Revision no. 261 of 1932, from an order of Babu N. C. Chandra, Subordinate Judge of Motihari, dated the 10th of February, 1932, dismissing an appeal against the order of Babu Parmeshwari Dayal, Munsif of Bettiah, dated the 11th of July, 1931.

(1) (1918) 3 Pat. L. J. 516.
(2) (1923) 5 Pat. L. T. 41.
(3) (1919) 55 Ind. Cas. 333.
(4) (1925) I. L. R. 47 All. 479.
(5) (1927) I. L. R. 5 Rang. 516.

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Surendra Nath Das v. *Alauddin Mistry*(1), *K. V. A. L. Chettyar Firm* v. *M. P. Maricar*(2), and *Nihal Chand Gopal Das* v. *Pritam Singh*(3), not followed.

Per KULWANT SAHAY, J. An auction-purchaser is not a person whose interests are affected by the sale within the meaning of the words of Order XXI, rule 90. It is only persons who had any interest in the property before the sale, and which interests are affected by the fact of the property being sold and of its passing out from the judgment-debtor to the purchaser, who can come in under rule 90.

Application by the auction-purchaser.

The facts of the case material to this report will appear from the judgment of Kulwant Sahay, J.

The case was originally heard by a single Judge who passed the following order :—

25-11-1932. KULWANT SAHAY, J.—The question involved in this case is whether an auction-purchaser can apply to set aside the sale under Order XXI, rule 90, of the Code of Civil Procedure. The petitioner purchased the property in execution of a rent decree. He then made an application to the effect that he has subsequently come to know that the sale was not a sale of the holding under a rent decree, but a sale in execution of a money decree, and that the property was subject to certain encumbrances which he as purchaser in execution of a money decree would be liable to pay. He accordingly applied for setting aside the sale. The Courts below have held that he has no locus standi to apply and reliance has been placed upon the decision of this court in *Khetro Mohan Datta* v. *Sheikh Dilwar*(4). Mr. Mitter on behalf of the petitioner contends that this case was wrongly decided, and he refers to a decision of the Allahabad High Court in *Ravinandan Prasad* v. *Jagarnath Sahu*(5). The view taken in the case of *Khetro Mohan Datta*(4) was subsequently affirmed in this court in *Kartik Chandra Chatterji* v. *Nagendra Nath Roy*(6). Sitting singly I am bound to follow the decision in the two cases of this Court cited above. Mr. Mitter, however, asks me to refer this case for decision to a Bench of two Judges.

Having regard to the importance of the point raised I accede to the prayer of Mr. Mitter, and direct that the case be laid before a Division Bench.

(1) (1928) 116 Ind. Cas. 156.
(2) (1928) I. L. R. 6 Rang. 621.
(3) (1932) A. I. R. (Lah.) 468.
(4) (1918) 3 Pat. L. J. 516.
(5) (1925) I. L. R. 47 All. 479.
(6) (1923) 5 Pat. L. T. 41.

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When the matter came up before the Division Bench it referred the case to the Special Bench by the following Order of Reference:—

JAMES AND AGARWALA, JJ.—In this case a certain holding was attached in execution of a decree. A claim was preferred apparently under Order XXI, rule 58, by a co-sharer in the holding, which was allowed, with the result that the interest of the claimant was exempted from attachment. The sale proclamation appears to have been issued without regard to the result of the claim, so that on the face of it, it appeared that the decree-holder in execution of a rent decree was putting up the complete holding for sale. The petitioner now before the Court purchased the holding at the sale; but immediately after his purchase, when he discovered that the decree-holder had no power to bring to sale the property as it was described in the sale proclamation, he applied under Order XXI, rule 90, Code of Civil Procedure, that the sale might be set aside.

Nobody opposed this application, which was indeed supported by the decree-holder; but the Munsif found himself unable to allow it, being bound by the decisions of this Court to the effect that an auction-purchaser was not a person whose interests were affected by the sale within the meaning of Order XXI, rule 90. An appeal to the Subordinate Judge was dismissed on the same ground. This application was originally placed for hearing before Mr. Justice Kulwant Sahay who considered that as the point of law raised was of some importance, the case ought to be heard by a Division Bench. After hearing the arguments for the petitioner, we consider that the application is one which should be heard by a larger Bench.

In *Khetro Mohan Datta* v. *Sheikh Dilwar*(1) it was held by this Court (Mullick and Thornhill, JJ.) that the auction-purchaser could not make such an application. That decision was followed in this Court in *Kartik Chandra Chatterji* v. *Nagendra Nath Roy*(2) when Mullick, J., sitting with Bucknill, J., affirmed his earlier decision. It was followed also by the Rangoon High Court in *Chettyar* v. *Maricar*(3) and by a Judge of the Calcutta High Court in *Surendra Nath Das* v. *Alauddin Mistry*(4). On the other hand the Madras High Court in *Krishnayya* v. *Sanjeeva Reddy*(5) had held that an auction-purchaser was a person whose interests were affected by the sale within the meaning of Order XXI, rule 90. The Allahabad High Court in *Ravinandan Prasad* v. *Jagarnath Sahu*(6) followed this decision of the Madras High Court and expressly differed from the decision of the Patna High Court in *Khetro Mohan Datta* v. *Sheikh Dilwar*(1). In *Chettyar* v. *Chettyar*(7) Brown, J. of the Rangoon High Court having these cases before him preferred the decision of the Allahabad High

(1) (1918) 3 Pat. L. J. 516.
(2) (1923) 5 Pat. L. T. 41.
(3) (1928) I. L. R. 6 Rang. 621.
(4) (1928) 116 Ind. Cas. 156.
(5) (1919) 55 Ind. Cas. 333.
(6) (1925) I. L. R. 47 All. 479.
(7) (1927) I. L. R. 5 Rang. 516.

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Court to that of this Court, though his own decision on this point was subsequently overruled by a Bench of his own Court in *Chettyar* v. *Maricar*(1), which I have mentioned above.

In our judgment, among these conflicting decisions, the reasons originally given by the Judges of the Madras High Court for their decision, and the reasoning of the Judges of the Allahabad High Court and of Mr. Justice Brown, J., of the Rangoon High Court, criticising Mullick, J.'s decision, deserve consideration; and since there are grounds for reconsidering the decision of this Court on the point, we direct that the application be laid before the Chief Justice in order that it may be heard by a larger Bench.

On this reference.

B. N. Mitter (with him *D. N. Das*), for the petitioner: An auction-purchaser is a person whose interests are affected by the sale within the meaning of Order XXI, rule 90. The decisions of this court in *Khetro Mohan Datta* v. *Sheikh Dilwar*(2) and *Kartik Chandra Chatterji* v. *Nagendra Nath Ray*(3) are wrongly decided. The Calcutta case of *Surendra Nath Das* v. *Alauddin Mistry*(4) merely followed the Patna cases.

[SAHAY, J.—How do you criticise *Khetro Mohon Datta* v. *Sheikh Dilwar*(2)?]

Their Lordships did not apply their minds to the provision of Order XXI, rule 90.

[SAHAY, J.—When the auction-purchaser acquired his interest after the sale, how can his "interests" be affected by the sale?]

There is nothing to confine the "interests" referred to in rule 90, to "interests" acquired prior to the sale.

[SAHAY, J.—If, as you say, the words are so general and wide as to include an auction-purchaser, what was the necessity of the words "person entitled to share in a rateable distribution of assets....."? Moreover, if your contention be right, the provision of rule 91 would be superfluous.]

(1) (1928) I. L. R. 6 Rang. 621.
(2) (1918) 3 Pat. L. J. 516.
(3) (1923) 5 Pat. L. T. 41.
(4) (1928) 116 Ind. Cas. 156.

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The scope of the provisions of rules 90 and 91 is different.

What would happen if a property subject to an encumbrance is sold and purchased on the footing that no encumbrance exists and subsequently it transpires that the property is subject to an encumbrance? Will the auction-purchaser be left without any remedy?

[SAHAY, J.—Then it follows that whenever any encumbrance is not notified it would be open to the auction-purchaser to apply for setting aside the sale.]

Patna cases have been dissented from by the Madras and Allahabad High Courts—*Bhavirisetti Gopala Krishnayya* v. *Pakanati Pedda Sanjeeva Reddy*(1), *Ravinandan Prasad* v. *Jaggarnath Sahu*(2) —and also in an earlier case of the Rangoon High Court—*S. N. V. R. S. Subramanian Chettyar* v. *N. L. M. Chettyar*(3). Two other cases against me are *K. V. A. L. Chettyar Firm* v. *M. P. Maricar*(4) and *Nihal Chand Gopal Das* v. *Pritam Singh*(5) I adopt the observations of Sulaiman, J. and Walsh, J. as a part of my argument.

No one for the opposite party.

S. A. K. *Cur. adv. vult.*

KULWANT SAHAY, J.—This case has been referred to a Special Bench for a consideration of the question whether an auction-purchaser of a property in execution of a decree is a person " whose interests are affected by the sale " within the meaning of the words in Order XXI, rule 90, of the Code of Civil Procedure.

The facts are that in execution of a decree which purported to be a rent decree a certain holding was

(1) (1919) 55 Ind. Cas. 333.
(2) (1925) I. L. R. 47 All. 479.
(3) (1927) I. L. R. 5 Rang. 516.
(4) (1928) I. L. R. 6 Rang. 621.
(5) (1932) A. I. R. (Lah.) 468.

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advertised for sale. It appears that certain co-sharers in the holding had not been made parties in the rent suit and they made an application under Order XXI, rule 58 of the Code with the result that the share of the objectors was released from attachment and sale. The sale proclamation, however, which related to the entire holding, remained as it was before the objection and the sale took place in accordance with the description of the property as contained in the sale proclamation. The petitioner was the purchaser at the sale, and soon after his purchase he discovered that what he had purchased was not the holding as described in the sale proclamation but only the right, title and interest of the judgment-debtors and that the property that he had purchased was subject to certain encumbrances. He accordingly made an application for setting aside the sale under Order XXI, rule 90, of the Code of Civil Procedure. The decree-holder appeared and filed an application stating that there had been irregularities in the sale and that he and the auction-purchaser had come to an agreement that the sale might be set aside, that the purchase money be refunded to the auction-purchaser, and that the execution case be struck off so that a fresh execution proceeding may be started. The learned Munsif, however, referred to certain decisions of this Court and held that an auction-purchaser is not entitled to apply under Order XXI, rule 90, to set aside a sale and he accordingly rejected the application. On appeal the learned Subordinate Judge concurred with the opinion of the Munsif and held that in face of the rulings of the Patna High Court the application could not be entertained. The auction-purchaser then came in revision to this Court, and the application was first heard by a single Judge who referred it to the decision of a Division Bench. The Division Bench referred the matter to the learned Chief Justice for reference to a Special Bench and the matter has now been heard by us.

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The decisions of this Court relied upon in the Courts below are the cases of *Khetro Mohon Datta* v. *Sheikh Dilwar*(1) and *Kartik Chandra Chatterji* v. *Nagendra Nath Ray*(2). In the first case which was decided in the year 1918, Mullick and Thornhill, JJ. held that an auction-purchaser cannot apply to set aside a sale except on the ground that the judgment-debtor had no saleable interest. No reference was made in this case to the provisions of Order XXI, rule 90. In the second case, which was heard in the year 1923, Mullick, J., sitting with Bucknill, J., reiterated the view taken by him in the first case. The provisions of Order XXI, rule 90, were here considered, and a decision of the Madras High Court (given in the year 1919) holding the contrary view was also considered. The learned Judges held that the words " interests affected by the sale " in rule 90 meant interests in the property existing before the sale and which have been adversely affected thereby. Since then it appears that so far as this Court is concerned the question has not again been considered and the law so far as this province is concerned has been as enunciated by Mullick, J.

In the Madras case referred to above [*Bhavirisetti Gopala Krishnayya* v. *Pakanati Pedda Sanjeeva Reddy*,(3)], the learned Judges held that an auction-purchaser is a person " whose interests are affected by the sale " under Order XXI, rule 90. They seem to be of opinion that the word " interests " in rule 90 means interests in the property, and they held that the interests of the auction-purchaser are affected by the sale inasmuch as he acquires an interest which he did not possess previously. The question came to be considered in the Allahabad High Court in *Ravinandan Prasad* v. *Jagarnath Sahu*(4) and Walsh, J.

(1) (1918) 3 Pat. L. J. 516.
(2) (1923) 5 Pat. L. T. 41.
(3) (1919) 55 Ind. Cas. 333.
(4) (1925) I. L. R. 47 All. 479.

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criticised the judgments of Mullick, J. in the two Patna cases cited above, and held that the words " whose interests are affected by the sale " are wide enough to include the auction-purchaser. He was of opinion that the Madras Court had put rather a narrow interpretation on the word " interests " inasmuch as it treated the word as being an interest in the property which the purchaser had acquired by the sale. Walsh, J. was of opinion that there was no reason for limiting it to the notion of interests in the property sold, but that having regard to the fact that the plural word " interests " had been used, it covered all interests which were affected by the sale, and that the auction-purchaser's interests were thus affected. The question then came for decision before a single Judge of the Calcutta High Court in *Surendra Nath Das* v. *Alauddin Mistry*(1). Mitter, J. considered the two decisions of the Patna High Court as well as the decisions of the Madras and the Allahabad Courts, cited above, and was of opinion that the view taken in the Patna cases was the correct view. In the Rangoon High Court, Brown, J. held in *S. N. V. R. S. Subramanian Chettyar* v. *N. L. M. Chettyar Firm*(2) that the Allahabad decision referred to above put the correct interpretation upon the words in rule 90; but his decision was upset by the Rangoon High Court in *K. V. A. L. Chettyar Firm* v. *M. P. Maricar*(3) where a Division Bench of that Court agreed with the view taken by the Patna High Court and dissented from the view taken by the Madras and the Allahabad High Courts. In the Lahore High Court, Shadi Lal, C. J. and Broadway, J. [in *Nihal Chand Gopal Das* v. *Pritam Singh*(4)] agreed with the view taken by the Patna and the Calcutta High Courts and disagreed with the view taken by the Madras and the Allahabad High Courts.

(1) (1928) 116 Ind. Cas. 156.
(2) (1927) I. L. R. 5 Rang. 516.
(3) (1928) I. L. R. 6 Rang. 621.
(4) (1932) A. I. R. (Lah.) 468.

We have thus a conflict of decisions upon the point, the Patna, Calcutta, Lahore and Rangoon High Courts taking one view and the Allahabad and the Madras Courts taking the other view. In this state of conflict of decisions the least that can be said is that the words used by the Legislature in rule 90 are ambiguous. It is open to us in order to find out the intention of the Legislature to examine what was the previous state of the law and whether the Legislature intended to make any change in the law. Under the corresponding provisions contained in Section 311 of the Code of 1882, it had been authoritatively established by the decision of the Privy Council that an auction-purchaser could not apply to set aside a sale on the ground of material irregularity, the words used in section 311 being clear that it was only the decree-holder, or any person whose immoveable property had been sold, who could apply to set aside a sale. It had, however, been held by the Courts that under section 311 of the Code of 1882 other persons who had interest in the property, besides the person whose property was sold, could come in and apply for setting aside the sale under the provisions of the section. Did the Legislature intend by using the words in rule 90 of the present Code to change the law so far as the auction-purchaser was concerned? There can be no doubt that the words " whose interests are affected by the sale " are very wide, and following the ordinary meaning of the words an auction-purchaser can be said to be included as such a person; but did the Legislature intend to include him? The provisions as regards setting aside sales are contained in Order XXI, rules 89, 90 and 91 of the present Code. Rule 89 provides for setting aside sale on deposit of certain sums of money by any person either owning the property sold or holding an interest therein by virtue of a title acquired before the sale. Rule 90 provides that a sale can be set aside on the ground of material irregularity or fraud in the publication and conduct of the sale, leading to a substantial injury to the person applying, and the persons who can apply

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under this rule are the decree-holder or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale. Rule 91 then provides for an application to set aside the sale by the purchaser and his right to do so is limited to the ground that the judgment-debtor had no saleable interest in the property sold. These provisions correspond to the provisions contained in sections 310A, 311 and 312 of the Code of 1882. So far as rules 89 and 91 are concerned there has been no alteration. The alteration has been made only in rule 90. Now, if it was intended that an auction-purchaser would be included within the words " whose interests are affected by the sale ", there was no reason to retain the provision contained in section 312 of the Code of 1882 and to reproduce it as rule 91 in the present Code. If the purchaser was a person whose interests are affected by the sale, then he could apply under rule 90 even on the ground that the judgment-debtor had no saleable interest. It cannot be assumed that the Legislature omitted to notice that there was a provision in the Code of 1882 contained in section 312 and that that provision was being reiterated in rule 91. It must have been a deliberate act of the Legislature to provide for application by a purchaser to set aside the sale in rule 91 and to limit it only to the ground that the judgment-debtor had no saleable interest in the property. There can be no doubt that it is open to us in order to find out the intention of the Legislature to see what the law on the subject was before the new enactment and whether the Legislature deliberately intended to alter that law—[*see Abdur Rahim* v. *Abu Mohamed Barkat Ali*(1), referred to by Mitter, J. in the Calcutta case cited above]. By making an express provision for an application by the auction-purchaser in rule 91, I am of opinion that the Legislature implied his exclusion from rule 90; and after giving the matter my best consideration, I am of opinion that the view taken

(1) (1927) I. L. R. 55 Cal. 519; P. C.

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by Mullick, J., which was agreed to by Thornhill and Bucknill, JJ, in the cases cited above, is the correct view. The auction-purchaser is not without his remedy, as he has a right to sue, for the exercise of which right he has got a longer period of limitation and which right would be taken away if it be held that he can come in under Rule 90, inasmuch as a suit by him would be barred under the provisions of rule 92.

I would, therefore, answer the question arising in the case by saying that an auction-purchaser is not a person whose interests are affected by the sale within the meaning of the words in Order XXI, rule 90, of the Code. It is only persons who had any interest in the property before its sale, and which interests are affected by the fact of the property being sold and of its passing out from the judgment-debtor to the purchaser, who can come in under rule 90. In the present case, however, we find that the decree-holder as well as the auction-purchaser agreed that the sale should be set aside and, in fact, the decree-holder also filed an application to the effect that the sale might be set aside and the execution case struck off without satisfaction, and the judgment-debtor never objected to it. Under those circumstances, upon the application of the decree-holder agreed to by the auction-purchaser and not objected to by the judgment-debtor, I am of opinion that it was within the power of the Court to set aside the sale before it was confirmed, and in the present case the sale ought to have been set aside under the inherent powers of the Court on the agreement of parties even though the application of the auction-purchaser was not maintainable.

JAMES, J.—I agree with the order proposed; but for reasons other than those set out by my learned brother Kulwant Sahay. When this case was originally before the Division Bench, we would have accepted the authority of the decisions of Mullick, J. without

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questioning them, as bound by them whether we approved of them or not if it had not been for the fact that the learned Judge before whom the case originally came had indicated some doubt regarding the correctness of these decisions by the manner of his reference of the case to a Division Bench. Now that it has been referred to a larger Bench for the express purpose of examining the basis of those decisions, it is not possible to avoid consideration of the question of whether they ought to be followed in preference to the decisions of the High Courts of Allahabad and Madras. I need not again describe the effect of those decisions, which have been mentioned in the order recommending reference to a Special Bench. Two other decisions have been cited before us here, indicating a difference of opinion on the question among the Judges of the Lahore High Court, in which the Division Bench accepted the view of Mullick J. But in my judgment the argument of Sir Cecil Walsh, criticising the ground of the decisions of Mullick, J. is quite unanswerable. To my mind the argument in support of Mullick, J.'s decisions, which is based on the ground that any other view would make rule 91 superfluous rests on two mutually repugnant propositions. The first is that the framers of the rule were so extremely careful to avoid anything like surplusage in Order XXI as a whole, that if they had meant what they had said in rule 90, they would necessarily have repealed rule 91. The second proposition is that they were so careless in their amendment of rule 90 that Sir Cecil Walsh, Sir Shah Muhammad Sulaiman, the Judges of the Madras High Court and other Judges of the Rangoon and Lahore High Courts have been unable to discover their true meaning. The correct manner to interpret the rule appears to me to assume that rule 90 as amended means what it says; and if this interpretation renders rule 91 superfluous, the matter must be left at that. The provisions of the old Code, strictly limiting to certain persons the right of preferring an application to set aside a sale

on the ground of material irregularity or fraud in publishing or conducting it were repealed by the new rule 90. Since the rule was so competely changed, we must take it as it stands: and, in my judgment, the view of Sir Cecil Walsh must be accepted, that decisions based on the old rule no longer have any force, since the new rule is certainly not a mere repeal and re-enactment of the old rule. Any person whose interests are affected by the sale may prefer an application under rule 90. It appears to me impossible to hold that the purchaser is not a person whose interests are affected by a court sale. If I sell a horse to *B* it cannot be said that my interests are affected and *B*'s are not. If the word 'interest' is to be used in its norrower sense, it must equally be held that the interest of the auction-purchaser is affected by the transaction which brings it into existence. It certainly cannot be said that I was not affected by the act of the Creator which brought me into existence; and I consider that an interest must be regarded as affected by a transaction which creates it as much as by a transaction which extinguished it. Hence I feel constrained to hold, with Sir Cecil Walsh and Sir Shah Muhammad Sulaiman, and with the Madras High Court, that an auction-purchaser is a person whose interests are affected by the sale, who is entitled to prefer an application under Order XXI, rule 90.

AGARWALA, J.—I agree to the order proposed. With respect to the question whether an auction-purchaser is a person whose interests are affected by the auction sale I respectfully agree with the reasoning of Walsh, J. in *Ravinandan Prasad* v. *Jagarnath Sahu*(1). It is not disputed that a judgment-debtor is a person whose interests are affected by the sale and I am unable to understand how a transaction which results in the ownership of property being transferred from the judgment-debtor to the auction-purchaser can be said to affect the interests of one and not of

(1) (1925) I. L. R. 47 All. 479.

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the other. It has been suggested that a sale, so far as the vendee is concerned, creates an interest but does not affect that interest and that the interest referred to in the rule is an interest in the property which is the subject-matter of the sale. As has been observed by Walsh, J., if the word in the rule were "interest" there might have been something to be said for this contention. But the word used by the Legislature is "interests", and, as has been pointed out in the case of *Dhirendra Nath Roy* v. *Kamini Kumar Pal*(1), the word "interests" in rule 90 is not limited to a proprietory or possessory interest in the subject-matter of the sale and does not exclude pecuniary interest.

It has also been suggested that as rule 91 specifically provides for the setting aside of the sale at the instance of an auction-purchaser on the ground stated therein, an auction-purchaser is impliedly excluded from the category of persons whose interests are affected by the sale within the meaning of rule 90. In my opinion the scope of these two rules is entirely different. Rule 90 provides for the setting aside of a sale on the ground of material irregularity or fraud in the proceedings which have led up to the sale and prescribes the procedure to be followed by persons affected by such irregularity or fraud. Rule 91 applies, however, to an entirely different state of affairs and provides a remedy in a case where the property has been put up to sale in which the judgment-debtor has no saleable interest, and it provides the procedure to be followed by the only person who is interested in having such a sale set aside, viz., the auction-purchaser. It may, however, be contended that the putting up to sale of a property which does not belong to the judgment-debtor is itself a material irregularity and is, therefore, covered by rule 90. But, in my opinion, the words "material irregularity" in rule 90, governed as they are by the words "in

(1) (1924) I. L. R. 51 Cal. 495.

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publishing or conducting it", refer only to an irregularity in the *procedure* to be followed before a property is put up to sale, and rule 91 comes into operation in those cases where in spite of the prescribed procedure having been regularly followed property has been sold in which the judgment-debtor had no saleable interest.

Order of Court.

The order of the court is that the order of the court below will be set aside, the sale will also be set aside and the execution case must be dismissed without satisfaction.

Order set aside.

PRIVY COUNCIL.

ANUP MAHTO

v.

MITA DUSADH.

J. C.*
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May, 5.

On appeal from the High Court at Patna.

Privy Council Practice—Record on Appeal—Value of Subject-Matter—Report—Code of Civil Procedure (V of 1908), Order XLV, r. 5.

When on a petition to the High Court for a certificate that a case is a fit one for appeal to the Privy Council a question has arisen as to the value of the subject-matter and a report thereon has been ordered under Order XLV, rule 5, the report and full information on the matter should be included in the record in the appeal to the Privy Council.

Preliminary objection rejected.

Appeal (No. 113 of 1929) from a decree of the High Court (February 22, 1928) reversing a decree of the Subordinate Judge of Patna (April 21, 1925) on appeal from a decree of the third Munsif of Patna.

* PRESENT: Lord Blanesburgh, Lord Macmillan and Sir George Lowndes.

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ANUP MAHTO v. MITA DUSADH.

The suit was instituted in the Court of the Munsif by the respondents against the appellant claiming to eject the appellant from certain agricultural land. The question for determination was whether under the provisions of the Bengal Tenancy Act, 1885, the appellant had occupancy rights. The High Court held that he had not.

The respondents by their printed case in the appeal contended (inter alia) that the subject-matter of the suit was below Rs. 10,000 and that the appeal was consequently incompetent under s.110 of the Code of Civil Procedure, 1908.

The appeal originally came on for hearing in November, 1932, when the above objection was raised by counsel. The Judicial Committee not having before it material for determining the validity of the objection, adjourned the matter in order that the relevant material might be produced.

Upon the adjourned hearing on May 5 there was produced a report which the Munsif had made in consequence of a direction given by the High Court under Order XLV, rule 5.

1933. *May* 5.—*Hyam* for the appellant.

Abdul Majid for the respondents.

The judgment of their Lordships was delivered by—

LORD BLANESBURGH.—In this matter their Lordships are of opinion that the objection taken has no foundation. By the report of the Munsif on a reference to him under Order XLV, rule 5, the value of the suit before the Board exceeds Rs. 10,000. Their Lordships are not going behind that report. Accordingly the objection on the score of value taken to the competency of the appeal fails and the appeal must now be set down for the purpose of being disposed of on the merits.

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But although delay has ensued and costs have been needlessly expended by this unavailing preliminary objection of the respondents their Lordships will not treat the case as one in which they ought to direct them to pay in any event the costs thrown away. The appellant is not free from some responsibility in the matter. They desire to say however by way of warning in future cases that when a question of this kind has been raised in India, and when a report with reference to value has been made under the rule above referred to it is desirable that full information with reference to these proceedings be included in the record so that no such unfortunate misapprehension as has arisen in this case will in any future appeal be possible.

The costs of both sides of this preliminary question will be costs in the appeal(1).

Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitors for respondents: *Francis & Harker.*

PRIVY COUNCIL.

J. C.* 1933.

May, 12.

HUKUM CHAND

v.

MAHARAJ BAHADUR SINGH.

On Appeal from the High Court at Patna.

Jains—Rights of worship—Parasnath Hill—Works by Swetambaris—Suit by Digambaris—Limitation—Suit for Declaration—Continuing Wrong—Specific Relief Act (I of 1877), s. 56—Limitation Act (IX of 1908), s. 23; Sch. I, article 120.

Parasnath Hill, which is regarded as sacred by both sects, the Swetambaris and the Digambaris, of the Jain community,

(1) The hearing of the appeal on the merits was adjourned.

* *Present*: Lord Thankerton, Sir John Wallis, and Sir Lancelot Sanderson.

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is not debottar property of the Jain deities installed thereon, but the property of the Swetambaris by purchase in 1918 from the zamindar with whose ancestors it was permanently settled. The Swetambaris in erecting on the hill buildings for the accommodation of temple servants, and dharamsalas for the use of pilgrims, and in putting sentries and night watchmen thereon, have not unlawfully interfered with the rights of worship of the Digambaris. But alterations made by the Swetambaris in the character of the charans in certain shrines was an interference with those rights. A suit for a declaration brought by Digambaris more than six years after the alterations was not barred as to that matter by article 120 of the Limitation Act, 1908, because the alterations were a continuing wrong within section 23 of that Act; the plaintiffs had not, by acquiescence or otherwise, disentitled themselves under section 56 of the Specific Relief Act, 1877, to the relief prayed.

Decree of the High Court varied.

Appeal (no. 121 of 1930) from a decree of the High Court (August 8, 1928) which modified a decree of the Subordinate Judge of Ranchi (May 26, 1924).

The appellants, representing the Digambari sect of the Jain community, instituted a suit against the respondents, representing the Swetambari sect of that community, alleging that various acts done, or threatened to be done, by the Swetambaris on Parasnath Hill were an unlawful interference with the rights of worship of the Digambaris.

The trial Judge made certain declarations and granted injunctions prayed for: upon appeal the High Court (Ross and Wort, JJ.) set aside certain of the declarations, and corresponding injunctions, but otherwise affirmed the judgment.

The facts of the case, and the grounds of the judgments in the High Court appear from the judgment of the Judicial Committee.

1933. March 10, 13, 14. *De Gruyther, K. C.*, *Hyam* and *Champat Rai Jain* for the appellants.

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

May 12. The judgment of their Lordships was delivered by—

SIR JOHN WALLIS.—This case is the result of further disputes between the two sects of Jain as to their rights of worship on Parasnath hill. As so much turns on the beliefs now entertained by the whole Jain community with reference to the sacred character of this hill, their Lordships will begin by citing the opening paragraphs of the judgment delivered by Lord Phillimore a few years ago in *Maharajah Bahadur Singh* v. *Hukum Chand*(1), in which this subject is most felicitously dealt with.

"The Jains recognise 24 highly saintly personages—men who have attained salvation or Nirvana, who are called Tirthankars (finders of the ford, across the river of death). These four and twenty are counted in many respects as higher than the gods or some of the gods in the Hindu Pantheon.

Twenty of them are believed to have attained Nirvana in the present cycle of the world's history upon the Hill Parasnath in the district of Hazaribagh in Bengal, with the result that the hill is held in reverence by Jains. The hill itself has some remarkable natural features, and rises into several peaks. Twenty spots apparently marked out by natural features, are believed to be places from which the 20 Tirthankars quitted earth; and at each of these spots, a footprint of the Saint is worshipped. There is a small enclosure covered with a cupola, which at the present moment is made of white marble. These spots have been set apart from remote antiquity. The four remaining Tirthankars quitted earth in other parts of India. In respect of them conventional spots have been since the year 1868 set apart and treated in a similar way.

Upon the hill there are also a shrine to a lesser Saint called Gautama Swami, an important temple in one of the highest parts of the mountain called Jalmandil, certain platforms set apart for religious contemplation, and two Dharamsalas or rest-houses for pilgrims. The hill is much frequented by pilgrims, who take the 24 shrines or tonks in regular order, worshipping at each.

According to the tenets of the Digambara, this worship must be performed fasting, and the whole hill is so sacred that from the moment they set foot on it, they must abstain from any office of nature, even spitting."

These practices are observed on their pilgrimages by the Swetambaris as well, but the Digambaris in the present case go much further and take up the position

(1) (1925) 24 All. L. J. 100.

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SIR JOHN WALLIS.

that any course of action inconsistent with their due observance, such as the regular and continuous employment of human beings on the hill or the building thereon of dwellings for them, necessarily involves a sacrilegious pollution and desecration of the sacred hill which they have a right to restrain. These are matters for the Jains themselves, and the Civil Courts are only concerned with them in so far as they are relevant to questions of civil right such as an alleged interference with the plaintiffs' rights of worship on the hill, and in that case the issue must be, not whether the acts complained of are in accordance with orthodoxy or with previous practice, but whether they do in fact interfere with the plaintiffs' rights of worship.

In 1918 the Swetambaris, who have all along been in management of the shrines, acquired by purchase the proprietary rights of the Raja of Palgunj in the hill, and in 1920, not long before the institution of the present suit, they availed themselves of the greater freedom of action so acquired by posting sentries and night watchmen on the top of the hill and by beginning to erect dwellings there for them and for the pujaris and other temple servants in daily employment on the hill, and also dharmasalas or rest houses for the accommodation of the pilgrims. They also proposed to erect a gate at the top of the winding pilgrim way, which starting from the village of Madhuban at the foot of the hill, provides a six miles ascent to the hill top. This gate the Digambaris alleged was intended to obstruct the Digambaris' access to the hill. These are some of the acts complained of in the present suit, which is a representative one instituted on behalf of the Digambaris against the Swetambaris pursuant to Order 1, Rule 8 of the Code of Civil Procedure, and their Lordships will dispose of them in the first instance.

In paragraphs 5 and 9 of the plaint the plaintiffs alleged that the entire hill and every stone of it is

held sacred and is an object of adoration and worship for both sects of the Jain community, and that on account of its special sanctity no building for human habitation can be erected on it, and the very idea of such a thing is considered sacrilegious.

The first defendant, in paragraph 10 of his written statement, did not admit that the Digambaris regarded every part and parcel of the hill as sacred, and denied that they had any rights in the hill, except as thereinafter stated. The ideas of sanctity conveyed in the plaint were highly exaggerated, and the Jain tenets were not opposed to buildings for human habitation on the hill, nor were they regarded as sacrilegious, provided that they were not unconnected with religious purposes. The Subordinate Judge at Ranchi, to which court the case had been transferred from Hazaribagh, acting mainly on the large body of oral evidence as to the sanctity attached by Jains to the hill, held that it was the endowed or debutter property of the Jain deities thereon, and that the plaintiff Digambaris were entitled to see that the hill —their most sacred Tirth—was kept immaculate and not defiled or desecrated; and he accordingly granted an injunction, with corresponding declarations, restraining the defendants from posting sentries and night watchmen on the hill or proceeding with the building of the proposed dwellings and dharmasalas, and also from erecting the gate which he found was intended to obstruct the Digambaris' access to the hill.

On appeal to the High Court, both the learned judges, in separate but concurring judgments, reversed this part of the lower court's decree, holding that the hill was not the debutter property of the Jain deities thereon, but was the property of the Raja of Palgunj, whose title, it is now finally settled by the recent decision of this Board, passed to the Swetambaris by the sale deed of March 9th, 1918. They further held that the acts complained of were not

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shown to have interfered with the Digambaris' rights of worship of the 21 ancient shrines as confirmed to them by the judgment of Lord Phillimore in the case already mentioned, and that the proposed gate was not shown to be intended to obstruct their access to the hill.

SIR JOHN WALLIS.

As regards the question of the hill being debutter property, as pointed out in the High Court judgments, it cannot be said that this issue was very clearly raised in the pleadings, but it has been dealt with by both the lower courts on all available evidence, and, in their Lordships' opinion, it is desirable that it should now be finally decided, so as not to give occasion for further litigation between the two sects. Their Lordships will therefore proceed to consider it.

The Jain shrines on Parasnath hill are undoubtedly of great antiquity, but very little is known of their past history or as to the time when the now prevailing views as to the sanctity of the whole hill first obtained acceptance. The early work referred to in the argument for the appellants merely extols the superior efficiency of the *abishekam* or ablution ceremony when performed at the shrines as compared with the same ceremony when performed in ordinary temples. From the 16th to the 18th century, the Jagat Seths, a wealthy and powerful family of bankers at Murshidabad, who belonged to the Swetambari sect, appear to have maintained the shrines, but on the cession to the East India Company in 1765 they removed to Calcutta.

At the decennial settlement in 1790, and afterwards at the permanent settlement, the hill was included in the *zemindari* of the Raja of Palgunj, which raises a legal presumption that it was his property. During the greater part of last century, the Raja of Palgunj, failing anyone better qualified, bore the expenses of the shrines, and recouped himself by taking a share of the pilgrims' offerings.

The hill itself is 25 square miles in extent, and rises to a height of nearly 4,500 ft. at top of the highest peak. According to the report of Lieut. Beadle, who visited it in 1846, it was covered, except at the very top, by forest trees and by dense jungle infested by wild beasts and was uninhabited by man, the few Santhal hamlets on the lower ranges being apparently overlooked. Since the coming of the British Raj, he said the number of pilgrims had been increasing annually. They were mostly of a wealthier class as compared with the Hindu pilgrims to Jagarnath, but owing to the construction of the Grand Trunk Road, which passes underneath the hill at a distance of 200 miles from Calcutta, he thought it bade fair to become a very popular shrine. The advent of the railway and the construction of 16 miles of metalled road from the nearest railway station to Madhuban, now make access easy, and pilgrims visit the hill in thousands every year. Otherwise the conditions are not much altered. In 1861, a military sanatorium was opened near the top of the hill, not far from some of the shrines, on a site acquired from the Raja, but was discontinued four years later. A dâk bungalow and a branch of the Dublin Mission now occupy the site. In 1876 the Raja granted a permanent lease of 2,000 acres more than half-way up the hill, and abutting on the pilgrims' way, to an English planter named Boddam, who opened a tea plantation there, and there is now another plantation in the same neighbourhood. At the beginning of this century, the Swetambaris began the construction of a large white marble temple over the Parasnath shrine at the top of the highest peak. The Digambaris were strongly opposed to this as affecting the unique and most impressive characteristics of the place, and so it is said to have been the beginning of the quarrel between the two sects about the hill.

Their Lordships will now refer as briefly as possible to the evidence which shows, in their opinion, that the Raja's title, which has now passed to the

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Swetambaris, is unassailable. In the first place, the fact that the Jains are not shown to have taken any objection to the military sanatorium and the tea plantation, both of which, in the light of the evidence in this case, must have been most distasteful to them, tells strongly against their present claim. In a suit filed by the Raja in 1867 against a member of the Swetambari sect, to establish his title to the hill and a share of the offerings, the lower court found that he was the proprietor of the whole hill except the shrines themselves, but the decree was reversed by the High Court on the ground that the plaintiff had not established any cause of action against the defendant. In 1872, these disputes were settled by an ekranama between the Raja and the Swetambari sect by which he undertook among other things to grant them land, stones, and timber for any new shrines. This stipulation involved a clear admission of the Raja's title to the hill.

In 1888, in consequence of the action of the lessee of the tea plantation in starting a lard factory which involved the slaughtering of pigs, a thing peculiarly offensive to the Jain religion, the Swetambaris filed a suit against the Raja and the lessee alleging that they were trespassers, and also that the lessee's action was a breach of one of the Raja's covenants in the ekranama, of which the lessee had notice when he entered into the lease. In the plaint they claimed title under an alleged ancient grant from the Emperor at Delhi which has always been rejected whenever put forward, but the case of debutter now set up was distinctly raised by additional issues as to whether the hill was dedicated to the religious purposes of the Jain religion, and as such vested in, and the property of, the Jain community. These claims of title were examined and rejected in elaborate judgments by the lower court and the High Court, which held that the property was in the Raja, but that the acts complained of were a breach of an implied restrictive covenant by the Raja in the ekranama of which the lessee had notice.

In 1900, the Digambaris are found joining with the Raja in successfully suing the Swetambaris for removing certain stairs which they had erected under licence from the Raja. In that suit the Swetambaris merely denied that the hill was the exclusive property of the Raja, and alleged that the plaintiffs had no right to interfere with the pilgrim way, but it was held that the defendants were not entitled to remove the stairs which had become annexed to the soil and were vested in the Raja as owner.

In 1903 the Digambaris filed another suit about the new temple which however was discontinued. In the plaint it was admitted that the hill was the property of the Raja, subject to the Jains' rights of worship.

For the last twenty years the two sects have been engaged in a struggle to acquire the Raja's title for their own sect which has now been finally determined by the judgment of the Board in favour of the Swetambaris.

The Subordinate Judge has discounted much of this evidence on the ground that one or other sect was not a party to the particular suit, but it is not a question of *res judicata*, but of repeated admissions and of the successful assertion of the Raja's title whenever challenged. Nor is there, in their Lordships' opinion, any foundation for the further suggestion that the Jains were not in a position to assert their rights. They are a wealthy community and must have incurred enormous costs in the litigation already mentioned, and in the twenty years' further litigation arising out of their efforts to acquire the Raja's title, whereas in 1903 the Raja was driven to seek relief under the Chota Nagpur Encumbered Estates Act largely owing to the heavy expenses he had already incurred in litigation with them about the hill.

The Subordinate Judge has based his finding that the whole hill is the debutter property of the Jain

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deities on the belief in its sanctity now entertained by both sects. As observed by Ross, J., that evidence undoubtedly establishes beyond a doubt that in the belief of the Jain community a spiritual quality in some way attaches to the hill, but this is a matter of faith and cannot in itself determine the physical ownership of the hill. On this part of the case their Lordships agree with the learned Judges of the High Court that the hill was not the debutter property of the Jain deities but the property of the Raja.

On this basis, the learned Judges rightly proceeded to consider whether the acts complained of interfered with the Digambaris' rights of worship on the hill. Now eating and drinking, spitting and the offices of nature, and many other things which are unseemly and irreverent acts in a place of worship, are naturally and properly prohibited in the ancient "Ashatana of Jin temples"; but, as observed by Ross, J., these rules can only be applied by analogy to a vast expanse like Parasnath hill, and must be subject to reasonable modifications in practice, and this is what is shown by the evidence to have happened.

No serious objection seems to have been taken to the military sanatorium while it existed, or to the plantations with their cooly lines lower down, though they involved a complete disregard of these rules. Further, writing in 1846, Lieut. Beadle says that a religious meeting or *mela* was held on the hill every year for a fortnight in January, and that shopkeepers ascended with grain and other provisions for the wants of the worshippers, and there is evidence that a Hindu *mela* is still held on the hill every year.

In a suit in 1910 it was proved that by immemorial custom the primitive and backward Santhals in the neighbourhood are entitled to hold a hunt on the hill enjoined on them by their religion on one particular day in the year. Eight to sixteen thousand Santhals take part in the hunt, working round the

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hill and across the pilgrim way, and the day ends with sacrifices to their gods and their annual caste meeting.

None of these things, however distasteful, appear to have interfered with the Jains' worship on the hill.

The objection to the erection of buildings on the hill seems to have been put forward prominently for the first time by the Digambari pundits in opposition to the erection of the Parasnath temple. According to their teaching as deposed to by some of the witnesses it is an act of ashatana to build a temple on the sacred hill, and it is also an act of ashatana to pull it down or to leave it standing, in the latter case because it involves the daily presence of pujaris on the hill to worship the images in the temple. Even so, it was not attempted to stop the building on this ground in the suit filed in 1903 and afterwards discontinued.

Coming now to the acts complained of—Owing to the increase in the number of pilgrims, pujaris and other temple servants have for some time been employed in daily attendance on the hill without objection being taken. Whether spending the night there was allowed or tolerated is a matter of controversy. All that is now proposed is to erect dwellings for them on the top of the hill instead of requiring them to make the long ascent and descent every day, to build dharmasalas or rest houses for pilgrims, and to station sentries and night watchmen on the hill. Their Lordships agree with the learned Judges that it is not proved that any of these acts will interfere with the Digambaris' rights of worship. As to the proposed gateway, the courts cannot assume that it will be used to obstruct the Digambaris' rights of access to the hill; if it should be, they will have their remedy. For these reasons their Lordships are of opinion that as to this part of the case the appeal fails.

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The remaining question as to the alterations in three of the shrines may be dealt with more briefly, as both the lower courts are in substantial agreement about the facts and have only differed on the question of limitation. The charans in the old shrines were impressions of the footprints of the Saints, each bearing a lotus mark. The Swetambaris, who prefer to worship the feet themselves, have evolved another form of charan not very easy to describe accurately in the absence of models or photographs, which shows toe nails, and must be taken to be a representation of part of the foot. This the Digambaris refuse to worship as being a representation of a detached part of the human body. Both the lower courts have held that the action of the Swetambari in placing charans of the description in three of the shrines is a wrong of which the Digambaris are entitled to complain.

As regards limitation the Subordinate Judge held on rather insufficient grounds that the acts complained of took place within six years of suit so that this part of the claim could not be barred by Article 120, but he also held that it could not be barred under that article as it was a continuing wrong, as to which under section 23 of the Limitation Act a fresh period begins to run at every moment of the day on which the wrong continues. The High Court on the other hand were of opinion that it was not a continuing wrong and that the claim was barred under article 120. In their Lordships' opinion the Subordinate Judge was right in holding that the acts complained of were a continuing wrong and consequently that this part of the claim is not barred. This question is covered by the decision of this Board in *Rajrup Koer* v. *Abul Hossein*(1), a case of diverting an artificial water course and cutting off the water-supply of the plaintiff's lower lying lands.

The fact that there is no period of limitation in suits arising out of continuing wrongs, except as regards actions for compensation which are governed by article 36, does not however conclude the question,

(1) (1880) I. L. R. 6 Cal. 394; L. R. 7 I. A. 240.

because under the law of India declarations and injunctions are discretionary forms of specific relief, and under section 56 of the Specific Relief Act the court may refuse to grant an injunction if the plaintiff by acquiescence or other conduct has disentitled himself to such relief. No such case, however, was made in the lower courts, and no sufficient cause has been shown for refusing to grant the reliefs prayed for as to this part of the case.

Lastly, it is not disputed that, in so far it strikes out declaration (*iv*) in the Subordinate Judge's decree and the direction as to the form of charan to be placed in two other shrines, the High Court's decree is not in accordance with their judgment.

In the result their Lordships will humbly advise His Majesty that this appeal ought to be allowed in part, and the decree of the High Court varied, (*a*) by deleting therefrom the directions which strike out from the decree of the Subordinate Judge (*1*) declaration 4, and (*2*) his direction requiring the defendants to remove from the tonks of Padam Prabhu. Sri Abhinandan Nathji and Dharam Nath the new charans placed by them therein and to put in these three tonks as well as the tonks of Sri Subudhinath and Sri Chandra Prabhu footprints as had originally been there, and (*b*) by setting aside the direction as to costs. In other respects the decree of the High Court ought to be affirmed. As regards costs, their Lordships think that justice will be done by ordering the appellants to pay two-thirds of the respondents' costs incurred in both courts below and two-thirds of their costs of this appeal. For this purpose the direction as to costs of the Subordinate Judge should also be set aside, and any costs already paid under the orders of the courts below will have to be adjusted to bring about the result arrived at.

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

Solicitors for respondents: *H. S. L. Polak and Company.*

REFERENCE UNDER THE COURT-FEES ACT.

1933.

February, 7.

Before James, J.

SIDESHWARI PRASAD

v.

RAM KUMAR RAI.*

29 Pat. 14

Court-Fees Act, 1870 (*Act VII of* 1870), *section* 12—*appeal against decision determining amount of mesne profits—ad valorem court-fee payable—rule applicable whether the profits may have accrued before suit, or after the date of the institution of the suit—memorandum accepted by Stamp Reporter as sufficiently stamped and duly admitted and registered—question not decided by Taxing Officer—appeal pending—change in practice brought about by subsequent decision—Stamp Reporter, whether can reopen the question and call upon appellant to pay ad valorem court-fee—Patna High Court Rules, Chapter VII, rule* 19, *scope of.*

The rule in *Dhanukhdhari Prasad Pande's* (1) case that ad valorem court-fee is payable on a memorandum of appeal against a decision determining the amount of mesne profits applies to all appeals from such decisions, whether the profits may have accrued before suit, or after the date of the institution of the suit.

Rule 19, Chapter VII, of the Rules of the Patna High Court provides:—

"Whenever the Stamp Reporter finds that a document which ought to bear a stamp under the Court-Fees Act, 1870, has been through mistake or inadvertence received, filed, or used in the court without being properly stamped, he shall report the fact to the pleader who presented such document. Such pleader shall at once initial the report and shall within three weeks thereafter, or within such further time as the Taxing Officer may allow, note on it whether he accepts or disputes the accuracy thereof. If such note is not made within such time, it shall not be open to such pleader to dispute the accuracy of the report".

When an appeal, at the time of its presentation, was accepted by the Stamp Reporter as sufficiently stamped in accordance with the practice then prevailing and was duly admitted and registered, but subsequently, while the appeal

* In the matter of Second Appeal no. 484 of 1930.
(1) (1933) I. L. R. 12 Pat. 188.

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was still pending, the Stamp Reporter, following a decision of the Court which interpreted the law and changed the practice, reopened the question and called upon the appellant to pay ad valorem court-fee on the memorandum of appeal, *Held*, (*i*) that the memorandum of appeal would be deemed to have been received through mistake or inadvertence so as to attract the operation of Rule 19;

(*ii*) that the Stamp Reporter was not functus officio and that, so long as the appeal may remain pending, he had the power under Rule 19 to reopen the question of whether a document is sufficiently stamped, where the matter has not already been decided by the Taxing Officer.

Query: (*i*) Whether it is proper to treat an appellant, whose memorandum of appeal may have been duly admitted and registered, where the matter of what may be the court-fee payable has not been left open, but has been decided in a manner which appears to be final, as liable to be called upon to pay additional court-fee during the pendency of the appeal, owing to a change in the view of the law taken by the court after the appeal has been admitted.

(*ii*) Whether the first part of section 12 of the Court-Fees Act, 1870, can be held to empower the Bench hearing the appeal to reject a memorandum as insufficiently stamped.

Krishna Mohan Sinha v. *Raghunandan Pandey*(1), referred to.

Reference to the Taxing Judge under section 5 of the Court-fees Act.

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

B. P. Sinha, for the appellant.

Government Pleader, for the Crown.

JAMES, J.—On December the 22nd, 1925, a Full Bench of this Court decided that where the amount of mesne profits accruing pendente lite was left to be ascertained in the course of execution of the decree, no court-fee was payable on the claim until the

(1) (1924) I. L. R. 4 Pat. 336, F. B.

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amount actually due had been ascertained. Following this decision, the Taxing Judge decided on the 14th July, 1926, that ad valorem court-fee should not be levied on appeals to this Court from decisions determining the amount of mesne profits—*Sheodhin Singh* v. *Norangi Lal Ram Marwari*(1). On the 10th of March, 1932, the question of whether ad valorem court-fee was payable on such appeals came before a Division Bench of this Court in *Kedar Nath Goenka* v. *Maharaja Chandra Mauleshwar Singh*(2), when it was decided that ad valorem court-fee was payable on such a memorandum of appeal On a question arising between the Stamp Reporter and an appellant after this decision, as to whether ad valorem court-fee was payable or not, the matter was referred to me as Taxing Judge, whose decision of the 18th of November, 1932, was that ad valorem court-fee was payable on the memorandum of appeal. In the present case the Stamp Reporter had accepted the appeal as sufficiently stamped, before the decision of the Division Bench in *Kedar Nath Goenka's*(2) case, but after the decision of that case he reopened the question and called upon the appellant to pay ad valorem court-fee on the value of his appeal The case has been referred to me by the Taxing Officer under section 5 of the Court-Fees Act for determination of the question of whether ad valorem court-fee shall be required in such cases, where appeals are still pending before this Court, though at the time of their presentation they were accepted by the Stamp Reporter as sufficiently stamped with a court-fee of Rs. 4. and duly admitted and registered.

Mr. B. P. Sinha on behalf of the appellant agrues that a distinction should be drawn between this case and that of *Dhanukdhari Prosad Pande*(3) wherein the Taxing Judge, accepting the view expressed by

(1) (1926) 11 Pat. L. T. 703.
(2) (1932) I. L. R. 11 Pat. 532.
(3) (1933) I. L. R. 12 Pat. 188

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the Division Bench, decided that ad valorem court-fee was payable on appeals from decisions determining the amount of mesne profits. In that case the appeal arose out of a suit for recovery of mesne profits, whereas in the present case the suit was for recovery of possession of land, with no claim for antecedent mesne profits, but with a claim for mesne profits pendente lite. In *Dhanukdhari Prosad Pande's*(1) case it was held that ad valorem court-fee was payable on the amount for which the appellant sought to avoid liability, or on the amount by which he sought to enhance the value of his decree, on the principle that the case was governed by the first article of Schedule I of the Court-Fees Act which prescribes that a memorandum of appeal must bear a court-fee stamp calculated on the value of the subject-matter in dispute in the appeal. The rule applies to all appeals from decisions determining the amount of mesne profits, whether the profits may have accrued before suit, or after the date of the institution of the suit; and no distinction can properly be drawn between this case and that of *Dhanukdhari Prosad Pande*(1), on any such ground

On the question of whether the rule that ad valorem court-fee is to be regarded as payable in the High Court on a memorandum of appeal of this nature is to be treated as affecting appeals admitted before the decision of the Division Bench of the 10th March, 1932, or the decision of the Taxing Judge of the following 18th of November. Mr. B. P. Sinha argues that when the Stamp Reporter has once accepted an appeal as properly stamped and when it has been admitted and registered, the Stamp Reporter should be treated as functus officio; and he should not be regarded as entitled to reopen the question of the sufficiency of the court-fee. He also argues that since there is no provision in the Court-Fees Act for refund of court-fee which might have been paid in

(1) (1933) I. L. R. 12 Pat. 188

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the opposite circumstances, it would not be fair to exact additional court-fee because during the pendency of the appeal, the practice has been changed by a decision of this Court.

It is suggested by the learned Government Pleader that the question of the sufficiency of the stamp on the memorandum of appeal must always be regarded as open until the appeal is finally heard and disposed of, in view of the provisions of the first part of section 12 of the Court-Fees Act, which directs that every question relating to valuation for the purpose of determining the amount of any fee chargeable on a memorandum of appeal shall be decided by the Court in which such memorandum is filed; and it is suggested that at the final hearing of the appeal it is open to the respondent to object that the memorandum of appeal has not been properly stamped. This view is certainly correct as applying to courts subordinate to the High Court and as applying to the High Court when considering the question of the sufficiency of the stamp in the court below under the second part of the section; but it must at least be regarded as doubtful whether the first part of section 12 of the Court-Fees Act can be held to empower the Bench hearing the appeal to reject a memorandum as insufficiently stamped, in view of the remarks of Sir Dawson Miller in *Krishna Mohan Singh* v. *Raghunandan Pande*(1), when he expressed the opinion that the power of the High Court to decide the amount of the fee payable on a memorandum of appeal presented to the High Court has been delegated to the Taixng Officer and the Taxing Judge.

However that may be, under rule 19 of Chapter VII of the Rules of the Patna High Court, the Stamp Reporter, when he finds that a document which ought to bear a stamp under the Court-Fees Act has been through mistake or inadvertence received in the Court

(1) (1924) I. L. R. 4 Pat. 836 (853), F. B.

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without being properly stamped, is required to report the fact to the pleader who presented the document, who is obliged to note within three weeks whether he accepts or disputes the accuracy of the report. There is no doubt that under this rule the Stamp Reporter would be required to take action if he found that a memorandum of appeal which was insufficiently stamped had been accepted by mistake or inadvertence as sufficiently stamped; and that it cannot be said that when the appeal is once admited and registered, the functions of the Stamp Reporter are necessarily at an end. Mr. B. P. Sinha points out that this rule applies only where an insufficiently stamped document has been accepted by mistake or inadvertence; and he contends that it cannot be applied to a case like that now before me, in which the Stamp Reporter acting correctly in accordance with the rule then prevailing accepted the memorandum of appeal as sufficiently stamped. But the rule does imply that the Stamp Reporter is not completely functus officio when an appeal has once been registered; and although it may be said that it is only where the document was received by mistake or inadvertence that the rule can be applied whereby the party's pleader is not permitted to question the amended report unless he does so within three weeks, it must be held that the Stamp Reporter has power to reopen the question of whether a document is sufficiently stamped, where the matter has not already been decided by the Taxing Officer, so long as the appeal may remain pending. The question remains of whether it is proper to treat appellants, whose memoranda of appeal may have been duly admitted and registered, where the matter of what may be the court-fee payable has not been left open, but has been decided in a manner which appears to be final, as liable to be called upon to pay additional court-fee during the pendency of the appeal, owing to a change in the view of the law taken in this Court after the appeal has been admitted.

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The learned Government Pleader, adopting the grounds set out by the Taxing Officer of this Court, argues that the appeal should be treated as having been admitted by mistake, and that rule 19 of Chapter VII of the High Court Rules should be held to apply.

As the Taxing Officer has pointed out, decisions of the Courts do not make the law or reverse it; they merely interpret it; and the law, when the Stamp Reporter accepted this memorandum of appeal as sufficiently stamped, was the same as is now, so that if he now corrects his former mistaken report he is not really giving retrospective effect to a decision of the Taxing Judge. The learned Advocate for the appellant accepting this view as technically correct, argues at the same time that whatever may be the formal or technical view of the matter, the view that the law has always been in accordance with the latest decision on any particular point is essentially mere convention or legal fiction, since any matter which has already been finally determined so as to be res judicata is not reopened merely because a different view of the law may be taken in some subsequent case. He argues that it would be straining the language of the rule to suggest that the Stamp Reporter acted by mistake or inadvertence when he admitted the plaint in accordance with the rule then prevailing, since if he had acted otherwise at that time, he would have been acting without authority and would have done wrong.

Whatever may be the incidental consequences of holding that the Stamp Reporter is not completely functus officio in the matter of these reports until the case is finally decided, I consider that this is the view which should be adopted. Mr. Sinha suggests that if the circumstances were the opposite of what they are, he would have no remedy; but that question may be considered when it arises. In appeals from orders determining the value of mesne profits which are still pending for decision in this Court, the Stamp

Reporter should require the memoranda to be stamped in accordance with the rule laid down in *Dhanukdhari Prosad Pande's*(1) case.

Order accordingly.

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APPELLATE CIVIL.

Before Kulwant Sahay and Khaja Mohamad Noor, JJ.

SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

RAMASRAY SINGH.*

1933.

February 10.

Cess Act, 1880 (*Beng. Act IX of* 1880), *sections* 4, 5, 6, 24—*raiyat, when required to submit return of the annual value—section* 24, *scope of—cultivating raiyat deriving income by allowing dealers of cattle to hold* hat *on the land—assessment of cess on the basis of income so derived. whether legal—scheme of the Act—persons holding the* hat, *whether lessees or licensees—cultivating raiyat allowing persons to hold* hat *on his lands, whether can be construed to have the status of tenure-holder.*

Section 24 of the Cess Act, 1880, provides :—

"The Collector may, whenever he may think fit, cause a notice in the form no. 1 in Schedule (B) contained, to be served on any person holding any lands or possessing any interest therein, although such person may have been mentioned in any return as a cultivating raiyat; and thereupon such person shall be bound to make a return of the annual value of such land within one month from the service of such notice in the form in Schedule (A) contained and the provisions of sections 17 and 18 regarding extension of time for lodging a return and regarding fine, respectively, shall be applicable to such person."

Held, that section 24 contemplates the case of a raiyat who is not cultivating the land himself directly but has let it out to under-raiyat for actual cultivation. If there is no under-raiyat and if the raiyat is himself cultivating the land, he cannot be called upon to furnish a return of the annual value which he derives in respect of the land.

* Appeal from Appellate Decrees nos. 696 to 708 of 1928, from a decision of Rai Bahadur Jyotirmoy Chattarji, District Judge of Saran, dated the 14th February, 1928, confirming a decision of Maulavi S. A. Hamid, Munsif of Chapra, dated the 13th December, 1926.

(1) (1933) I. L. R. 12 Pat. 188.

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The scheme of the Cess Act appears to be that the holder of the estate has to pay cesses upon the rent that he receives in respect of the estate. The tenure-holder in his turn has to pay cesses upon the rent that he receives from the raiyat under him and the raiyat has to pay the cesses not upon what he receives from the land but upon what rent he pays to his superior landlord. Where, therefore, the plaintiffs who were the cultivating raiyats of certain lands in a village had allowed the dealers of cattle to hold a sort of *hat* upon their holding for which they charged a certain fee, and they were assessed with a certain amount of cess upon the income they derived from these dealers of cattle, *held*, that the assessment on the basis of the income derived by the plaintiffs was illegal.

Held, further, that in view of the definition of the term "tenure" in the Act, the plaintiffs cannot be construed to have the status of a tenure-holder in respect of the lands held by them when they allow the dealers in cattle to come upon the land and hold a *hat* there.

Persons holding a *hat* upon the land of the cultivating raiyat are not lessees under them but are mere licensees.

Khudan Lal Singh v. *Hafizuddin*(1) and *Secretary of State for India* v. *Karuna Kanta Chowdhury*(2), followed.

Appeal by defendant no. 1.

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

Rai Gurusaran Prasad, Government Pleader, for the appellant.

B. P. Sinha and *Harinandan Singh*, for the respondents.

KULWANT SAHAY AND KHAJA MOHAMAD NOOR, JJ. —These are appeals by the defendant no. 1, the Secretary of State for India in Council, against the decision of the District Judge of Saran confirming the decision of the Munsif and decreeing the plaintiffs' suits for a declaration that the assessment of road cess made upon them under the Road Cess Act was

(1) (1932) 13 Pat. L. T. 648.
(2) (1907) I. L. R. 35 Cal. 82, F. B.

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ultra vires and without jurisdiction and the realisation of the cess so assessed was illegal and for a refund of the same.

The plaintiffs are admittedly the cultivating raiyats of certain lands in village Anandpur which adjoins the lands of Sonepur where the Sonepur Fair is held annually. It appears that the plaintiffs allowed the dealers of cattle to hold a sort of *hat* upon their holdings for which they charged a certain fee per head of cattle from those dealers. These plaintiffs were called upon to submit a return under section 24 of the Cess Act (Bengal Act IX of 1880) and thereafter they were assessed with a certain amount of cess upon the income they derived from the dealers of cattle who hold the *hat* upon their land. They protested that they were not liable to be assessed on the income they derived which could not be treated as the annual value of the land within the definition of the expression as given in the Cess Act. Their objections were disallowed up to the Board of Revenue. They then instituted the present suits for a declaration that they were not liable to assessment and for a refund of the cesses realised from them.

The defence of the Secretary of State for India in Council was that the plaintiffs were the holders of tenures within the definition of the term as given in the Cess Act and that, therefore, they were liable to assessment and they have been rightly assessed and the cesses have been legally recovered from them.

Both the Courts below have held that the assessment on the basis of the income derived by the plaintiffs from the dealers of cattle was illegal and ultra vires and they made a declaration entitling the plaintiffs to a refund of the cess realised from them and granted them a decree as prayed for.

The argument advanced by the learned Government Pleader on behalf of the appellant is that under section 5 of the Cess Act an immovable property is

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liable to the payment of local cess. Under section 6 the local cess is to be assessed on the annual value of lands. Under section 4 "annual value of any land, estate or tenure" means the total rent which is payable, or if no rent is actually payable, would on a reasonable assessment be payable during the year by all the cultivating raiyats of such land, estate or tenure, or by other persons in the actual use and occupation thereof. It is contended that the plaintiffs' interest in the land is an immoveable property within the meaning of section 5 and that, therefore, under section 6 they are liable to assessment upon the annual value which is to be determined upon the sum they recover which is to be treated as the annual value within the definition of the term as given in section 4. It is clear that the argument of the learned Government Pleader cannot be accepted as sound. Under section 41 of the Cess Act every cultivating raiyat has to pay to the person to whom his rent is payable a certain proportion of the local cess calculated under the provisions of the Act or upon the annual value ascertained under the provisions of section 24 or 25 of the Act in respect of the land held by him. The amount upon which the plaintiffs are sought to be assessed is not the amount of the rent which is payable by the plaintiffs to their landlord and, therefore, they cannot be assessed with cesses upon this amount, nor is the amount the annual value ascertained under the provisions of section 24 or 25 of the Act. Section 24 empowers the Collector to cause a notice in the prescribed form to be served on any person holding any lands or possessing any interest therein, although such person may have been mentioned in any return as a cultivating raiyat. This section merely empowers the Collector to call upon the cultivating raiyat to submit a return and the cultivating raiyat has to submit a return of the annual value of the land held by him. According to the definition of the term "annual value" he has to mention in the return the rent which is payable to him. That supposes that the

raiyat has got an under-raiyat under him from whom he recovers rent. If there is no under-raiyat and if the raiyat is himself cultivating the land, it is clear that he cannot be called upon to furnish a return of the annual value which he derives in respect of the land. The note to section 4 printed in the Bihar and Orissa Cess Manual of 1927 clearly indicates that section 24 contemplates the case of a raiyat who is not cultivating the land himself directly but has let it out to under-raiyats for actual cultivation. For ought we know, the provisions contained in section 24 might have been introduced for the purpose of enabling the Collector to check the accuracy of the return filed by the proprietor or the tenure-holder, who in his return has described certain lands as in the possession of cultivating raiyats. Section 26 provides that if it shall appear to the Collector that any person upon whom a notice has been served under section 24 has been wrongly classed in the return as a cultivating raiyat, the Collector may direct that the entry be corrected and that such person be classed as a tenure-holder. This clearly refers to the return submitted by the superior landlord or tenure-holder. In any event when as a matter of fact in the present case there is no actual cultivating raiyat under the plaintiffs, the plaintiffs cannot be called upon to submit a return of the annual value of their lands. The scheme of the Road Cess Act appears to be that the holder of the estate has to pay cesses upon the rents that he receives in respect of the estate. The tenure-holder in his turn has to pay cesses upon the rent that he receives from the raiyat under him and the raiyat has to pay the cesses not upon what he receives from the land but upon what rent he pays to his superior landlord. In the present case the plaintiffs are the cultivating raiyats. There is no dispute on the point that they are the cultivating raiyats. As cultivating raiyats they are liable under the Act to pay cesses upon the rent they pay to the superior landlord in respect of the land forming their raiyati holding. If the plaintiffs make any profit out of the land, that profit is not to

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be taken into consideration in assessing the road cess in respect of the land. It is only the income derived by the holder of the estate or of the tenure upon which cess is to be assessed and in so far as the cultivating raiyat is concerned it is only upon the rent payable by him that cess is to be assessed. Under the circumstances it is clear that the plaintiffs cannot be assessed to cesses in respect of any profit which they make out of the holding.

The question is whether the plaintiffs can be construed to have the status of a tenure-holder in respect of the lands held by them when they allow the dealers in cattle to come upon the land and hold a *hat* there. The definition of the term " tenure " as given in the Act precludes such a contention. It expressly provides that the interest of a cultivating raiyat is not included in the term " tenure ". The plaintiffs are admittedly cultivating raiyats and they cannot be treated to be tenure-holders for the purposes of assessment of cesses. The persons who hold the *hat* and deal in cattle upon the land are not lessees under the plaintiffs. They are mere licensees who have been granted license to come upon the land and to sell their cattle. The difference between a lessee and a licensee has been pointed out in the case of *Khudan Lal* v. *Hafizuddin*(1), and the Full Bench decision of the Calcutta High Court in *Secretary of State for India* v. *Karuna Kanta Chowdhry*(2) is a clear authority on the point. It is, therefore, clear that the decision of the learned District Judge was correct.

These appeals must, therefore, be dismissed with costs.

Appeals dismissed.

(1) (1932) 13 Pat. L. T. 648.
(2) (1907) I. L. R. 35 Cal. 82, F. B.

CRIMINAL REFERENCE.

Before James and Agarwala, JJ.

1933, February, 21.

K. T. KESHAN

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 209, 253 *and* 446(*1*)—*commitment, whether can be made without recording evidence for prosecution.*

Before the Magistrate makes a commitment under section 446(*1*), Code of Criminal Procedure, 1898, he must consider whether there are grounds for discharging the accused under section 209 or section 253 of the Code.

No one for or against the reference.

JAMES AND AGARWALA, JJ.—The Subdivisional Magistrate of Begusarai has in this case made a commitment to the Court of Sessions under section 446 of the Code of Criminal Procedure, without holding any preliminary inquiry under Chapter XVIII of the Code. Before the Magistrate makes a commitment under section 446(*1*), Code of Criminal Procedure, he must consider whether there are grounds for discharging the accused under section 209 or section 253 of the Criminal Procedure Code; and he cannot do this without taking the evidence for the prosecution.

The commitment is therefore quashed, and the case is remanded to the Subdivisional Magistrate for inquiry preliminary to commitment, on the completion of which he will be in a position to say whether the accused ought to be discharged or committed for trial.

Reference accepted.

* Criminal Reference 6 of 1933.

APPELLATE CIVIL.

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March, 1.

Before Fazl Ali and Scroope, JJ

NAKSHETRAMALI DEI

v.

BRAJASUNDER DAS.*

Will—Construction—Hindu wills, Cardinal rule governing—bequest in favour of person not living at testator's death, whether void—Succession Act, 1925 (Act XXXIX of 1925), section 112, scope of—Restriction (1) of Schedule III of the Act—bequest not postponed nor legatee alive at testator's death—exception to section 112, applicability of—bequest in favour of " a son " of L or G—bequest, whether void for uncertainty—extrinsic evidence inadmissible to show which of the living sons of L or G was intended to be benefited —charitable bequest for the relief of " any poor and deserving Karan family or families or individuals," whether operative.

Section 112 of the Succession Act, 1925, lays down :

" Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

Exception.—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or, if he is dead, to his representatives."

Held, that section 112 is subject to the restriction (1) of Schedule III of the Act which says—

" Nothing therein contained shall authorise a testator to bequeath property which he could not have alienated inter vivos."

The cardinal rule governing the Hindu wills is that a person capable of taking under a will must be such a person as could take the gift inter vivos and, therefore, must either in fact or in contemplation of law be in existence at the date of the death of the testator.

* Cuttack Appeals from Original Decree nos. 5 and 6 of 1930, from a decision of Babu Harihar Charan, Subordinate Judge of Cuttack, dated the 30th November, 1930.

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Where a will, after making certain bequests, provided :

" (*1*) Lalmohan's first male child by the present wife to be heir, in default of any male child being born to him or dying in childhood either a son of Lakshmidhar or Gopal to be heir. The boy should live with the daughter-in-law as her adopted son.....

(*3*) Rs. 10,000 should be set apart in a fund the income of which the executors shall apply to the relief of any poor and deserving Karan family or families or individuals in shape of necessaries of life in times of distress, medical or educational aid, help for marriage of daughter or such other deserving cause.

(*4*) The residue to be administered by the executors for the benefit of heir to pass to him absolutely on his attaining the age of 21 years."

Held, (*i*) that *LM* having no male child living at the death of the testator, the bequest under the first part of clause (1) of the will could not take effect;

(*ii*) that there being no male child alive and the testator not having intended, by the terms of the will, that the operation of the bequest should be suspended indefinitely until a son was born to *LM*, no matter how long after the death of the testator that event might take place, the exception to section 112 was inapplicable to the case; *Dinesh Chandra Ray Choudhury* v. *Biraj Kamini Dasi*(1), followed.

(*iii*) that the second part of clause (1) was void for uncertainty as extrinsic evidence was not admissible in order to show which particular son of *LD* or *G* (both having got more than one son) was intended to be benefited by the testator.

Powell v. *Davies*(2), *Ashburner* v. *Wilson*(3) and *Wilson* v. *Wilson*(4), referred to.

(*iv*) that the charitable bequest under clause (*3*) was operative as the words used by the testator were sufficiently certain and descriptive to indicate the class of persons whom the testator intended to benefit. The essential feature of most of the charitable trusts is that the beneficiaries are an uncertain and indefinite class of persons described in general, often fluctuating and changing in their individual numbers.

Manorama Dassi v. *Kali Charan Banerjee*(5), followed.

(1) (1911) 15 Cal. W. N. 945.
(2) (1839) 1 Ben. 532.
(3) (1850) 17 Sim. 204.
(4) (1847) 1 De. G. & S. 152.
(5) (1903) I. L. R. 31 Cal. 166.

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A will should be construed as liberally as possible and every attempt should be made to give effect to the intention of the testator.

Appeal no. 5 by the plaintiff.

Appeal no. 6 by defendants 2 and 9.

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

S. C. Chatterji and *L. K. Das Gupta* for the appellant in F. A. 5/30

S. N. Ray, *B. K. Ray* and *G. Dhal*, for the appellants in F. A. 6/30.

G. Dhal, for the respondents in F. A. 5/30.

B. Mohapatra, *S. C. Chatterji* and *L. K. Das Gupta*, for the respondents in F. A. 6/30.

FAZL ALI AND SCROOPE, JJ.—These two appeals arise out of a suit brought by one Nakshetramali Dei, one of the daughters of Rai Bahadur Sudam Charan Naik, for the construction of a will left by him. The principal relief claimed by her is set out in the plaint in these terms :—

"That on a proper construction of the document, dated 9th January 1925, propounded as the last will and testament of the late Rai Bahadur Sudam Charan Naik, let it be declared that the disposition made by the deceased of his properties by the said document are invalid, inoperative and void and as such the said properties have vested in his legal heirs, namely, the plaintiff and defendants nos. 8 and 9."

Sudam Charan Naik died on the 31st January, 1925, leaving behind three daughters one of whom is the plaintiff and the other two are defendants 8 and 9 in the suit. His only son Kishore Charan Naik had died during his life-time and the latter's widow is defendant no. 10 and their daughter is defendant no. 11. The other defendants in the suit are the husbands of defendants 8 and 9, their sons, one Lakshmidhar Mahanty (one of the executors under the will) and his two sons. The will after

making certain bequests provides in effect that the person referred to in the first clause as the "heir" is to be the residuary legatee. The only clauses of the will with which we are concerned in these appeals are the following :—

1. Lalmohan's first male child by the present wife to be heir, in default of any male child being born to him or dying in childhood either a son of Lakshmidhar or Gopal to be heir. The boy should live with the daughter-in-law as her adopted son.

2. Cuttack house will pass absolutely to Lalmohan subject to the condition that he lives there with the daughter-in-law and her daughter who shall have the right to live there during life.

3. Rs. 10,000 should be set apart in a fund the income of which the executors shall apply to the relief of any poor and deserving Karan family or families or individuals in shape of necessaries of life in times of distress, medical or educational aid, help for marriage of daughter or such other deserving cause.

4. The residue to be administered by the executors for the benefit of heir to pass to him absolutely on his attaining the age of 21 years ".

Now, there is considerable difference of opinion among the parties as to the construction and the effect of the first clause. It is argued on behalf of the plaintiff (the appellant in Appeal no. 5) that the bequest under this clause cannot take effect as it is void for uncertainty. The defendants 2 and 9 who are appellants in Appeal no. 6 state on affidavit that a son has been recently born to them (the actual date of birth is stated to be the 15th of August, 1932) and contend in the first place that the newly born son should be taken to be "the heir" referred to in the first clause of the will and secondly, that if this contention is not accepted, the first clause of the will should be held to be void for uncertainty and it should be declared that the property left by the testator devolves upon his three daughters who are his natural heirs. On the other hand it is contended on behalf of respondents 3 to 5 that the second son of defendant no. 3 (Lakshmidhar) is the person who will be the residuary legatee under the will, whereas the case of respondents nos. 6 and 7, the two sons of Gopal

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is that defendant no. 7, the second son of Gopal will be the residuary legatee. Defendant no. 10 in her written statement does not admit that the first clause in the will is void for uncertainty and adds—

"Though Babu Lakshmidhar Mahanty and Babu Gopal Chandra Patnaik had two sons each at the time of death of Rai Bahadur Sudam Charan Naik, yet the intention of the testator was perfectly clear, viz., in speaking of a son of Lakshmidhar or a son of Gopal he meant their second sons."

In her evidence also she does not commit herself any further on the point as we shall see presently.

We will first deal with the question whether Lalmohan's newly born son can be held to be "the heir" under the first clause of the will. The learned Subordinate Judge has dealt with this point as follows:—

"Now it has been admitted and also proved in this case that defendant no. 2 and defendant no. 9 had no male child at the testator's death, so that the first clause is bound to fail. Surely it could not mean that any male child who may be born at any time even after the testator's death should be the heir. This was conceded by the learned pleader who argued defendant no. 2's case."

In our opinion the view taken by the learned Subordinate Judge is correct. It is argued on behalf of Lalmohan (defendant no. 2) and his wife that the exception to section 112 of the Indian Succession Act will apply to the present case and reliance is placed on the last clause of the will which provides that

"the residue is to be administered by the executors for the benefit of heir to pass to him absolutely on his attaining the age of 21 years."

It is contended that the object of the testator was to postpone the legacy until the heir in question had attained the age of 21 years and, therefore, it was not necessary that the son of Lalmohan should have been in existence at the time of the testator's death.

Mr. B. K. Ray who appeared on behalf of the appellant in Appeal no. 6 soon saw the flaw in his argument. Section 112 lays down in the first instance

uest to a person not in existence at the e testator's death is void. The exception ws provides:—

rty is bequeathed to a person described as standing in gree of kindred to a specified individual but his possession d until a time later than the death of the testator by or bequest or otherwise: and if a person answering the live at the death of the testator, or comes into existence vent and such later time, the property shall at such that person, or, if he is dead, to his representatives."

nion the exception is wholly inapplicable ent case. No son of Lalmohan was in t the time of the testator's death and it ave been within the contemplation of the at the operation of the bequest should be indefinitely until a son was born to Lal- matter how long after the death of the at event might take place. The testator l in view the possibility that a son might rn to Lalmohan and so he made an alterna- t in favour of " a son " of Lakshmidhar The fourth clause on which Mr. B. K. does not postpone the operation of the favour of the residuary legatee indefinitely. r hand it clearly implies that the property in the " heir ", whoever he may be, as tain legacies have been paid out, but it dministered by the executors until he has e age of twenty-one years.

section 112 is subject to the restriction edule III of the Act which says—

therein contained shall authorise a testator to bequeath he could not have alienated inter vivos."

Chandra Ray Choudhury v. *Biraj Kamini* ch was strongly relied upon by Mr. Ray, Mookerjee pointed out that the cardinal rule governing the Hindu wills is that a person

(1) (1911) 15 Cal. W. N. 9

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capable of taking under a will must be such a person as could take the gift inter vivos and, therefore, must either in fact or in contemplation of law be in existence at the date of the death of the testator. Mr. B. K. Ray admits that it had been conceded on behalf of defendant no. 2 before the trial Judge that a son of Lalmohan could succeed to the estate under the first clause only if he had been in existence at the time of the testator's death. In our opinion Lalmohan's newly born son cannot be treated as the heir within the first clause of the will.

There still remains the question of the construction of the remaining part of the first clause. Mr. Chatterji who appears on behalf of Lakshmidhar and his two sons contends in the first place that extrinsic evidence would be admissible in the present case to show which of the two sons of Lakshmidhar and Gopal were referred to by the testator in the first clause of the will and then proceeds to show that defendant no. 10 has clearly stated in her deposition that the second sons of Lakshmidhar and Gopal respectively were intended to be benefited by the testator and that defendant no. 10 was not asked a single question in cross-examination to show that her statement on that point was challenged as incorrect. Lastly, it is argued by him that the words " either the son of Lakshmidhar or Gopal " should in view of the evidence adduced in the case be taken to mean " the second son of Lakshmidhar or the second son of Gopal "; that the bequest made in this case was an alternative bequest as provided in section 96 of the Indian Succession Act and it meant that the second son of Lakshmidhar was to succeed in the first instance as an heir and that failing him the second son of Gopal was to be the heir. This argument was accepted by the learned trial Judge who has relied in his decision upon a certain passage in Jarman on Wills. This passage was referred to more than once

in the course of the arguments in the Court. It runs as follows :—

" A gift in favour of ' one child of *A* ' or' a son of *A* ' may appear from the context to mean the eldest (or only) child of *A*.....In the case above put of a gift to ' one of the sons ' of *J. S.*, he having several sons, parol evidence is not admissible to remove the uncertainty, because the uncertainty is apparent on the face of the will, the terms of which suppose the existence of more than one son, and moreover show that the testator had not determined which of them to make the object of his bounty. If, however, the gift is to " *the* son of my brother *A* " and it appears that A has two or more sons, extrinsic evidence is admissible in the first instance to show whether the testator had reasons for preferring one son, and if no such evidence is forthcoming, evidence is admissible to show which son the testator intended to benefit."

This passage refers to three groups of cases in which the beneficiary is referred to either as " a son of *A* ", or as " one of the sons of *A* " or as " the son of *A* ". The learned Subordinate Judge is of opinion that the present case is similar to the case where the gift was made in favour of " a son of *A* " and upon the evidence of the defendant no. 10 he holds that the persons referred to are the second sons of Lakshmidhar and Gopal respectively. He seems however to have ignored the fact that what Mr. Jarman says is that—" A gift in favour of ' one child of *A* ' or ' a son of *A* ' may appear from the context to mean the eldest (or only) child of *A*.....". There is a good deal of difference between the intention of the testator being apparent from the context and it being necessary to prove it by means of extrinsic evidence. No cases were cited at the Bar but at pages 446 and 447 of Jarman on Wills the cases

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of *Powell* v. *Davies*(1); *Ashburner* v. *Wilson*(2) and *Wilson* v. *Wilson*(3) are referred to. In *Powell* v. *Davies*(1) the property devised was to be divided into four parts between one child of *A*, one child of *B*. one child of *C* and one child of *D*. At the time of making the will and at the death of the testator *B* had only a child, namely, a daughter, but after the testator's death *B* had a son. At the death of *A* there were children, both sons and daughters of *A*, *C* and *D*. It was held that the daughter of *B* and the eldest child of *A*, *C* and *D* respectively, whether a son or daughter, who came into esse after the testator's death were entitled. In *Ashburner* v. *Wilson*(2) the devise to "a son of my nephew *A*" was held to operate in favour of the first born son of *A*. In *Wilson* v. *Wilson*(3) one of the annuities was directed by a will to be paid to the widow so long as she should live and if she had any child born, such sum was to be continued for its life. It was held that the direction applied to the eldest child only. In none of these cases extrinsic evidence appears to have been allowed to prove the intention of the testator. In the present case there is nothing in the will to show which of the two sons of Lakshmidhar or Gopal was intended to be benefited by the testator under the will. A case like the present is somewhat different from a case where the son intended to be benefited is particularised and is described as "the son of *A*" and in our opinion extrinsic evidence is not admissible in order to show which particular son of Lakshmidhar or Gopal was intended to be benefited by the testator. It is not the case of any of the parties to this litigation that the testator might have referred to the eldest son of Lakshmidhar or Gopal. On the other hand the only contention before us is that the testator meant the second son of Lakshmidhar and the second son of Gopal. This contention cannot be accepted

(1) (1839) 1 Bea. 532.
(2) (1850) 17 Sim. 204.
(3) (1847) 1 De. G. & S. 152.

without referring to the extrinsic evidence in the case and once it is held that extrinsic evidence is not admissible, there can be no escape from the conclusion that the first clause of the will is void for uncertainty.

Assuming, however, that extrinsic evidence is admissible there still remains the question whether the evidence that has been adduced in this case is of any material assistance in construing the will. The only witness whose evidence throws any light on the intention of the testator is defendant no. 10. The important passage in her evidence on which reliance has been placed on behalf of the defendant no. 3 runs thus:—

"I had a talk with him (the testator) before he executed the will. That was about a month before his death. He told me then thus—that he would make all arrangements for my convenience..... That I should have an adopted son in either Budha or Belu, that they would be regarded as my own son and live with me. That he who would be adopted by me would be regarded as my son..... That I should adopt a son of Lalmohan if a son is born to him. That in case Lalmohan should have no son, I should adopt Budha. Budha is the younger (second son) of Mina Dei, wife of Rai Bahadur Lakshmidhar. That if Budha be not available for adoption I should adopt Belu, the son of Kalyani Dei, wife of Gopal Babu."

Defendant no. 10 was cross-examined on behalf of defendant no. 3 as well as of defendants nos. 6 and 7, sons of Gopal. Cross-examined on behalf of defendants 6 and 7 she made the following statement:

"My husband very often expressed the desire to have Belu as his adopted son..... On one occasion there was a talk in the presence of Sudam Babu and myself and the wife of Lakshmidhar about the management of properties. There was a talk then as to who would be the adopted son of myself. It was settled there that Belu would be my adopted son. I cannot say if that decision was in accordance with the wishes of Sudam Babu."

This statement would go to show that it had been settled among certain relations on a certain occasion that Belu, the second son of Gopal, would be the adopted son. When cross-examined on behalf of

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defendant no. 3, however, she made the following statement:

"Sudam loved Budha very much. My husband liked Budha very much. He also expressed his desire to adopt Budha as he was saying for others."

These statements as well as some other statements made by her make it difficult for the Court to decide what value should be attached to the evidence given by her as to the intention of the testator. Assuming, however, that the statement made by her in the examination-in-chief is to be accepted in its entirety the comment which it seems pertinent to make here is that she could not legally adopt either Budha or Belu and this is conceded by all the parties to this litigation. Once it is found that she had no power to adopt for her husband and, therefore, none of the four boys was legally "available for adoption", one is left to speculate as to the precise intention of the testator. It is said that the testator did not mean that there should be an adoption in the strict and legal sense of the term, but that whoever the boy may be who is selected he should occupy to all intents and purposes the position of an adopted son. This may have been the intention of the testator, but to our mind this introduces a further element of uncertainty in the will because in that case any one of the four boys may at any time come forward and claim that he is available for adoption. Defendant no. 10 does not say anywhere in her evidence if the fact of a particular boy being available for adoption depends upon the wish of his parents or upon his own willingness to be treated as an adopted child. In our opinion the extrinsic evidence in this case is of a very vague character and even if such evidence as has been adduced is held to be admissible it would be difficult to say with any degree of certainty as to what was really intended by the testator. The appellants in both the appeals have laid great stress upon the fact that the will is not in the form in which an alternative bequest is usually made and the word "either"

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occurring before " a son of Lakshmidhar " indicates that the testator was himself indifferent as to whether a son of Lakshmidhar or a son of Gopal was to become the residuary legatee and all that he intended was that one of these persons should succeed as an " heir ". We recognise that no undue weight should be attached to the word " either "; but having regard to the whole context and also to the fact that the testator might have well dropped the word " either " if he meant to make an alternative bequest in the sense in which such bequest is contemplated in law, it appears to us that the word " either " does add to the difficulties of the construction. It is no doubt true that the will should be construed as liberally as possible and every attempt should be made to give effect to the intention of the testator but in this particular case the testator has chosen to draft the will in such a form that the element of uncertainty cannot altogether be eliminated. It is conceded by every one concerned that the testator was a well educated and enlightened person and if by " a son " of Lakshmidhar he definitely meant Budha and by " a son " of Gopal he meant Belu, there was nothing to prevent him from expressing his intention in clearer and more precise terms. Why he left it so vague it is difficult to say. It may perhaps be said that what the testator really meant was that Lalmohan's first child should be the heir and in default of such a child any of the sons of Lakshmidhar or Gopal who might be able to live with his daughter-in-law as her adopted son should be the " heir ". Unfortunately, however, the first clause cannot take effect because no child of Lalmohan was in existence at the time of the testator's death. As regards the second clause if a boy had been adopted or chosen to be treated like an adopted son by the testator's daughter-in-law during the life-time of the testator something could be said in favour of such a boy. It is, however, conceded on all sides that defendant no. 10 has not yet adopted or selected any of the sons of Lakshmidhar or Gopal and there is

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nothing in her evidence to suggest her own preference for one of these boys over the other. In this state of confusion we are constrained to hold that the first clause of the will is void for uncertainty and the law will, therefore, take its course and the natural heirs of Rai Bahadur Sudam Charan Naik, that is to say, the three daughters, will get the properties.

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In the second clause of the will the house at Cuttack is given absolutely to Lalmohan subject to the condition that he lives there with defendant no. 10 and her daughter. The Subordinate Judge has held that this clause is inoperative because in the first place Lalmohan has not fulfilled the condition, that is to say, he has not been living with defendant no. 10 and her daughter and in the second place he has made himself unfit to live with her in the sense in which the testator intended him to live by reason of the fact that he has embraced the Christian religion. A good deal of argument was advanced before us as to whether mere conversion to Christianity would affect his right under the will in respect of the house and it was argued on the one hand that the condition imposed upon him was merely one of residence and not of "messing" with the defendant no. 10 and her daughter and, therefore, it can yet be easily fulfilled: and on the other, that what the testator intended was that they should live as members of the same family and that such residence involves the idea of being able to live in a common mess. It appears to us that the real object of the testator was that his daughter-in-law who was a widow and her daughter should not live alone in the house but that there should be a male relative to look after them and with this object he chose Lalmohan, one of his sons-in-law, to whom he intended to give the house subject to the life estate conferred upon the defendant no. 10. The mere fact, therefore, that Lalmohan has become a Christian, although it might perhaps make his relations with the defendant No. 10 less cordial, would not prevent

his living in the house with her and looking after her. There, however, remains the question of fact whether Lalmohan has been living with the defendant No. 10 since the death of Sudam Babu or not. On this question we are inclined to accept the finding of the learned trial Judge who had the advantage of seeing the witnesses who were examined in this case, that Lalmohan has not fulfilled this condition. It appears that Lalmohan is a pleader who was formerly practising at Beharampur, a different district altogether which is at a long distance from Cuttack, and he embraced Christianity a year after Sudam Babu's death and since then he has been working as a preacher. He says that he used to reside at Beharampur when he was practising as a pleader there but during vacation he used to come to Cuttack. This shows that he has not been living continuously in the house. He admits that after Sudam Babu's death he lived in the house for about two months; then he went away. He further says that after becoming Christian he lived in the house in May, June and part of July, 1927. Reading the entire evidence of this witness as well as of the other witnesses one can see that Lalmohan has not been living continuously with defendant no. 10 and her daughter in the house at Cuttack and that his visits to Cuttack have not been very frequent and although on certain occasions he probably did stop in that house, on several other occasions he stopped in other houses and that he has not lived in the house for sometime past. It is unnecessary to decide whether the condition of residence imposed in this case is a condition precedent or condition subsequent. In our opinion the condition imposed by the testator is one which is contemplated in section 136 of the Indian Succession Act. It is true that the testator has not said in so many words that the bequest shall cease to have effect or that the subject-matter of the bequest shall go to another person if the legatee does not perform certain acts,

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but it appears to us that this is what in substance was meant by the testator and his intention must be given effect to. In our opinion the decision of the learned trial Judge is correct on this point and this part of the bequest fails.

The only other clause in the will which remains to be construed is what we have described as clause 3 which directs the executors to apply Rs. 10,000 to the relief of any poor and deserving Karan family or families or individuals. Here also we find ourselves in complete agreement with the learned Subordinate Judge and we think that this part of the will must be held to be operative. The bequest under the clause is merely a charitable bequest and, as has been remarked in many decisions, the essential feature of most of the charitable trusts is that the beneficiaries are an uncertain and indefinite class of persons described in general, often fluctuating and changing in their individual numbers. It appears to us that the words used by the testator here are sufficiently certain and descriptive to indicate the class of persons whom the testator intended to benefit and the learned Subordinate Judge has rightly held that the principle laid down in *Manorama Dassi* v. *Kali Charan Banerjee*(1) applies to this case.

The fourth clause of the will has been quoted by us merely because Mr. Ray appearing on behalf of the appellant in Appeal No. 6 relied upon it in construing the first clause of the will. So far as the other clauses of the will are concerned they have been all construed by the learned Subordinate Judge and they are not the subject-matter of any of the appeals before us.

The result is that the appeals are allowed to this extent that the first clause of the will is declared to be void on account of uncertainty and the decision of the learned Subordinate Judge is varied to that extent

(1) (1903) I. L. R. 31 Cal. 166.

and in other respects his decision is upheld. Costs of the suit will not be borne by the parties but the appellants will get their costs out of the estate in the hands of the executors. Hearing fee in appeal no. 5 will be assessed at ten gold mohurs and in appeal no. 6 at 5 gold mohurs.

Appeals allowed in part.

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APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Kulwant Sahay, J.

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v.

NRISINGHA CHARAN NANDY CHAUDHURY.*

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February. 21. *March.* 6.

Code of Civil Procedure, 1908 (Act V of 1908), section 109(a)—appeal to Privy Council—order refusing the appointment of receiver, whether is "final order".

The appointment of a receiver is in the discretion of the court and the order is an interlocutory order which in no way decides any cardinal point arising for decision between the parties in the suit.

Held, therefore, that an order refusing the appointment of a receiver is not a final order within the meaning of section 109(*a*), Code of Civil Procedure, 1908.

Chundi Dutt Jha v. *Padmanand Singh Bahadur*(1), *Kishen Pershad Panday* v. *Tiluckdhari Lall*(2), *Rahimbhoy Habibhoy* v. *Turner*(3), *Mahomed Musaji Saleji* v. *Ahmed Musaji Saleji*(4) and *Magni Ram Bungar* v. *Sridhar Chaudhury*(5). followed.

Binoy Krishna Mukerjee v. *Satish Chandra Giri*(6) and *Binoy Krishna Mukerjee* v. *Satis Chandra Giri*(7), referred to.

* Privy Council Appeal no. 16 of 1932.

(1) (1895) I. L. R. 22 Cal. 928.
(2) (1890) I. L. R. 18 Cal. 182.
(3) (1890) I. L. R. 15 Bom. 155, P. C.
(4) (1911) 13 Cal. L. J. 507.
(5) (1924) 6 Pat. L. T. 119.
(6) (1926) 31 Cal. W. N. 540.
(7) (1927) I. L. R. 55 Cal. 720, P. C.

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Application for leave to appeal to the Privy Council. The facts of the case material to this report are stated in the judgment of the Court.

Manohar Lal and *Bindeshwari Prasad*, for the applicant

S. N. Bose, *G. P. Das* and *N. C. Roy*, for the opposite party.

COURTNEY TERRELL, C. J. AND KHAJA MOHAMAD NOOR, J.—This is an application for leave to appeal to the Privy Council against the decision of a Division Bench of this Court in the matter of the appointment of a receiver during the pendency of a martgage suit. The plaintiffs instituted the suit to enforce two simple mortgages of an impartible raj which is now in the possession of the defendant no. 19, Nrisingha Charan Nandy Chaudhury, under a usufructuary mortgage executed by the mortgagors. The Subordinate Judge made an order for appointment of a receiver, but on appeal this Court has set aside that order, and the present application is for leave to appeal against that decision of this Court.

The only question for consideration is whether the decision of this Court can be construed to be a decree or final order within the meaning of section 109(*a*) of the Code of Civil Procedure. The question has been considered in several cases. In *Chundi Dutt Jha* v. *Pudmanund Singh Bahadur* (1) it was held that there was no appeal to the Privy Council against an order refusing the appointment of a receiver in a suit inasmuch as such an order does not finally decide any matter which is directly at issue in the case in respect to the right of the parties, and is not final within the meaning of clauses (*a*) and (*b*) of section 595 of the Code of 1882 and section 39 of the Letters Patent of the Calcutta High Court. The

(1) (1895) I. L. R. 22 Cal. 928.

learned Judges relied, amongst others, upon the decision of the Privy Council in *Kishen Pershad Panday* v. *Tiluckdhari Lall*(1) and held that the order refusing to appoint a receiver was not an order which finally decided any question at issue in the case or the rights of any of the parties. They also referred to the Privy Council decision in *Rahimbhoy Habibhoy* v. *Turner*(2) in support of the proposition that the order was not a final order. In *Mahomed Musaji Saleji* v. *Ahmed Musaji Saleji*(3) the same view was taken and it was held that an order appointing a receiver was not a final order within the meaning of clause (*a*) of section 109 of the Code, and that where the question in controversy was whether a receiver should or should not be appointed in respect of the subject-matter of the litigation, and the Courts took divergent views upon the matters, certificate as to the fitness of the case for appeal to His Majesy in Council should not be granted. The same view was held by this Court in *Magni Ram Bungar* v. *Sridhar Choudhury*(4), where it was held that an order refusing or granting the appointment of a receiver does not fall within the provisions of section 109, Civil Procedure Code, as the appointment of a receiver is in no way a matter which finally determines the rights of the parties. There also a receiver had been ordered to be appointed by the Subordinate Judge and the High Court had on appeal set aside that order, and reliance was placed upon the decision of the Calcutta High Court in *Chundi Dutt Jha* v. *Pudamanund Singh Bahadur*(5) and *Muhammad Musaji Saleji* v. *Ahmad Musaji Saleji*(3), just referred to. In *Binoy Krishna Mukerjee* v. *Satish Chandra Giri*(6) the application for leave to appeal to the Privy Council against an

(1) (1890) I. L. R. 18 Cal. 182.
(2) (1890) I. L. R. 15 Bom. 155.
(3) (1911) 13 Cal. L. J. 507.
(4) (1924) 6 Pat. L. T. 119.
(5) (1895) I. L. R. 22 Cal. 928.
(6) (1926) 31 Cal. W. N. 540.

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order of a Division Bench of the High Court setting aside the order of the District Judge for the appointment of a receiver was entertained and leave was granted under clause (*c*) of section 109 of the Code. When this matter went before the Privy Council, their Lordships entertained the appeal but in disposing of it, Viscount Sumner made the following observations :—

" Their Lordships remark that it was with some doubt in the mind of at least one of the Judges of the High Court that leave to appeal to His Majesty in Council was given in this case, and they think it right to add that, as a general rule and in the absence of special circumstances or some unusual occasion for its exercise, the power of making interlocutory order is one which is not a suitable subject for review by the Judicial Committee. Not only are the practice of the Court and the manner in which experience has shown that it is wise to apply it, better known to the High Courts in India than they can be to their Lordships, but the delay occasioned by taking this additional appeal adds gravely to the procrastination, which is already the bane of Indian litigation "—*Benoy Krishna Mukherjee* v. *Satish Chandra Giri*(1).

It is clear from the decisions cited above that an order refusing the appointment of a receiver is not a final order within the meaning of section 109(*a*) of the Civil Procedure Code. The appointment of a receiver is in the discretion of the Court and the order is an interlocutory order which in no way decides any cardinal point arising for decision between the parties in the suit. In the present case it has been observed by the Division Bench that the suit was instituted in March, 1931, and must be ripe for hearing. Mr. Manohar Lal for the petitioners states that some preliminary points have yet to be determined before the suit can be heard and that there will be delay in the

(1) (1927) I. L. R. 55 Cal. 720, P. C.

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actual hearing of the suit. Even so, the delay in the disposal of the suit cannot be so great that it cannot be disposed of before the disposal of an appeal to the Privy Council against the order of this Court. Under the circumstances of the case it does not appear desirable that leave should be granted under clause (*c*) of section 109 of the Code, and, in fact, Mr. Manohar Lal has not pressed for a leave under this clause.

We rejected the application and stated that the reasons will be given later on. We, therefore, record the above reasons for rejecting the application. The opposite party is entitled to his costs. Hearing fee five gold mohurs.

Leave refused.

LETTERS PATENT.

Before Kulwant Sahay and Khaja Mohamad Noor, JJ.

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Jan. 6, 9, 10.
Feb. 23.
March, 9.

Hindu Law—adoption—widow having authority to adopt according to the opinion or advice of husband's father—adoption by widow after death of husband's father—adoption whether invalid—deed, construction of —surrounding circumstances—Hindu widow, limitations to the power of, to dedicate property for pious and charitable purposes—Letters Patent of the Patna High Court, clause 9—failure to record reasons, whether a mere irregularity not affecting jurisdiction—decree obtained against a person in one capacity, whether can be resisted by him in another capacity—Specific Relief Act, 1887 (*Act 1 of* 1887), *section* 56(*b*), *whether applicable where both proceedings pending in one court—suit for declaration and perpetual injunction—plaintiff, whether entitled to mere declaration when injunction cannot be granted—right to sue, when is deemed to accrue.*

* Letters Patent Appeals nos. 86 and 87 of 1932, from a decision of His Lordship the Chief Justice, dated the 20th April, 1932.

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The failure to record reasons on the proceedings of the Court, as required by clause 9 of the Letters Patent, in removing a case from a Subordinate Court, is a mere irregularity which does not affect the jurisdiction of the High Court and does not make its decision illegal.

A decree obtained against a person in one capacity can be resisted by him in another capacity.

Babajirao Gambhirsing v. *Laxmandas Guru Raghunathdas*(1), *Kartick Chandra Ghose* v. *Ashutosh Dhara*(2), *Upendra Nath Kalamuri* v. *Kusum Kumari Dasi*(3), *Somwar Gir* v. *Mayanand Gir*(4), *Ramanathan Chettiar* v. *Levvai Marakayar*(5) and *Murigeya* v. *Hayat Saheb*(6), followed.

In construing a deed the duty of the court is to ascertain the intention from the words used in the document, and the surrounding circumstances are to be looked into merely with the object of ascertaining the real intention of the executant from the words used by him.

Rajendra Prasad Bose v. *Gopal Prasad Sen*(7), followed.

R, a Hindu governed by the Dayabhaga, died in 1869, having executed an *anumatipatra* by which, after stating that it was necessary for him to have an adopted son to inherit his property, he authorised his wife, then thirteen or fourteen years of age, to adopt his half-brother and if there was (as was the case) an obstacle to take him in adoption, then to adopt whom she wanted "according to the opinion or advice of" (*matanusare*) his father. The widow made an adoption in 1885 without consulting her father-in-law, he having died in 1873.

Held, on a construction of the deed and on a consideration of the surrounding circumstances, that the motive of the husband being more secular than religious, his intention was not to give an unrestricted power to his young wife to adopt, that the adoption was to be made according to the advice and opinion of the husband's father which the widow

(1) (1903) I. L. R. 28 Bom. 215.
(2) (1911) I. L. R. 39 Cal. 298, F. B.
(3) (1914) I. L. R. 42 Cal. 440.
(4) (1928) I. L. R. 50 All. 801.
(5) (1899) I. L. R. 23 Mad. 195.
(6) (1898) I. L. R. 23 Bom. 237.
(7) (1930) I. L. R. 10 Pat. 187, P. C.

was not at liberty to disregard and that, therefore, the adoption was invalid.

Rajendra Prasad Bose v. *Gopal Prasad Sen*(1), followed.

Surendra Nandan v. *Sailaja Kant Das Mahapatra*(2), distinguished.

The powers of a Hindu widow who holds the property of her deceased husband are wider with reference to the religious acts in connection with the actual obsequies of the deceased and the periodical performance of the obsequial rights prescribed in the Hindu religious law which are considered as essential for the salvation of the soul of the deceased, than in respect of the acts which although not essential or obligatory are still pious observances which conduce to the bliss of the deceased's soul, and if performed are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case if the income of the property, or the property itself, is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case, she can alienate a small portion of the property for pious or charitable purpose, she may have in view, on appropriate occasions.

Where, therefore, a dedication alleged to have been made by a widow was found to be of almost one-third of the entire estate and it was not shown that it was made on some appropriate occasion, *held*, that the dedication could not be supported as a valid endowment.

Sardar Singh v. *Kunj Bihari Lal*(3), followed.

Kunj Bihari Lal v. *Laltu Singh*(4), *Ram Sumran Prasad* v. *Gobind Das*(5) and *Vuppuluri Tatayya* v. *Garimilla Ramakrishnama*(6), referred to.

Section 56, Specific Relief Act, 1887, lays down:

"An injunction cannot be granted.....

.....

(b) to stay proceedings in a court not subordinate to that from which the injunction is sought."

(1) (1930) I. L. R. 10 Pat. 187, P. C.
(2) (1891) I. L. R. 18 Cal. 385.
(3) (1922) I. L. R. 44 All. 503, P. C.
(4) (1918) I. L. R. 41 All. 130.
(5) (1926) I. L. R. 5 Pat. 646.
(6) (1910) I. L. R. 34 Mad. 288.

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Held, that clause (*b*) of section 56 has no application where both the proceedings are pending in the same court; the prohibition contained in the clause operates only in respect of courts which are not subordinate in the sense that they are co-ordinate or superior and not in respect of the court itself which must always be taken as competent to regulate its own proceedings.

Ramsadhan Biswas v. *Mathura Mohan Hazra*(1), followed.

Appu v. *Raman*(2) and *Artistic Colour Printing Company, In re*(3), referred to.

Where a plaintiff asks for a declaration and also prays for a perpetual injunction under section 56(*b*) of the Specific Relief Act, 1887, he is not debarred from getting the declaration sought for, merely because the perpetual injunction cannot be granted.

Sethurayar v. *Shanmugam Pillai*(4), followed.

There can be no right to sue until there is an accrual of the right asserted in the suit and further its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

Mussamat Bolo v. *Mussammat Koklan*(5), followed.

Appeals under clause 10 of the Letters Patent.

The facts of the case material to this report will appear from the judgment of Kulwant Sahay, J.

P. R. Das (with him *S. C. Bose* and *Bajrang Sahay*), for the appellants.

Sir Sultan Ahmad (with him *G. P. Das* and *P. Misra*), for the respondents.

KULWANT SAHAY, J.—These are two appeals under the Letters Patent against the decision of his Lordship the Chief Justice, arising out of an application under Order XXI, rule 100, of the Code of

(1) (1924) 81 Ind. Cas. 2.
(2) (1891) I. L. R. 14 Mad. 425.
(3) (1880) 14 Ch. Div. 502.
(4) (1897) I. L. R. 21 Mad. 353.
(5) (1930) 34 Cal. W. N. 1169, P. C.

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Civil Procedure and of a suit instituted by the respondents against the appellants for certain declarations. There was a third suit instituted by the present appellants against the respondents, which was dismissed by this Court and against which dismissal an appeal under the Letters Patent has already been dismissed. Both the suits and the application under Order XXI, rule 100, Civil Procedure Code, were filed in the Court of the Subordinate Judge at Cuttack. They were removed from the Court of the Subordinate Judge to this Court and were heard in its extraordinary original jurisdiction under clause 9 of the Letters Patent of this Court.

A point was taken by the appellants that the order of removal of the cases from the Court of the Subordinate Judge to this Court was illegal inasmuch as the reasons for so doing were not recorded on the proceedings of this Court, as required by clause 9 of the Letters Patent. It is true that the reasons were not recorded; but the mere non-recording of the reasons does not in any way affect the jurisdiction of this Court and does not make its decision illegal. It is only an irregularity which does not affect the jurisdiction. Learned Counsel for the appellants conceded this point and did not press it further.

The facts are shortly these :—

One Golok Prasad had a son, Ram Prasad Bose, by his first wife, and he had four sons by his second wife. Ram Prasad Bose married one Ahladini *alias* Gangamani, and he died on the 16th of February, 1869. Before his death he had executed a document called *anumatipatra* giving authority to his wife to adopt a son. The document provided that his wife should adopt his father's youngest son who was then called Chema, but that if there was any obstacle to take him in adoption according to the Shastras then that boy would be made a sneha-putra, or she may adopt anyone else whom she wants " with the permission of my father ", the vernacular word used for

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the words " with the permission of " being " *matanusare* ". After the death of Ram Prasad his widow Ahladini adopted one Krishna Prasad on the 23rd of November, 1884. Krishna Prasad died in 1909 leaving an infant son Gopal Prasad who was born in 1908. The widow Ahladini died in September, 1920. On her death a suit was instituted by the surviving sons of Golok Prasad by his second wife, in the year 1921, for recovery of the entire estate of Ram Prasad as the next reversionary heirs, and for a declaration that the adoption of Krishna Prasad by the widow was invalid for want of authority, and also that in fact no adoption was made. The suit of the reversioners was dismissed by the Subordinate Judge and the High Court on appeal affirmed the decree of the Subordinate Judge. The reversioners then went in appeal to the Privy Council. The decision of the Privy Council is reported in *Rajendra Prasad Bose* v. *Gopal Prasad Sen*(1). Their Lordships of the Privy Council held that the adoption was invalid inasmuch as the condition precedent, viz., the permission of the father as laid down in the *anumatipatra* had not been complied with, the father having died in the year 1873 before the date of the adoption. It was contended before their Lordships that the vernacular word " *matanusare* " had been incorrectly translated as " with the permission of ", the true translation being " according to the opinion or advice of ". Their Lordships of the Privy Council accepted the official translation and held that with the death of Golok Prasad the power to adopt given to the widow of Ram Prasad came to an end. Their Lordships accordingly made a decree for ejectment against the defendant Gopal Prasad with mesne-profits from the death of Ahladini to the date when possession was delivered to the plaintiffs; and they made a declaration that Krishna Prasad was not the adopted son of Ram Prasad. In due course in execution of the decree of the Privy Council the reversioners

(1) (1930) I. L. R. 10 Pat. 187, P. C.

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obtained delivery of possession of the estate and thereby they dispossessed Gopal Prasad of all the properties forming the estate of Ram Prasad of which he was in possession. It may be noted here that after the decision of the Privy Council, Gopal Prasad filed an application to the Privy Council for a review of the judgment, which was ultimately rejected.

On the 2nd of January, 1931, Gopal Prasad as the shebait of an idol Radha Madhab Jiu Thakur, filed an application under Order XXI, rule 100, of the Code of Civil Procedure, complaining of his dispossession in execution of the decree, on the allegation that a portion of the estate of Ram Prasad had been endowed to the Thakur by Krishna Prasad under a deed of endowment, dated the 14th of September, 1906, and that he was in possession of the endowed property as the shebait of the Thakur and in that capacity he could not be dispossessed of the endowed property in execution of the decree inasmuch as the decree was not binding upon the idol. A notice of this application being given to the decree-holders, they on the 29th of January, 1931, instituted a suit in the Court of the Subordinate Judge for a declaration that the endowment was invalid inasmuch as Krishna Prasad not being the adopted son of Ram Prasad had no authority to make the endowment, and for a permanent injunction restraining the defendants, viz., the idol and Gopal Prasad as the shebait, from proceeding with the objection under Order XXI, rule 100, and from getting an order of restoration of possession in that proceeding. These are the two matters which were withdrawn by this Court from the Court of the Subordinate Judge and heard by this Court in its extraordinary original jurisdiction. The learned Chief Justice dismissed the application under Order XXI, rule 100, and decreed the suit of the reversioners, and it is against that decision that the present appeals under the Letters Patent have been preferred to this Court.

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I shall first take up the appeal in the reversioners' suit, which is Letters Patent Appeal no. 87 of 1932. The first point taken by the learned Counsel for the appellant is that the learned Chief Justice was wrong in holding that a person cannot have two capacities and that the decree of the Privy Council is binding on Gopal Prasad in his individual capacity as well as in his capacity as the shebait of the Thakur. Learned Advocate for the respondents concedes the point that Gopal Prasad can set up his title as the shebait and can validly urge that the decree of the Privy Council in the previous suit is not binding upon him in his capacity of the shebait. That a decree obtained against a person in one capacity can be resisted by him in another capacity is concluded by authorities: reference may be made to *Babajirao Gambhirsing* v. *Laxmandas Guru Raghunathdas*(1); *Kartick Chandra Ghose* v. *Ashutosh Dhara* (2); *Upendra Nath Kalamuri* v. *Kusum Kumari Dasi*(3); *Sonwar Gir* v. *Mayanand Gir*(4); *Ramanathan Chettiar* v. *Levvai Marakayar*(5); and *Murigeya* v. *Hayat Saheb*(6). As the point is conceded by the learned Advocate for the respondents it is not necessary to pursue the matter further.

The second contention of the learned Advocate for the appellant is that the decision of the Privy Council in the previous suit is not binding on the idol represented by the shebait. This contention is also conceded and is covered by the authorities mentioned above, and need not be discussed at all.

The next point for consideration is the construction of the *anumatipatra* or the deed of authority. It is contended that the question of construction of the deed does not arise in the present suit, as it is

(1) (1903) I. L. R. 28 Bom. 215.
(2) (1911) I. L. R. 39 Cal. 298.
(3) (1914) I. L. R. 42 Cal. 440.
(4) (1928) I. L. R. 50 All. 801.
(5) (1899) I. L. R. 23 Mad. 195.
(6) (1898) I. L. R. 23 Bom. 287.

not the basis of the suit and the plaintiffs have not in their plaint asked for a construction of the deed, and it is argued that even if the question does arise, we have to decide it on the footing that the official translation was incorrect. As regards the first contention, it is true that the plaintiffs did not in their plaint ask the Court to construe the deed; but the deed is an important piece of evidence in the case and the rights of the parties depend upon the true construction thereof. It is true that the official translation, upon which the Privy Council proceeded in the previous suit, is not binding on the present defendant; but the learned Chief Justice proceeded on the assumption that the translation contended for by the defendant-appellant was the correct translation of the vernacular word "*matanusare*". It is contended that the two translations affect the rights of the parties differently; if the word "*matanusare*" be translated as "with the permission of" then it is conceded that a condition precedent was imposed, and if the person whose permission was to be obtained be dead the authority comes to an end; on the other hand, if the correct translation be "in accordance with the opinion or advice of" the father, then it is contended that such opinion or advice may be disregarded and the widow was not bound to follow it. Reliance has been placed upon a number of decisions in support of the proposition that where a mere direction is given by the husband to the widow to act according to the advice of some other person in the matter of the adoption, such advice may be disregarded. In *Surendra Nandan* v. *Sailaja Kant Das Mahapatra*(1) the will of the husband provided that the widow should adopt a son with the good advice and opinion of one Krishna Gobind. The widow tried to obtain the consent of Krishna Gobind before the adoption but he refused to give such consent; the widow then adopted the plaintiff in that case without such consent; and it was held that the adoption was

(1) (1891) I. L. R. 18 Cal. 385.

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not invalid. In disposing of this point the learned Judges observed: "We think that all the testator intended was to suggest that his wife would exercise a sound discretion if in the matter of choosing a boy to be adopted she consulted Krishna Gobind, a man in whom he, the testator, seems to have reposed confidence. Looking at the religious efficacy that ensues from the adoption of a son by a widow to her deceased husband, we think the Court should not be too astute to defeat an adoption, but should rather do its utmost to support it, unless such adoption is clearly in excess or in breach of the power to make it." The vernacular words used in that will were "*satjukti o paramarsha*" which were translated as "good advice". The Privy Council in construing the present deed no doubt proceeded on the official translation of the word "*matanusare*", viz., "with the permission of"; but their Lordships in construing the deed looked at the surrounding circumstances and they laid it down that the duty of the Court was to ascertain the intention from the words used in the document, and the surrounding circumstances are to be looked into merely with the object of ascertaining the real intention of the executant from the words used by him. They further referred to the fact that, although the paramount intention that often actuates a husband to empower his wife to adopt a son to him is religious, yet sometimes a husband mainly by mere secular motives empowers his wife to adopt a son or sons to continue his line of ancestors and to inherit his property and keep up his own name; and in the present case after a consideration of the surrounding circumstances as well as on a consideration of the intention gathered from the word used by the husband, their Lordships came to the conclusion that it was the intention of the husband that the adoption should be made in accordance with the views of the father. They referred to the fact that Ram Prasad was comparatively young (indeed it appears that he died

quite young on a sudden attack of Cholera) and his wife was a young girl of about 13 or 14 years of age. On a consideration of this fact their Lordships held that it was unlikely that he could ever have wished that his girl wife should have an unrestricted choice in the selection of his adopted son to the extent of allowing her to bring a stranger to inherit his property. These considerations arise even if the translation alleged by the defendant be accepted as correct. It is contended that their Lordships did not proceed upon the assumption that the result would be the same if either translation was accepted. That is no doubt true; but the considerations which influenced their Lordships to hold that unrestricted power was not given to the widow to adopt arise even upon the translation set up by the defendant. The words according to the translation put by the defendant are " in accordance with the opinion or advice of the father ". She was not at liberty to disregard the opinion or advice of the father. The circumstances which influenced the Judges in the case of *Surendra Nandan* v. *Sailaja Kant Das Mahapatra*(1) were different from those in the present case. The intention of the husband is manifest from another contemporaneous document, viz., the will executed by him on the same date as the *anumatipatra* in which he directed that certain properties shall be held and enjoyed by his wife Ahladini by taking a son in adoption for which he had executed an *anumatipatra*. That shows that the motive of the husband was mere secular than religious. It appears from the judgment of the Subordinate Judge in Suit no. 487 of 1921 (which went up to the Privy Council) that Golok Prasad the father, on the death of his son Ram Prasad, filed the *anumatipatra* and the will of Ram Prasad before the Collector of Balasore praying that the estate of his deceased son might be taken over by the Court of Wards. The estate which his son Ram Prasad was dealing with by his will was the estate he had acquired from his maternal grandfather, and, therefore, the other sons of Golok Prasad from his

(1) (1891) I. L. R. 18 Cal. 885.

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second wife could have no title or interest in it. Ram Prasad was quite a young man, and the will and the *anumatipatra* appear from all the surrounding circumstances to have been executed at the instance of, or at least with the advice of, Golok Prasad, and it is unlikely that Ram Prasad should have intended to give unrestricted power to his girl wife to adopt. His real intention was that the adoption should be made according to the advice and opinion of his father Golok Prasad. On a consideration of the terms used in the *anumatipatra* as well as of the surrounding circumstances, I am of opinion that the widow Ahladini was not given an unrestricted power to adopt and that the authority to adopt became invalid after the death of Golok Prasad.

The adoption being invalid it follows that the deed of endowment executed by the adopted son creating the endowment in favour of the Thakur was invalid, and the defendant Gopal Prasad cannot claim the properties in dispute in his capacity as the shebait of the Thakur and he cannot resist the plaintiff's possession thereof.

These were all the points which arose upon the decision appealed against. The learned Counsel for the appellant has, however, raised certain other points which were not raised at the original trial.

It is contended that the plaintiffs were not entitled to any decree at all. The plaintiffs had asked in the plaint for certain declarations and for a perpetual injunction. As to the prayer for injunction it is contended that the plaintiffs are not entitled to the injunction, and that if the permanent injunction cannot be given the declarations asked for cannot be granted. As regards the prayer for injunction reference is made to clauses (*a*) and (*b*) of section 56 of the Specific Relief Act. The clauses run as follows:—

"An injunction cannot be granted—

(*a*) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

(*b*) to stay proceedings in a court not subordinate to that from which the injunction is sought."

It is contended that the two conditions must be satisfied before an injunction can be granted, viz., that (*1*) the proceeding sought to be restrained must be pending in a subordinate Court, and (*2*) the injunction must be necessary to prevent multiplicity of proceedings. In this case the suit and the proceeding sought to be stayed were pending in courts of co-ordinate jurisdiction, and, therefore, clause (*b*) operates and the plaintiffs were not entitled to the injunction. It may be noted that the two proceedings were pending in the same Court, that is, the suit had been instituted in the same Court in which the application under Order XXI, rule 100, Civil Procedure Code, had been filed. As is pointed out in *Appu* v. *Raman*(1), clause (*b*) of section 56 is apparently taken from section 24(*5*) of the English Judicature Act of 1873 which was as follows:

"No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal shall be restrained by prohibition or injunction."

But the same section provided that

"Nothing in this Act contained shall disable either of the said courts from directing a stay of proceedings in any case or matter pending before it, if it shall think fit."

As was pointed out by Sir George Jessel, M.R., in the case of *In re Artistic Colour Printing Company*(2), the Court never did by injunction restrain a proceeding: what it did was to restrain a party to a cause from going on. Therefore, when the Act says, "no cause or proceeding shall be restrained by injunction," it means that no party shall be restrained from going on with his action. As in the present case both the proceedings were pending in the same Court, clause (*b*) of section 56 has no application. The Court can always regulate its own proceedings. This was

(1) (1891) I. L. R. 14 Mad. 425.
(2) (1880) 14 Ch. Div. 502.

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pointed out by Mukherji, J. in *Ramsadhan Biswas* v. *Mathura Mohan Hazra*(1); where the learned Judge observed that the prohibition contained in clause (*b*) of section 56 operates only in respect of Courts which are not subordinate in the sense that they are co-ordinate or superior and not in respect of the Court itself which must always be taken as competent to regulate its own proceedings. As regards clause (*a*) it is contended that there is no question here of multiplicity of proceedings. It is contended that what is meant by multiplicity of proceedings is as illustrated in the *Illustrations* (*p*) and (*q*) of section 34 of the Specific Relief Act. In the present case there is no apprehension of a multiplicity of proceedings. Reliance is placed upon the observations of Jenkins, C.J., in *Karnadhar Haldar* v. *Hariprasad Roy Chaudhuri*(2), where in considering the provision of clause (*e*) of section 54 of the Act the learned Chief Justice observed: "The clause has application to a well-known condition of affairs which is absolutely remote from that with which we have to deal in this case. It is not as though the plaintiffs here would have to bring repeated suits or to make repeated applications or to take repeated proceedings for the purpose of establishing or safeguarding their rights, or of preventing the acquisition of rights by the defendant." And it is argued that there is no apprehension of any such repeated proceedings or repeated applications so far as the present case is concerned. That was a case in which a suit had been instituted with a prayer to have it declared that the defendant had no title to the lands in suit and to establish that the plaintiffs were not bound by a decree in a title suit for perpetual injunction restraining the plaintiffs in the former suit from taking possession of the lands in suit by executing the decree of the previous title suit. The second suit had been instituted before the plaintiffs in the previous suit had taken any steps to

(1) (1924) 81 Ind. Cas. 2.
(2) (1910) I. L. R. 37 Cal. 731.

execute the decree, nor did it appear that he had even threatened to execute it. In the present case the decree of the Privy Council has already been executed and possession delivered to the plaintiffs, and the defendant has already filed an application under Order XXI, rule 100, of the Code of Civil Procedure. Under the circumstances I am of opinion that the contention based on clauses (*a*) and (*b*) of section 56 are not sound and cannot be given effect to.

As regards the contention that no declaration can be granted if the perpetual injunction cannot be granted, it is sufficient to refer to the decision of the Madras High Court in *Sethurayar* v. *Shanmugam Pillai*(1). That was a suit in which the plaintiff wanted a declaration that the defendant was his benamidar and further asked for an injunction restraining the defendant from executing a decree obtained by him upon the basis of the mortgage bond in which the plaintiff claimed beneficial interest. It was held that the injunction prayed for could not be granted under section 56(*b*) of the Specific Relief Act, but if the plaintiff's case be true he was entitled to the declaration granted by the Munsif.

It is next contended that the claim for the declaration in the present case was barred by limitation under Article 120 of the Indian Limitation Act. This Article prescribes a period of six years' limitation from the time when the right to sue accrues. It is contended that there was an invasion of the plaintiffs' right when the widow Ahladini died on the 7th of September, 1920, which was more than six years before the present suit. The name of the Thakur stood recorded in the Collectorate as well as in the record-of-rights, and the possession of the Thakur was notorious, undoubted and public. Now, the right which accrued to the plaintiffs on the death of the widow was not the right to sue for a mere declaration but the right to bring a suit for possession, for which

(1) (1897) I. L. R. 21 Mad. 353.

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the period of limitation is twelve years under Article 141 of the Indian Limitation Act. The plaintiffs, however, succeeded in obtaining possession within twelve years from the death of the widow. Their right to bring the present suit for the declaration accrued only when the defendant applied under Order XXI, rule 100, to be restored to possession, and that was on the 2nd January, 1931, and the present suit was instituted on the 29th of January. In a similar case it was held by the Privy Council in *Musammat Bolo* v. *Musammat Koklan*(1) that there can be no right to sue until there was an accrual of the right asserted in the suit and, further, its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit was instituted. In this case the infringement of the right, or at least a clear and unequivocal threat to infringe that right by the defendant, took place on the filing of the application under Order XXI, rule 100. It is thus clear that the claim for the declaration is not barred by limitation.

It is next contended that the plaintiffs could not obtain a decree making the declaration without giving evidence as regards the facts alleged in the plaint as constituting a cause of action for the suit, viz., threat to obstruct the possession of the plaintiffs as stated in paragraph 22 of the plaint. It is true that no evidence was given in the present case but the cause of action really accrued to the plaintiffs on the defendant's filing the petition under Order XXI, rule 100, and not on the allegation contained in paragraph 22 of the plaint. There is to my mind no substance in any of these contentions.

Lastly, it is contended that the dedication although purporting to be made by the adopted son was really made by the widow Ahladini herself and she was entitled to do so of a reasonable share of the estate, and the dedication by the de facto owner with

(1) (1930) 34 Cal. W. N. 1169, P. C.

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the consent of the de jure owner to fulfil pious motives is a valid dedication. For the plaintiffs it is pointed out that there was no such suggestion in the application under Order XXI, rule 100, nor in the written statement originally filed in the suit, nor even in the additional written statement filed subsequently. In fact the allegation contained in the written statement was that the dedication was by the adopted son Krishna Prasad. No issue was raised on the point as it did not arise on the pleadings, nor was the point taken in the grounds of appeal to this Court. It is further pointed out that, even assuming the dedication to be by the widow herself, it was not a valid dedication, as the dedication was in respect of a considerable share of the estate. What has been laid down is that a dedication of a small portion of the estate may be made by the widow on appropriate occasions. In *Sardar Singh* v. *Kunj Bihari Lal*(1), the Privy Council pointed out that the powers of the Hindu female who holds the property are wider with reference to the religious acts in connection with the actual obsequies of the deceased and the periodical performance of the obsequial rights prescribed in the Hindu religious law which are considered as essential for the salvation of the soul of the deceased, than in respect of the acts which although not essential or obligatory are still pious observances which conduce to the bliss of the deceased's soul, and if performed are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case, if the income of the property, or the property itself, is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case, she can alienate a small portion of the property for the pious or charitable purpose she may have in view. On reference to the decision of the High Court in *Kunj Bihari Lal* v. *Lattu Singh*(2) it will appear that the share dedicated was about one-eightieth of the entire estate; in *Ram Sumran*

(1) (1922) I. L. R. 44 All. 503, P. C.
(2) (1918) I. L. R. 41 All. 180.

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Prasad v. *Gobind Das*(1) the property gifted was not more than one-fortieth part of the entire estate; in *Vuppuluri Tatayya* v. *Garimilla Ramakrishnamma*(2) the property gifted bore a small proportion to the entire estate. In the present case the property endowed is almost one-third of the entire estate as will appear from the application of the mother of Gopal Prasad for appointment of a guardian of the minor. The dedication is of one-half of the estate bearing tauzi no. 38. Moreover, it is necessary that the gift for pious purposes must be on some appropriate occasion. No such occasion is shown in this case. Assuming, therefore, that the dedication in the present case was by the widow herself, even then it cannot be supported as a valid endowment.

The result is that Letters Patent Appeal no. 87 must be dismissed with costs.

Letters Patent Appeal no. 86 *of* 1932.

In this view of the case it is not necessary to consider on merits the appeal no. 86 arising out of the application under Order XXI, rule 100. It is conceded that the petitioner, the idol, was in possession and that he could not be dispossessed in execution of the decree of the Privy Council obtained against Gopal Prasad in his individual capacity; but having regard to the result of the suit instituted by the reversioners in which their title has been declared and the endowment has been held to be invalid, there is no necessity to investigate the point and to order restoration of possession to the idol. This appeal also must, therefore, be dismissed with costs. There will be no separate hearing fee in this case.

Khaja Mohamad Noor, J.—I agree.

Appeals dismissed.

(1) (1926) I. L. R. 5 Pat. 646.
(2) (1910) I. L. R. 34 Mad. 288.

REVISIONAL CIVIL.

Before Khaja Mohamad Noor and Agarwala, JJ.

1933.

March, 10.

RAJESHWARI PRASAD SINGH

v.

BRAHMANAND LALL.*

Provincial Small Cause Courts Act, 1887 (Act IX of 1887), section 17—unregistered security bond duly executed, attested and stamped, filed along with application—security found sufficient and bond registered after period of limitation—whether sufficient compliance with law—"security", significance of.

Where an unregistered security bond duly executed, stamped and attested, was filed along with the application for setting aside a Small Cause Court decree, and the security having been found sufficient by the court, the bond was registered after the expiry of the period of limitation for filing the application, the delay in getting it registered not being due to any fault of the applicant himself.

Held, that there was sufficient compliance with the provisions of section 17 of the Provincial Small Cause Courts Act, 1887.

Ram Charittar Ram v. *Hashim Khan*(1), *Bishun Dayal Thakur* v. *Sheotahal Sahoo*(2) and *Kauleshwar Lal* v. *Satya Brata Banerji*(3), referred to.

Per AGARWALA, J.—(*i*) The word "security", occurring in the first clause of section 17 of the Provincial Small Cause Courts Act, is not a word which has been defined either in this Act or in the General Clauses Act. Generally speaking, that word signifies anything that makes the money more assured in its payment or more readily recoverable;

(*ii*) when once the Judge accepts a bond as security, it is not open to the Court subsequently to say that the security is not to its satisfaction.

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* Civil Revision no. 643 of 1932, from an order of Babu Radha Krishna Prasad, Small Cause Court Judge of Arrah, dated the 19th of September, 1932.

(1) (1920) 1 Pat. L. T. 323.
(2) (1921) 62 Ind. Cas. 108.
(3) (1925) 7 Pat. L. T. 138.

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Application in revision by the defendant.

This application in revision was directed against an order of the Small Cause Court Judge of Arrah, refusing to set aside an ex parte decree, passed against the applicant, on the 2nd of October, 1931. The application to set it aside was filed on the 8th January, 1932, the defendant-applicant's case being that he came to know of the decree on the 12th of December, 1931, when he was arrested in execution of that decree. The Small Cause Court Judge rejected the application on two grounds: first, that though the service of summons on the defendant-applicant was not proper, the defendant nevertheless had knowledge of the suit and the application not having been filed within thirty days of the decree, it was barred by limitation; and secondly, that the defendant-applicant did not comply with the provisions of section 17 of the Provincial Small Cause Courts Act, inasmuch as he did not furnish security either with the application, or, at any rate, before the expiry of the period of limitation for filing the application.

B. P. Sinha, for the petitioner.

Mahabir Prasad and *Tarkeshwar Nath*, for the opposite party.

KHAJA MOHAMAD NOOR, J. (after stating the facts set out above proceeded as follows:)—As to the first point, under Article 164 of the Indian Limitation Act an application to set aside an ex parte decree must be filed within thirty days from the date of the decree or, where the summons has not been duly served, from the date of the applicant's knowledge of the decree. In the present case the application is obviously not within thirty days of the decree; but as there is a clear finding of the learned Small Cause Court Judge that the summons was not duly served on the applicant, the applicant did come within the second part of the Article, and he was entitled to come within thirty days of his knowledge of the decree. The learned Small Cause Court Judge

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is in error when he expects the application within thirty days of the knowledge of the suit. The period is to be counted from the date of the knowledge of the decree, and not from the date of the knowledge of the suit. This point need not be pursued further as in my opinion the decision of the learned Judge is obviously wrong.

The next question is whether the applicant has complied with the provisions of section 17 of the Provincial Small Cause Courts Act. It appears that along with his application the applicant filed a duly executed security bond. On that day the Court adjourned passing order on that bond, but later ordered an enquiry as to the sufficiency of the security offered, indicating that it was prepared to accept the security of property if it was found to be sufficient; and that it did not insist on cash security. There was a long delay in conducting the enquiry. Ultimately the security was found sufficient and the bond was registered on the 2nd of May, 1932, and accepted by the Court. The learned Small Cause Court Judge is in error in thinking that what was filed along with the application on the 8th of January, 1932, was a draft bond on a plain piece of paper. We have examined the bond ourselves. It was, as I have said, a properly executed security bond on a stamped paper. The learned Advocate for the opposite party has, however, drawn our attention to the fact that on the margin of the bond where the signature of the executant appears, there is a date given " 2nd May 1932 " and he suggests that the bond was executed on that day. I am satisfied that this is not so. The bond bears the date ' 5th of January, 1932 '. It was registered on the 2nd of May, 1932, after the Court on due enquiry accepted it and directed it to be registered. It appears from the order-sheet that the document was taken out from the Court for registration and there perhaps at the instance of the officers of the Registration Department the date of execution was to be given and so the date " 2nd May, 1932 " has been mentioned.

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The ink of that date is obviously different from the ink of the execution signature. That a properly executed and attested unregistered security bond was filed along with the application admits of no doubt. Now the question is what is the effect of filing an unregistered security bond of which the registration was not completed till after the period of limitation for filing the application. Unfortunately there is no case law on this point. It has been held in a large number of cases in Calcutta and in some decisions of several learned Judges of this Court sitting singly that the provisions of section 17 of the Act are mandatory; that the Courts have no power to extend time for furnishing security; and that security, either cash or in any other form which the Courts approve, must be filed within the period of limitation. With all this, if I may say so, I entirely agree. As to decisions of this Court, see *Ram Charittar Ram* v. *Hashim Khan*(1) and *Bishun Dayal Thakur* v. *Sheotahal Sahoo*(2). I also respectfully agree with the decision of Sen, J. in *Kauleshwar Lal* v. *Satya Brata Banerji*(3) that filing of a draft security bond is not sufficient compliance with the provisions of section 17 of the Small Cause Courts Act. But here the question is, whether a duly executed bond (though not registered but subsequently registered) is a sufficient offer of security within the meaning of section 17 of the Small Cause Courts Act. In my opinion the criterion is this. Was the security which the party placed in the hands of the Court and which the Court ultimately accepted sufficient to enforce the obligation upon him? Judged by this test an unregistered security bond is, in my opinion, sufficient compliance with the law, provided that the delay in getting it registered is not due to any fault of the applicant himself. In this case the applicant placed himself in the hands of the Court by giving the Court a fully executed bond. Once he did so he could have been compelled to register it under the

(1) (1920) 1 Pat. L. T. 323.
(2) (1921) 62 Ind. Cas. 108.
(3) (1925) 7 Pat. L. T. 138.

provisions of the Registration Act and the liability of the security bond could have been enforced against him. It was open to the Court to call upon the applicant to have the document registered there and then; but the Court deferred passing orders till it was satisfied as to the sufficiency of the security and the document was registered within the time allowed by the law for registration of duly executed documents. An applicant who instead of giving security in cash gives it in property, he does so at his own risk. If later on the security offered is found to be insufficient and the Court rejects it on that ground, the applicant will have to suffer its consequences. But in this case, as I have said, a properly executed bond was offered and the Court by its order indicated that it was prepared to accept it provided the security was sufficient. The security was found sufficient and the document was registered. There was, in my opinion, sufficient compliance with the law.

Both the grounds on which the application was rejected by the learned Judge in the Court below fail. I would allow the application, set aside the ex parte decree and direct that the suit be restored to its original order and disposed of according to law.

AGARWALA, J.—I entirely agree. With respect to the construction of the phrase " security to the satisfaction of the Court ", occurring in the first clause of section 17 of the Provincial Small Cause Courts Act, I would only add that the word ' security ' is not a word which has been defined either in this Act or in the General Clauses Act. Generally speaking, that word signifies anything that makes the money more assured in its payment or more readily recoverable. In the present case the bond that was tendered as security, as has already been pointed out by my learned brother, was properly executed, stamped and attested, and it was filed within the time allowed by law. The Court before which it was filed accepted the bond as security and directed the applicant to

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register it. Unfortunately the application for restoration of the suit subsequently came up for disposal before another Judge who had taken the place of the Judge who had accepted the security, the latter having been transferred, and probably this has brought about the present state of affairs. In my view, the first Judge who dealt with the matter having accepted the bond as security, it was not open to the Court subsequently to say that the security was not to its satisfaction.

Rule made absolute.

30 Pat. 247 (S.C.)

SPECIAL BENCH.

Before Kulwant Sahay, Macpherson and Khaja Mahomed Noor, JJ.

1933.

Feb. 13, 14.
March, 16.

JADUNANDAN SINGH

v.

SRIMATI SAVITRI DEVI.*

Revenue Sales Act, 1859 (*Act XI of* 1859), *sections* 2 *and* 3—kistbandi *date and latest date, distinction between—kist date, significance of—original* kistbandi *fixed according to Fasli era—7th June latest date under section* 3—*payment not made on 7th June—sale held in September, whether valid.*

In Bihar the *kistbandis* fixed under the engagement entered into with the proprietors for payment of the Government revenue were almost invariably according to the Fasli era, and the four dates in June, September, January and March fixed for the payment of the Government revenue are the latest dates of payment determined by the Board of Revenue under section 3 of the Revenue Sales Act, 1859.

Where the original *kistbandi* under section 2 of the Act is unknown and forgotten, the latest dates fixed under section 3 are popularly known as the kist dates. They are not the

* Appeal from Appellate Decree no. 1597 of 1931, from a decision of D. P. Sharma, Esq., I.C.S., Officiating Additional District Judge of Monghyr, dated the 3rd October, 1931, reversing a decision of Maulavi Abdul Aziz, Additional Subordinate Judge of Monghyr, dated the 4th March, 1929.

kistbandi dates as provided by section 2 but only the latest dates of payment as fixed by the Board of Revenue under section 3.

Jagdishwar Narayan v. *Muhammad Haziq Hussain*(1), *Jagdishwar Narayan* v. *Muhammad Haziq Hussain*(2), *Sri Sri Radha Gobinda Deb Thakur* v. *Girija Prasanna Mookherjee*(3) and *Krishnachandra Bhoumik* v. *Pabna Dhanabhandar Company, Ltd.*(4), followed.

Musammat Saraswati Bahuria v. *Surajnarayan Chaudhuri*(5), explained.

Haji Buksh Elahi v. *Durlav Chandra Kar*(6), referred to.

Where, therefore, it appeared that the original *kistbandi* fixed in respect of the estate in arrear was according to the Fasli era, and the 7th of June was not the *kistbandi* date under section 2 but the latest date under section 3 and the June instalment was not paid on the latest date, viz., the 7th of June, *held*, that it was within the jurisdiction of the Collector to sell the estate after that date and that, therefore, the sale held on the 20th of September was a valid sale.

Appeal by the defendant.

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

Sir Sultan Ahmed (with him *S. N. Roy* and *Chaudhuri Mathura Prasad*), for the appellant.

L. K. Jha and *N. N. Sen*, for the respondents.

KULWANT SAHAY, J.—This is an appeal by the defendant against the decision of the Additional District Judge of Monghyr reversing the decision of the Subordinate Judge and setting aside a revenue sale under Act XI of 1859. It appears that there are several co-sharers in the estate Nadaura, bearing tauzi no. 364 of the Monghyr Collectorate. Some of

(1) (1923) 5 Pat. L. T. 473.
(2) (1926) I. L. R. 6 Pat. 200, P. C.
(3) (1931) 35 Cal. W. N. 912.
(4) (1931) I. L. R. 59 Cal. 1034, P. C.
(5) (1931) I. L. R. 10 Pat. 496, P. C.
(6) (1912) I. L. R. 39 Cal. 981; L. R. 39 I. A. 177.

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the co-sharers had opened separate accounts under section 11 of the Act and the share left after the opening of these separate accounts was known as the ijmali or the residuary share. The Government revenue payable on account of this ijmali share was Rs. 22. The plaintiff owns 1-anna 10-gandas 1-kauri, and the defendants-second-party own 11-gandas out of the total 2-annas 1-ganda 1-kauri share of the estate which was left as the ijmali share. The revenue sale of this ijmali share was held on the 20th of September, 1927, for arrears of the June instalment of 1927, and it was purchased by the defendant-first-party for a sum of Rs. 120 only. The plaintiff preferred an appeal before the Commissioner against the sale, but this appeal was dismissed on the 18th of November, 1927. The present suit was then instituted on the 4th of June, 1928, for setting aside the sale. The allegations contained in the plaint were non-service of the notices under sections 6 and 13 and section 7, and that the sale was brought about by the defendants-second-party who fraudulently made default in payment of their share of the Government revenue and who suppressed the several notices issued by the Collector and who purchased the property themselves in the name of their creature the defendant-first-party. The relief asked for was that the sale may be set aside on account of the irregularities which had occasioned serious loss to the plaintiff as property worth more than Rs. 3,000 was sold for the grossly inadequate price of Rs. 120; and secondly, that if the sale be not set aside then the defendant-first-party may be directed to execute a reconveyance in favour of the plaintiff in respect of her share in the estate. The suit was contested by the defendant-first-party alone who denied the allegations of the plaintiff as regards the irregularities as well as the fraud alleged by her in bringing about the sale.

The learned Subordinate Judge found that there was no irregularity inasmuch as the notices under sections 6 and 13 and section 7 were properly served,

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and no fraud was proved to have been practised in respect thereof. He further held that the plaintiff was not entitled to a reconveyance inasmuch as the defendant-first-party did not make the purchase for the defendants-second-party but was the real purchaser at the sale. He found that the price fetched at the sale was inadequate; but having regard to the finding of want of irregularity and fraud he held that mere inadequacy of price was no ground for setting aside the sale. Against the decree of the Subordinate Judge the plaintiff preferred an appeal before the District Judge. The learned District Judge affirmed the finding of the Subordinate Judge on the two points raised by the plaintiff in her plaint and pressed before the Subordinate Judge. A third point was, however, raised before the District Judge, which had not been raised either in the plaint or in the grounds of appeal before the District Judge and which did not form the subject-matter of any of the issues framed in the suit. The point was that the sale made by the Collector was without jurisdiction and as such it was liable to be set aside. The learned Officiating District Judge gave effect to this contention of the plaintiff and set aside the sale. The defendant no. 1, who was the purchaser at the revenue sale, has preferred this second appeal, and the only contention raised in the appeal was whether the Collector had jurisdiction to sell the ijmali share of the estate.

The question of jurisdiction is raised in this way. The sale purported to be made for the arrears of the " June-kist " of 1927. The learned District Judge finds that there was an arrear in June-kist of 1927. The notification issued by the Collector showed the arrears to be Rs. 6-12-6. The District Judge was of opinion that the arrears amounted to only Rs. 3-11-0. The actual amount of arrears is immaterial. The fact found is that there was an arrear in the June-kist of 1927. The learned District Judge, however, refers to the provisions of sections 2 and 3 of the Revenue Sales Law (Act XI

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of 1859) and says that under section 2 it did not become an arrear of revenue until the 1st of July, 1927, and under section 3 of the Act the latest date for payment of such arrears was the 28th of September, 1927, and as the sale was held on the 20th of September, 1927, it was illegal and invalid as the Collector had no jurisdiction to hold the sale before the 28th of September, 1927, and he relied upon the decision of the Privy Council in *Musammat Saraswati Bahuria* v. *Surajnarayan Chaudhuri*(1).

In the first place it is to be noticed that the point upon which the learned District Judge set aside the sale was not taken by the plaintiff at any stage of the suit until the argument of the appeal before the District Judge. The point involved a determination of a question of fact, viz., what was the kist or instalment according to which the settlement and kistbandi of the mahal in question had been regulated within the meaning of section 2 of the Act. No allegation was made that the 7th of June, 1927, was the date of the kist or instalment within the meaning of section 2 and it is overwhelmingly improbable that it could be. No opportunity was given to the defendant to show that the 7th of June was not the kist date under section 2. It is conceded that the latest dates of payment fixed by the Board of Revenue under section 3 of the Act in so far as the present estate is concerned, are the 7th of June, 28th of September, 12th of January, and 28th of March of each year. The learned District Judge has taken it for granted that the 7th of June, 1927, was the kist date within the meaning of section 2 of the Act. It is a well-known fact that in Bihar the original *kistbandis* fixed under the engagement entered into with the proprietors for payment of the Government revenue were almost invariably according to the Fasli era, and the four dates in June, September, January and March fixed for the payment of the Government revenue are the latest dates of payment determined by the Board of

(1) (1931) I. L. R. 10 Pat. 496, P. C.

Revenue under section 3 of the Act and could not possibly be *kistbandi* dates of the Fasli era. It was pointed out in *Shama Kant Lal* v. *Kashi Nath Singh*(1) that where the original *kistbandi* under section 2 of the Revenue Sales Act is unknown and forgotten, the latest dates fixed under section 3 are popularly known as the kist dates. They are not the *kistbandi* dates as provided by section 2 but only the latest dates of payment as fixed by the Board of Revenue under section 3 of the Act. The word ' kist ' no doubt appears in the Tauzi Ledger and the dates in the four months mentioned above are shown there as the June-kist, September-kist, January-kist, and the March-kist. But it has been expressly stated in the Tauzi Manual that the word ' kist ' is therein used to indicate the period between one latest day of payment of the arrears of revenue and the next, and is not used in the restricted sense in which the word is used in section 2 of the Act.

In *Saraswati Bahuria's* case(2) it is evident that it was found as a matter of fact (and not held as a matter of law) that on the evidence which the parties in that case were able to adduce before the court of first instance, the original kist dates under section 2 of the Act coincided with the dates fixed under section 3 of the Act, and it was solely upon the facts as there found that it was held that the sale in that case took place before the latest date of payment prescribed by the Board of Revenue and so was illegal. This distinction was brought out by the Calcutta High Court in *Sri Sri Radha Gobinda Deb Thakur* v *Girija Prasanna Mookherjee*(3). That was also the case in *Krishnachandra Bhoumik* v. *Pabna Dhanabhandar Company, Ltd.*(4)

That in some very rare cases the two dates fixed under sections 2 and 3 of the Act may coincide is

(1) (1926) 7 Pat. L. T. 747.
(2) (1931) I. L. R. 10 Pat. 496, P. C.
(3) (1931) 35 Cal. W. N. 912.
(4) (1931) I. L. R. 59 Cal. 1034, P. C.

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illustrated by *Haji Buksh Elahi* v. *Durlav Chandra Kar*(1) which was a modern case in a Government Khas-mahal. The distinction between the *kistbandi* date under section 2 and the latest date of payment under section 3 was brought out by this Court in *Jagdishwar Narayan* v. *Muhammad Haziq Hussain*(2) which went in appeal before the Privy Council [*Jagdishwar Narayan* v. *Muhammad Haziq Hussain*(3)] and the Privy Council affirmed the view of this Court on this point and explained the decision in *Haji Buksh Elahi's case*(1), but the decision in *Jagdishwar Narayan* v. *Muhammad Haziq*(3) does not appear to have been brought to their Lordships' notice in *Saraswati Bahuria* v. *Surajnarayan Chaudhuri*(4).

The learned District Judge has, therefore, fallen into an obvious error in treating the 7th of June, 1927, as the *kistbandi* date under section 2 of the Act, in which view the Government revenue would not become an arrear until the 1st of July and the estate could not be sold until the next latest date of payment which was the 28th of September. That the 7th of June, 1927, was actually not the *kistbandi* date under section 2 has now been set at rest by the production on behalf of the appellant of the original *kistbandi* from the office of the Collector of Monghyr. Having regard to the fact that the point was not taken in the trial Court and no opportunity was given to the defendant to show what the actual kist dates were under section 2 of the Act, we thought it fit to admit in evidence in this Court the original *kistbandi*. The learned Advocate for the plaintiff-respondent waived his right of formal proof of the document, although he objected that the document ought not to be admitted in evidence at this late stage; but having regard to the circumstances, and in order to enable us to give judgment, we were of opinion that this is a fit case

(1) (1912) I. L. R. 39 Cal. 981; L. R. 39 I. A. 177.
(2) (1923) 5 Pat. L. T. 478.
(3) (1926) I. L. R. 6 Pat. 200, P. C.
(4) (1931) I. L. R. 10 Pat. 496, P. C.

for admission of new evidence on the point. On referring to this document it is clear that the original *kistbandi* fixed in respect of this estate was according to the Fasli era and the eleven kists were payable for the months of that era (except Bhado which is blank) in sicca currency as follows:—

	Rs.	a.	p.
Asin	2	8	0
Kartik	2	8	0
Agrahan	7	8	0
Pous	15	0	0
Magh	10	0	0
Phalgun	2	8	0
Chait	10	0	0
Baisakh	50	0	0
Jeth	50	0	0
Asarh	5	0	0
Sravan	5	1	13

This was certainly the *kistbandi* of the whole estate bearing tauzi no. 364 and could only vary with the compensation for sicca currency. By the opening of the separate accounts the revenue for the residuary or ijmali share was fixed at Rs. 22 and on referring to the Tauzi Ledger it appears that for the payment of this sum of Rs. 22 the latest dates were as follows:—

	Rs.	a.	p.
7th June	15	2	0
28th September	1	10	0
12th January	1	10	0
28th March	3	10	0

The payment not having been made on the latest date, viz., the 7th of June, 1927, it was within the jurisdiction of the Collector to sell the estate after that date, and, therefore, the sale held on the 20th of September was a valid sale.

The decree of the learned District Judge must, therefore, be set aside and that of the Subordinate

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Judge restored. The appeal must be allowed with costs throughout.

MACPHERSON, J.—I agree.

KHAJA MOHAMED NOOR, J.—I agree.

Appeal allowed.

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Before Dhavle and Rowland, JJ.

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Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 190(*1*) *and* 191—*Magistrate, cognizance taken by, under section* 190(*1*) (*b*) *on a police report—different offence disclosed by evidence—cognizance taken of the new offence—Magistrate, whether deemed to have taken cognizance under section* 190(*1*) (*c*)—*section* 191, *whether applies in such circumstances —principle applicable to summons cases, whether applies to warrant cases—taking of cognizance, significance of—court, power of, to frame charges as may be justified by evidence irrespective of offence or offences of which cognizance is initially taken.*

If a Magistrate takes cognizance of an offence under section 190(*1*) (*c*), Code of Criminal Procedure, 1898, his further proceedings are bad unless he informs the accused that he is entitled to have the case tried by another court. *Emperor* v. *Chedi*(1), followed.

But where the Magistrate has before him a police report disclosing one offence of which he takes cognizance, and if in the course of taking evidence a different offence is disclosed and he takes cognizance of it, he would be deemed to have taken cognizance of the latter offence, not under

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* Criminal Revision no. 76 of 1933, from an order of Ramchandra Chaudhuri, Esq., Sessions Judge of Shahabad, dated the 23rd December, 1932, affirming the decision of P. K. Misra, Esq., Magistrate, First Class, Arrah, dated the 25th August, 1932.

(1) (1905) I. L. R. 28 All. 212.

clause (*c*) of section 190(*1*), but under clause (*b*), and therefore he is competent to hold the trial in respect of the new offence disclosed without first informing the accused under section 191 that he was entitled to have the case tried by another court.

Reg. v. *Dhandu Ramchandra*(1), *Jagat Chandra Mazumdar* v. *Queen-Empress*(2), *Dedar Buksh* v. *Symapadadas Malakar*(3), *Charu Chandra Das* v. *Narendra Krishna Chuckerbutty*(4) and *Abdul Rahman* v. *Emperor*(5), followed.

In summons cases, whatever may be the nature of the complaint or summons, the Magistrate who is trying the case may convict the accused of any offence triable under Chapter XX which on the facts he appears to have committed. In warrant cases, although the principle is not so explicitly stated, the legislature did not intend to lay down a principle different from that applicable to summons cases.

Per DHAVLE, J.—Taking cognizance under section 190(*1*) is a very particular, technical matter confined to the initiation of proceedings. Cognizance is taken under clauses (*a*), (*b*) and (*c*) of section 190(*1*) before the taking of any evidence.

The power of the court to frame charges, which comes into operation well after the initial requisite of taking cognizance under section 190(*1*), is governed by the general provisions contained in Chapter XIX which seem to enable the Court to frame such charges as may be justified by the evidence produced irrespective of the particular offence or offences of which cognizance may have been taken under section 190(*1*) at the initial stage.

When a Magistrate has taken cognizance of an offence upon a complaint or upon a police report, any offence that may be disclosed by the evidence may be dealt with at the trial, and section 190(*1*) (*c*) and section 191 have no application in such circumstances.

The facts of the case material to this report will appear from the judgment of Rowland, J.

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(1) (1868) 5 Bom. H. C. R. 100 (Cr.).
(2) (1899) I. L. R. 26 Cal. 786.
(3) (1914) I. L. R. 41 Cal. 1013.
(4) (1900) 4 Cal. W. N. 867.
(5) (1925) 94 Ind. Cas. 717.

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S. N. Sahay (with him *Mahabir Prasad*, *D. N. Varma* and *Tarkeshwar Nath*), for the petitioner.

S. M. Gupta, for the Crown.

ROWLAND, J.—The petitioner has been convicted under section 409 of the Indian Penal Code and sentenced to one year's rigorous imprisonment and fine of Rs. 500. He was Head Clerk and Accountant in the Surajpura Wards Estate no. 2. In that capacity he drew from the Treasury, month by month, a number of small items of money on account of the provident fund of employees. It was his duty regularly to deposit these amounts in a post office savings bank account maintained in respect of the provident fund monies. In his books he showed these amounts as regularly paid in from time to time; but in fact they were not so paid in. The items aggregating Rs. 110-2-0 which are the subject of the charge, were drawn by him during the year 1930, but were deposited into the savings bank on the 13th October, 1931. The defence of accused was that he retained the money not for his personal use but to utilize in meeting necessary expenses of the estate for which there was not cash in hand in the estate; that payments on behalf of the estate had been made by him in advance of the bills drawn for such payments; that he drew a bill on 12th October, 1931, for Rs. 131-10-3, and made the deposit next day out of monies drawn by this bill, by which he re-imbursed himself for payments already made. The payees had received their money in advance. This defence was rejected by both the courts below. The petitioner complained that he had called for documents from the Collector or the estate which were withheld claiming privilege under the Evidence Act, section 124, and contended that he had been prejudiced thereby, because such documents would have substantiated his defence. In particular it was urged that the petitioner's explanation called for at the beginning of the enquiry, which led to the

proceedings, gave the same story as was offered at the trial, and the other documents would have proved it to be true. We have examined the cheque for Rs. 131-10-3 and compared it with the payees' receipts by which the items comprised in it are supported, and have found that the dates of these receipts conclusively prove this explanation to be false. The bulk of the money was not disbursed until after the bill was drawn. It is, therefore, not open to the petitioner to contend that he has been prejudiced by withholding necessary documents.

It was further contended that the conviction of the accused is bad in law, because in the first information the defalcation charged against the accused was in respect of a different sum, namely, Rs. 1,887, of which Rs. 110-2-0, for which he was convicted, is not a part. It is said that the Magistrate had before him a police report disclosing one offence, and if in the course of taking evidence, a different offence was disclosed and he took cognizance of it, he should be held to have taken cognizance of the latter offence not on police report under section 190 (*1*) (*b*) but under section 190 (*1*) (*c*) of the Code of Criminal Procedure, the result being that the Magistrate was disqualified from holding the trial in respect of the new offence disclosed unless he first informed the accused under section 191, Criminal Procedure Code, that he was entitled to have the case tried by another court. It may be conceded that if a Magistrate takes cognizance of an offence under sub-section (*1*), clause (*c*), of section 190, his further proceedings are bad unless he informs the accused that he is entitled to have the case tried by another court [*Emperor* v. *Chedi*(1)]. But it does not appear to us that cognizance was taken under section 190 (*1*) (*c*). To hold so appears contrary to the principles underlying the provisions for the trial of summons cases and warrant cases. In summons cases it is

(1) (1905) I. L. R. 28 All. 212.

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laid down by section 246 that whatever may be the nature of the complaint or summons, the Magistrate who is trying the case may convict the accused of any offence triable under this Chapter which on the facts he appears to have committed. In the Chapter dealing with warrant cases the principle is not so explicitly stated; but under section 254 a Magistrate has to frame a charge if he " is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try." Prima facie there is no reason to suppose that the legislature intended to lay down a different principle in warrant cases from that applicable to summons cases. Once the parties are before the court the Magistrate will deal with the accused for any offence disclosed by the evidence. No decision of the Patna High Court has been placed before us; but the Bombay High Court in *Reg.* v. *Dhandu Ramchandra*(1) have held in a case similar to the one before us that no separate complaint was needed and a Magistrate to whom the case was transferred could try the accused for any offence disclosed by the evidence and was not limited to the offence specified in the complaint or police report. In Calcutta, as long ago as 1899, a case was considered where a Magistrate had received a complaint of a certain offence and after taking evidence proceeded against the petitioner and others for an offence other than the offence mentioned in the complaint. The decision [*Jagat Chandra Mazumdar* v. *Queen-Empress*(2)] was that the Magistrate had taken cognizance of the offence under clause (*a*) and not clause (*c*) of sub-section (*1*) of section 190. And the same principle has been followed in other cases. The decisions are in accordance with the impression to be obtained from a plain reading of the relevant sections of the Code. The conviction of the accused was,

(1) (1868) 5 Bom. H. C. R. 100 (Cr.).
(2) (1899) I. L. R. 26 Cal. 786.

therefore, in order. The sentence does not call for interference. In my opinion, therefore, the rule should be discharged.

DHAVLE, J.—I agree.

The point of law raised before us is that it was—so it is argued—under clause (*c*) of sub-section (*1*) of section 190 of the Code of Criminal Procedure that the trying Magistrate took cognizance of the offence of breach of trust of the particular sum in respect of which he has been convicted, and that as the Magistrate did not comply with section 191, the proceedings are void and the conviction illegal. A graver objection that could have been urged, but was not, is that even apart from section 191, the proceedings would, on that footing, be void under section 530(*k*) as the trying Magistrate was not empowered to take cognizance under clause (*c*) [*see* the Civil List for the quarter in question].

The point is so often taken that though it is really covered by authority, it may be useful to examine in some detail the position that results when the Magistrate who tries a case frames a charge of an offence not specified in the complaint or police report on which cognizance may have been taken under clauses (*a*) and (*b*) of section 190(*1*). Few Magistrates in this province are specially empowered to take cognizance under clause (*c*). Cognizance is usually taken by a Subdivisional Magistrate, and cases are mostly tried by subordinate Magistrates to whom they are transferred under section 192 after taking cognizance, but who are themselves not empowered to take cognizance under any of the three clauses of section 190(*1*).

If the petitioner's contention be correct, not only must his conviction be set aside but the procedure to be followed in a very large number of trials by Magistrates in this province will require consideration. Form XXVIII in Schedule V of the Code of Criminal Procedure states, in cases tried by

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Magistrates, that the charges are within their cognizance, but taking cognizance by reason of a transfer under section 192 or otherwise is quite a different matter from taking cognizance under section 190 (*1*) which is among the " Conditions requisite for initiation of Proceedings " and has to be satisfied before the Magistrate—whether it be the Magistrate who takes cognizance under section 190 (*1*) himself or some other Magistrate to whom he transfers the case under section 192—can begin to function as the trying Magistrate.

" The expression ' to take cognizance ' has not been defined in the Criminal Procedure Code, and it is difficult to ascertain at what precise stage of a case cognizance is said to be taken "—*see Ananta Ram Tewari* v. *Sheikh Altab*(1) and the different opinions expressed in the Full Bench case of *Emperor* v. *Mackay*(2). In *Emperor* v. *Sourindra Mohan Chuckerbutty*(3) Stephen and Carnduff, JJ. remarked that " taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence ". It is interesting in this connection to refer to section 480 of the Code which empowers the Court, when certain contempts are committed in its view or presence, to

> " cause the offender to be detained in custody and at any time before the rising of the Court on the same day....., if it thinks fit, take cognizance of the offence and sentence the offender... ....."

The power of detention in such cases is exercised before the Court " takes cognizance of the offence " and is somewhat similar to the power of a Magistrate under section 64, when any offence is committed in his presence, within the local limits of his jurisdiction, to arrest or order the arrest of the offender. It may

(1) (1913) 17 Cal. W. N. 795.
(2) (1926) I. L. R. 53 Cal. 350, F. B.
(3) (1910) I. L. R. 37 Cal. 412.

be observed that action under section 480, including the taking of cognizance, is not confined to Criminal Courts alone, and that the power of arrest under section 64 may be exercised by a Magistrate irrespective of whether or not he is empowered to take cognizance under section 190(*1*).

Taking cognizance under section 190(*1*) is thus a very particular, technical matter confined to the initiation of proceedings. From the terms of clauses (*a*) and (*b*) of the sub-section it is clear that cognizance is taken under those clauses before the taking of any evidence; and section 191 shows that cognizance is taken under clause (*c*) also " before any evidence is taken ". Even apart from the wording of sections 190(*1*) and 191, the procedure laid down in the Code leaves no room for taking cognizance under section 190(*1*) after what is described in the heading of Chapter XVII as " the Commencement of Proceedings before Magistrates ". These proceedings may be inquiries under Chapter XVIII (sessions cases), or trials under Chapter XX (summons cases), Chapter XXI (warrant cases) or Chapter XXII (summary trials which, however, do not require any further notice).

In summons cases it is not necessary to frame any charges, but under section 246 the Magistrate may convict the accused of any offence triable under the Chapter which from the facts admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons. No question can thus arise in summons cases regarding the applicability of section 190(*1*) (*c*) and section 191.

In warrant cases section 254 requires the trying Magistrate to frame a charge when he is of opinion that there is ground for presuming that the accused has committed an offence triable under the Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him;

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and there is no direct provision similar in terms to section 246. It is in those cases that the question is often raised whether sections 190(*1*) (*c*) and 191 do not apply when the trying Magistrate frames charges relating to offences other than those specified in the complaint or police report upon which cognizance is initially taken under section 190(*1*).

As regards inquiries into sessions cases, section 210 requires the Magistrate to frame a charge, declaring with what offence the accused is charged, on being satisfied that there are sufficient grounds for committing the accused for trial. In this Chapter also, Chapter XVIII, there is no provision (indeed there could not be) similar to section 246. It is also noticeable that neither in this Chapter nor in the Chapter relating to the trial of warrant cases is to be found any provision restricting the Magistrate to the offence or offences which may have been specified in the initial complaint or police report. The power of the Court to frame charges is governed by the general provisions contained in Chapter XIX which seem to enable the Court to frame such charges as may be justified by the evidence produced, irrespective of the particular offence or offences of which cognizance may have been taken under section 190(*1*) at the initial stage. Thus section 236 provides for the framing of alternative charges, and section 235 for the framing of charges relating to connected acts or omissions. Section 227 empowers the Court to add to charges, and section 230 provides that if the offence stated in the new or altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has already been obtained for a prosecution on the same facts as those on which the new or altered charge is founded. As the Code now stands, " previous sanction " is necessary in the case of offences dealt with under section 197 which provides that no Court

shall *take cognizance* of such offences except with the previous sanction of the local Government. We may thus have a charge framed of an offence of which cognizance cannot be taken without previous sanction; but the framing of the charge can only follow the taking of cognizance, and yet the section does not speak of or provide for taking cognizance. It seems to me that the reason for this is that the power of framing charges comes into operation well after the initial requisite of taking cognizance under section 190(*1*), and that this power is not restricted to the offender or the specific sections, if any, mentioned by the prosecutor. A complaint, as defined in section 4(*h*) need not in fact specify any offender or even the section of the law which makes an act or omission punishable; and cognizance is taken under section 190(*1*) (*a*) upon receiving a complaint of facts which constitute an offence, while charges are framed on the evidence before the trial Court. The evidence may, and not infrequently does, disclose offences other than those originally mentioned or implied, but it cannot be said that cognizance is taken of such new offences under clause (*c*) of sub-section (*1*) of section 190, for the double reason that the stage for the application of the sub-section itself is long past and the clause can have no application to the evidence produced in the case. Similar observations apply to cases in which cognizance has been initially taken under clause (*b*) upon a police officer's written report of facts constituting an offence. It has in fact been repeatedly held that when a Magistrate has taken cognizance of an offence upon a complaint or upon a police report, any offence that may be disclosed by the evidence may be dealt with at the trial; and that section 190(*1*) (*c*) and section 191 have no application in such circumstances.

My learned brother has pointed out how in *Jagat Chandra Mazumdar* v. *Queen-Empress*(1) it was

(1) (1899) I. L. R. 26 Cal. 786.

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held that section 190(*1*) (*c*) did not apply where, after taking evidence, a Magistrate had proceeded against a person originally complained against, and another, for an offence other than the offences mentioned in the complaint on which cognizance has been initially taken. In *Dedar Buksh* v. *Symapadadas Malakar*(1) the trying Magistrate who had no power to take cognizance under section 190(*1*) (*c*) found after examining some witnesses, that though there was no satisfactory evidence against the original accused, there was sufficient evidence against other persons, and issued processes against such other persons for offences, not all of which were specified in the original complaint, and it was held that the Magistrate's proceedings were not bad, notwithstanding the facts that he had no power to take cognizance under clause (*c*) of section 190(*1*) and that the complainant had presented a petition before him for the withdrawal of the complaint and its dismissal as untrue. *Charu Chandra Das* v. *Narendra Krishna Chuckerbutty*(2) was a case where cognizance had been initially taken on a police report; the police sent up one person who was tried and convicted, and the Magistrate then, on the evidence of one of the witnesses, proceeded against two other persons. The Magistrate was not empowered to take cognizance under clause (*c*) of sub-section (*1*) of section 190, but Prinsep and Hill, JJ. held that the Magistrate was entitled to proceed as he had done, and that " having taken cognizance of the offence it was his duty to proceed to deal with the evidence brought before him and to see that justice was done in regard to any person who may be proved by the evidence to be concerned in that offence." In *Abdul Rahman* v. *Emperor*(3) it was urged that the subject-matter of the second charge framed against Abdul Rahman not having been disclosed either in

(1) (1914) I. L. R. 41 Cal. 1013.
(2) (1900) 4 Cal. W. N. 364.
(3) (1925) 94 Ind. Cas. 717.

the complaint or in the examination of the complainant, the trying Magistrate could only have taken cognizance of the offence under section 190(*1*) (*c*) and that as he had not followed the provisions of section 191, his proceedings in connection with that charge were illegal and void. The contention was negatived by Maung Ba and Doyle, JJ. and when the matter was taken up to the Privy Council, their Lordships took the same view and observed that the Magistrate had formulated the second charge as he had formulated the first in consequence of the one complaint. Their Lordships distinguished the case of *Emperor v. Chedi*(1) as a case in which, while trying one person, the Magistrate found occasion to formulate a charge against some one else.

The present is not a case where a charge has been framed against a person not originally accused, but a case in which a second charge was formulated, as was the first, on evidence taken in consequence of the one police report on which cognizance was initially taken by a competent Magistrate under clause (*b*) of section 190(*1*).

Mr. Sahay has referred to the evidence of the Sub-Deputy Collector who set the police in motion that he had not mentioned in what he calls his complaint to the police the defalcation of the Provident Fund monies. But the witness's initial communication to the Sub-Inspector of Police was that the appellant had " committed defalcation with regard to certain items of money ", and the list of items totalling Rs. 1,887 which was attached was described as " a list of some of these " (items of money). The defalcation had come to light when the auditor from the local Audit Department audited the accounts of the Estate, and it was after evidence had been given by the prosecution of the defalcation, not only of the items totalling Rs. 1,887 but also of the Provident Fund monies, that the trying Magistrate

(1) (1905) I. L. R. 28 All. 212.

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framed the two charges on one of which the appellant was ultimately given the benefit of the doubt and of the other he was convicted. It seems clear that the trying Magistrate, who was not empowered to take cognizance under clause (*c*) of sub-section (*1*) of section 190 did not (as indeed he could not) take cognizance of any offence under clause (*c*), but that being properly in seisin of the whole case on its transfer to him by the Subdivisional Magistrate, he had authority, on the evidence, to frame a charge with respect to the Provident Fund monies as well.

Rule discharged.

REVISIONAL CRIMINAL.

Before James and Dhavle, JJ.

1933.

Mar. 21.

SITARAM AHIR

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 123—*person affected by the order, whether should have opportunity of being heard before final order.*

The person affected by the order under section 123, Code of Criminal Procedure, 1898, must have an opportunity of being heard before the final order is made under that section.

Emperor v. *Amir Bala*(1), followed.

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

Mahabir Prasad and *Tarakeshwar Nath*, for the petitioners.

Assistant Government Advocate, for the Crown.

* Criminal Revision no. 88 of 1933, from an order of R. C. Chaudhuri, Esq., Sessions Judge of Shahabad, dated the 10th December, 1932, modifying an order of Babu Sukhdeo Narain, Subdivisional Magistrate of Buxar, dated the 9th September, 1932.

(1) (1911) I. L. R. 35 Bom, 271.

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JAMES, J.—The petitioners were required to execute bonds for good behaviour under section 118 of the Code of Criminal Procedure by the Special Magistrate of Buxar, who then placed the proceedings before the Sessions Judge of Shahabad under section 123 of the Code. The Sessions Judge before taking up the reference directed that the prisoners should be informed of the date fixed for hearing which should have been done through the District Magistrate. The petitioners say that they had no information regarding the proceedings in the Court of the Sessions Judge and it appears that the District Magistrate referred the notice to the Special Magistrate who directed that his Bench clerk should see that the prisoners were informed; but it does not appear that anything further was done. The proceedings under section 123 should not have been taken without notice to the persons affected by the order. The case of *Emperor* v. *Amir Bala*(1) only need be cited as authority for this rule that the person affected by the order must have an opportunity of being heard before the final order is made under section 123 of the Code of Criminal Procedure. The order of the Sessions Judge must, therefore, be set aside and the case is remanded to him for re-hearing after giving notice to the petitioners according to law.

The prisoner Chandrika Ahir has not moved the High Court; but it appears that notice was not served on him. The whole of the order of the Sessions Judge will be set aside and the case against the four men Sita Ram, Ujagir, Chandrika and Kulbans will be re-heard.

DHAVLE, J.—I agree.

Rule made absolute.

(1) (1911) I. L. R. 35 Bom. 271.

REVISIONAL CIVIL.

1933.

Mar. 22, 23, 24.

Before James and Agarwala, JJ.

BHATOO SINGH

v.

RAJA RAGHUNANDAN PRASAD SINGH.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 73 *and Order XXI, rule* 89—*money deposited under rule* 89 *of Order XXI, whether becomes assets in the hands of the court within the meaning of section* 73.

Money paid into court for the benefit of a particular decree-holder under Order XXI, rule 89, Code of Civil Procedure, 1908, becomes assets in the hands of the court within the meaning of section 73 of the Code and is available for rateable distribution in the same way as any other money paid in for his benefit, whether realised by sale or paid in to avoid attachment.

Noor Mahomed Dawood v. *Bilasiram Thakursidass*(1) and *Sidh Nath Tewari* v. *Tegh Bahadur Singh*(2), followed.

Harai Saha v. *Fazlur Rahman*(3), *Thiraviyam Pillai* v. *Lakshmana Pillai*(4) and *Murugappa Chettiar* v. *Palaniyappa Chetty*(5), dissented from.

Narayan v. *Amgauda*(6), distinguished.

Application in revision by one of the decree-holders.

The facts of the case material to this report are stated in the judgment of the court.

G. P. Singh, for the petitioner.

S. N. Banerji, for the opposite party.

JAMES AND AGARWALA, JJ.—In this case two sets of decree-holders instituted proceedings in execution of decrees against one Tek Narain Singh, and an

* Civil Revision no. 94 of 1932, from the orders of Babu Tek Nath Jha, Munsif of Bihar, dated the 25th of January, 1932, and the 29th of January, 1932.

(1) (1919) I. L. R. 47 Cal. 515.
(2) (1932) I. L. R. 54 All. 516.
(3) (1913) I. L. R. 40 Cal. 619.
(4) (1917) I. L. R. 41 Mad. 616.
(5) (1917) 42 Ind. Cas. 507.
(6) (1920) I. L. R. 45 Bom. 1094.

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order was made for rateable distribution of the assets which should be realized. One of the decree-holders named Bhatoo Singh brought certain property to sale in execution of his decree with the result that the property was knocked down for Rs. 920, which would in the ordinary course have been available for rateable distribution among the creditors after deduction of the costs of execution; but within the statutory period the judgment-debtor paid his dues under Order XXI, rule 89, and secured a release of the property which had been sold. The amount deposited for the benefit of the decree-holder was Rs. 814. The other decree-holders. who had already obtained an order for rateable distribution, applied for rateable distribution of this amount; and their prayer was allowed by the Munsif.

We are asked to revise the order of the Munsif on the ground that he had no jurisdiction to make rateable distribution of money deposited under Order XXI, rule 89. The learned Advocate for the petitioner relies in the main upon the decision in *Harai Saha* v. *Fazlur Rahman*(1), wherein it was held that although money paid into Court under Order XXI, rule 89, might be regarded as assets held by a Court within the meaning of section 73 of the Code of Civil Procedure, it was not available for rateable distribution because it was specially paid for the benefit of a particular decree-holder, and the Court had no jurisdiction to utilize the money for any other purpose. Mr. Justice Phillips of the Madras High Court took a similar view in *Murugappa Chettiar* v. *Palaniyappa Chetty*(2), basing his decision on the ground that if the sum paid for the benefit of the decree-holder under Order XXI, rule 89, could be deemed to be held by a Court, the sum paid as a percentage of the purchase money for the benefit of the auction-purchaser would equally be assets liable to rateable distribution. The learned Advocate

(1) (1913) I. L. R. 40 Cal. 619.
(2) (1917) 42 Ind. Cas. 507.

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points out that the view that a payment under Order XXI, rule 89, must be regarded as definitely ear-marked for the specific creditor who is conducting the execution case finds support also from observations made in other cases. Thus in *Narayan* v. *Amgauda*(1) Sir Norman Macleod, discussing the opinion of the most eminent of commentators on the law of Civil Procedure, who considered that money paid into Court under rule 89 should be liable to rateable distribution, remarked that it appeared to him that when it was expressly provided that the money should be paid in for a particular purpose such money could not be treated as assets held by a Court. The question of whether money paid under Order XXI, rule 89, should be treated as available for rateable distribution did not actually arise in that case; and it may be remarked that the Calcutta High Court regarded the money as assets held by the Court, but specially ear-marked for the creditor who controlled the proceedings in execution in which it was realized. In *Thiraviyam Pillai* v. *Lakshmana Pillai*(2) Seshagiri Ayyar, J., holding that money realized under Order XXI, rule 83, was liable to rateable distribution, remarked that Order XXI, rule 89, distinctly provided for payment to the decree-holder and the purchaser, and that consequently the payment must be taken to have been ear-marked for those particular purposes. No decision of this Court, directly to the point, has been brought to our notice; but the learned Advocate for the opposite party argues that no logical distinction can be drawn between money paid into Court for the benefit of the decree-holder under rule 89 and money paid into Court for his benefit under any other rule. He adopts the words of Sir George Rankin in *Noor Mahomed Dawood* v. *Bilasiram Thakursidass*(3) wherein, dealing with section 73 of the Code of Civil Procedure, the learned Judge

(1) (1920) I. L. R. 45 Bom. 1094.

(2) (1917) I. L. R. 41 Mad. 616.

(3) (1919) I. L. R. 47 Cal. 515.

remarks that there is no support for theories grounded upon the voluntariness of any payment into Court under stress of execution. As Sir George Rankin says " The debtor is allowed to arrive at the same result by means less distressing to him but there is no difference in the result, because the debtor chooses the more convenient means. The money, paid with whatever motive, if paid to the Court, is paid upon terms of the Code whatever they may be. These terms, as I read section 73, have been laid down so that distinctions in the form in which execution has been had, in the precise extent to which execution has been allowed to run, in the exact source or genesis of the fund in Court, are now no part of the definition of the assets that are subject to distribution rateably ". The learned Advocate for the respondent-opposite party suggests that the Calcutta High Court might now be prepared to consider whether the provisions of section 73 of the Civil Procedure Code should not be applied to money paid under Order XXI, rule 89, even though that rule may direct that certain sums be paid for the benefit of the specific decree-holder. The learned Advocate also draws our attention to the judgment of Sir Grimwood Mears in *Sidh Nath Tewari* v. *Tegh Bahadur Singh*(1) wherein the remarks of Sir George Rankin are quoted with approval in discussing the question of whether part-payment made by a judgment-debtor in order to obtain a postponement of sale should be treated as assets liable to rateable distribution. It was then held that part-payment must be so treated.

It appears to be clear that all money paid by a judgment-debtor into Court under stress of execution before sale, whether to avoid attachment or whether made at an earlier or later stage, should be treated as assets held by the Court liable to rateable distribution under section 73 of the Civil Procedure Code; but there is some ground for doubt as to whether money paid into Court under Order XXI, rule 89,

(1) (1932) I. L. R. 54 All. 516.

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ought not to be exempted from this category. The ground of distinction given by Phillips, J., of the Madras High Court is that in addition to the money paid in satisfaction of the decree under execution the judgment-debtor is required to pay five per cent. of the purchase money as compensation to the auction-purchaser, which cannot be regarded as assets liable to rateable distribution. But on the view that money paid into Court for the benefit of the decree-holder cannot be regarded as assets liable to rateable distribution because by the provisions of Order XXI, rule 89, it must be paid in for the benefit of the decree-holder and so must be treated as ear-marked for his decree, the learned Advocate for the respondents points out that no assets will ordinarily be held by a Court which are not ear-marked for some specific purpose and no civil deposits are ordinarily accepted unless they are made for the benefit of some decree-holder or in the names of some specific persons. There appears to be considerable force in this argument. It may be true that under the provisions of Order XXI, rule 89, the Court would ordinarily have no discretion to dispose of the money deposited otherwise than by making it over to the individual decree-holder in whose name the particular execution may be proceeding; but this does not necessarily mean that if other decree-holders have already established their claims to rateable distribution, they shall not be entitled to share in the amount thus realized. There appears to be no logical ground for excluding from liability to rateable distribution any payment made into Court under stress of execution for the benefit of any of the decree-holders entitled to rateable distribution. In our judgment, the position is not affected by the fact that the sum of five per cent. which is deposited for payment to the auction-purchaser is not liable to rateable distribution; the auction-purchaser is not in any way concerned with the order under section 73. It is reasonable to hold, in the words of Sir George Rankin, that any payments made into Court under stress of execution cannot without anomaly be treated

otherwise than the results of execution would be treated; the debtor may be allowed to arrive at the same result by means less distressing to him: but there is no difference in the result, because the debtor chooses a more convenient means. The money paid with whatever motive, if paid to the Court, is paid upon terms of the Code whatever they may be. We have not before us the exact figures representing the claims of the decree-holders in the present case; but it would appear that whereas on the sale originally made the petitioner would have been entitled to about Rs. 690 and the other creditors to Rs. 230, by the result of cancelling the sale under Order XXI, rule 89, the petitioner receives Rs. 605 and the other creditors Rs. 209. If the petitioner's claim had been allowed, he would have received Rs. 814 and the other creditors nothing. We cannot believe that when the rules under the first schedule of the Civil Procedure Code were framed, this result was intended; and we ought not to allow it unless the terms of the rules make it perfectly clear that these anomalies and undesirable consequences must necessarily follow from their application. As I have said, money paid into Court for the benefit of the decree-holder under Order XXI, rule 89, becomes assets in the hands of a Court in the same way as any other money paid in for his benefit, whether realized by the sale or paid in to avoid attachment; and the fact that under Order XXI, rule 89, this money is described as being paid for payment to the decree-holder does not make it ear-marked for his exclusive benefit any more than any other money realized under stress of execution towards satisfaction of his decree is to be regarded as specially ear-marked so as to remove it from the operation of section 73 of the Civil Procedure Code.

The application must be dismissed with costs: hearing fee one gold mohur. The learned Advocate for the petitioner draws our attention to the fact

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that his execution case should not have been dismissed with a note of full satisfaction; but this is a matter which can very easily be rectified.

Rule discharged.

APPELLATE CIVIL.

Before Wort and Khaja Mohamed Noor, JJ.

JAINARAYAN OJHA

v.

HIRA OJHA.*

JAMES AND AGARWALA, JJ.
1933.

April, 22, 24.

Abatement—Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXII, rules* 2 *and* 4—*Hindu co-widows impleaded as defendants as representing the estate of their deceased husband—death of one—right to sue, whether survives against the other alone—substitution, whether necessary—rule* 2, *applicability of.*

Where in a suit the defendants were the two widows of a Hindu as representing the estate of their deceased husband and during the pendency of the appeal, in which the widows were the respondents, one of them died and no step was taken to bring on the record her legal representative.

Held, (*i*) that on the death of one of the widows the right to sue survived against the other alone and that, therefore, the case was governed by Order XXII, rule 2, Code of Civil Procedure, 1908.

(*ii*) that no substitution being necessary in the circumstances, there could not be an abatement of the appeal. *Lilo Sonar* v. *Jagru Sahu*(1), *Daroga Singh* v. *Raghunandan Singh*(2), *Basist Narain Singh* v. *Modnath Das*(3), and *Musammat Waleyatunnissa Begam* v. *Musammat Chalakhi* (4), distinguished.

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* Appeal from Original Order no. 216 of 1931 with Civil Revision no. 583 of 1931, from the orders of S. K. Das, Esq., I.C.S., District Judge of Shahabad, dated the 22nd July, 1931 and 16th May, 1931.

(1) (1924) I. L. R. 3 Pat. 853.
(2) (1925) 6 Pat. L. T. 451.
(3) (1927) I. L. R. 7 Pat. 285.
(4) (1930) I. L. R. 10 Pat. 341.

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Per KHAJA MOHAMED NOOR, J.—Co-widows who hold the estate of their deceased husband jointly are governed by the rule of survivorship. Both of them jointly and severally represent the estate and if one of them dies the other continues to represent the estate alone.

Appeal by the plaintiffs.

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

S. M. Mullick and *Ramanandan Prasad*, for the appellants.

S. N. Ray and *Harihans Kumar* for the respondents.

WORT, J.—It was urged by Mr. S. N. Ray during the course of the argument that this case was a case which necessitated a reference to a Full Bench having regard to certain decisions which have been arrived at by this Court from time to time which, according to Mr. Ray, deal with the point which comes up for consideration in this appeal. But, in my judgment, the necessity for that course does not arise for the reasons which will presently appear and which mainly are that the cases which have been relied upon by Mr. Ray can certainly be distinguished so far as their facts are concerned from the facts which present themselves in this case.

So far as this case is concerned there were two widows who were defendants, amongst other persons, in an action. The action resulted in a decision which was partly in the defendants' favour and to that extent there was a decree in favour of the defendants. There was an appeal and during the pendency of the appeal one of the widows died. I should have stated that these two ladies were the widows of one Bhiki Ojha. The matter came before the learned District Judge on the 16th May, 1931, and the substance of his order was that having regard to the fact that one of the widows had died and her legal representatives had not been brought on to the record, the whole

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appeal abated. I might say at this stage that if in fact and in law the appeal had abated there would have been no necessity for the order made by the learned Judge but that perhaps is immaterial. On the 11th of July of the same year the appellant before us filed a petition praying that in the circumstances the order for the abatement of the entire appeal may be set aside. As a result of that petition the learned District Judge on the 22nd July, 1931, made this order which it is perhaps necessary to state in extenso :

" No sufficient cause is shown why the application to bring the legal representatives of the deceased was not made within the prescribed time. No such cause is even suggested. The application is therefore dismissed."

The first contention of Mr. Ray, who appears on behalf of the respondents, as I understand his argument, is that the procedure adopted by the appellant was entirely out of order and as a result the appeal was barred by limitation. Mr. Ray's contention is that the petition of the 11th July, 1931, was nothing more in substance than an application to review the judgment or order made by the District Judge on the 16th May, 1931. It is not seriously denied by Mr. Ray that if the circumstances allowed, and in fact the petition of the 11th July, 1931, was an application to set aside the abatement, then there could be no objection to the procedure which the appellant had adopted, and his preliminary point, he admits, under those circumstances would have to be overruled. Whatever words the appellant used in his petition of the 11th July, 1931, may have been, there can, to my mind, be no doubt that that was in substance an application to set aside the abatement and if that prayer was refused as it appears to have been refused on the 22nd July, 1931, there can be no doubt that there was an appeal to this Court and that equally there was no doubt that the appeal is within time. I might add in this connection that there is an application in revision against the order of the 16th May, 1931, and even supposing that my decision had been otherwise as regards the point with which I have just dealt, I

should be constrained to hold that such an application would lie in the circumstances. But it becomes unnecessary to express one's view definitely on that point having regard to my decision on the first question which I have stated Mr. Ray has raised.

Now so far as the merits of the case are concerned, the question is whether the appeal either abated in whole or in part. Again it is not denied that in so far as the learned District Judge purported to state or did state that the appeal abated as a whole then that part of the order in any event cannot be supported. The question is whether it abated in part. As it has been pointed out no application was made to bring the representatives of the deceased widow on the record and it is for that reason that it is said that the appeal has abated. Mr. Ray would have us hold that Order XXII, rule 2, of the Code of Civil Procedure does not apply but Order XXII, rule 4. Order XXII, rule 2, provides—

> " where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants ".

Now I wish to be very careful in the observations which I am about to make and confine those observations strictly to the point which we have to decide. The point is whether this case can be said to come within Order XXII, rule 2. Order XXII, rule 2, clearly contemplates at least those cases of joint tort-feasors or joint contractors, the right surviving as it does in those cases to the survivor. But the question is does it apply to this particular case. In no sense of the word can it be said that the two widows representing the estate of their deceased husband represent each other. On the death of the one it cannot be said that the surviving widow represents the other, either as her legal representative or as her heir,

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and it is only under those circumstances could it possibly be said that the argument of Mr. Ray could succeed.

In support of the argument which Mr. Ray advances reference has been made to four cases of this Court. The first is the case of *Lilo Sonar* v. *Jhagru Sahu*(1). That was a case in which the respondent no. 1 Jhagru Sahu had died and his legal representative was Doman respondent no. 2 who was already on the record. The observation upon which Mr. Ray particularly relies in that case is to be found at the bottom of page 855 and it is this: "The fact that Doman one of the legal representatives of the deceased is already on the record does not relieve the appellant or the other heirs of Jhagru Sahu from making an application for substitution as legal representatives of Jhagru Sahu in terms of rule 4 of Order XXII. Doman was respondent in his own capacity. Now, if the appellant wants him to be placed on the record as legal representative of Jhagru Sahu, a proper application should be made". Though it is perhaps quite unnecessary for the purposes of this case, it might be said that it is not seriously disputed that if a person is on the record first in his own capacity and it is sought to have him on the record in the capacity of legal representative of the deceased party it may be necessary to make such an application. That I have said and I wish to be particularly careful in this case not to go beyond the facts. Whether the last proposition to which I have referred establishes this point, I wish to repeat, it is immaterial to state.

In connection with the passage to which I have just referred, Mr. Ray will have us read it as applying to the facts of this case. In that case both Jhagru and Doman were members of a joint Mitakshara family; they were both on the record, and it is contended that the learned Judge was confining himself to those facts, and, as I understand the argument of

(1) (1924) I. L. R. 3 Pat. 853.

Mr. Ray, it is said that the learned Judge disregarded the fact for the purposes of that case that there were those who were not already on the record —a fact which, in my judgment, makes all the difference—to repeat, that there were other members of the joint family who took by survivorship and who were not on the record. In my opinion the contention of Mr. Ray cannot be supported. It seems to me that whatever this case, the case of *Lilo Sonar* v. *Jhagru Sahu*(1), decided, it did not decide the question with which we have to deal in this case. I think that is sufficiently indicated by a reference to the earlier part of the judgment in which the learned Judge pointed out that the legal representatives of Jhagru Sahu entered appearance and opposed the application for substitution. In my judgment the case to which I have just referred does not finally decide this point with which we have to deal.

The next case is the case of *Daroga Singh* v. *Raghunandan Singh*(2). The point with which we have to deal is expressly decided in this case. It was a case of a mortgage decree. Some of the plaintiffs who were respondents in the appeal died during its pendency, first the karta and then his son. The question raised was whether there was an abatement in the circumstances that the son had died and there being no steps to bring his sons on the record. It was decided by Dawson Miller, C. J. that there was, and to this extent it is contended that the case is in favour of the present respondent's contention as to abatement. But the learned Chief Justice expressly stated that so far as the death of the karta was concerned no question arose as the interest devolved upon the other members by survivorship.

Now the other case referred to is the case of *Musammat Waleyatunnissa Begam* v. *Musammat Chalakhi*(3). The only observation that I propose to

(1) (1924) I. L. R. 3 Pat. 853.
(2) (1925) 6 Pat. L. T. 451.
(3) (1930) I. L. R. 10 Pat. 341.

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make with regard to this case is that there was no question of survivorship. There the question was in regard to the legal representatives of one of the deceased respondents who was a Mohammadan being already on the record; and quite clearly whatever else that case may have decided it could not have decided a case where, as undoubtedly in this case, the right to sue survived against the surviving litigant. In this case it is obvious that the estate of the deceased Bhiki Ojha was represented in the first place by the two widows and on the death of one of them it was represented by the surviving heir. In my judgment, therefore, this case clearly comes within Order XXII, rule 2.

For these reasons I would hold that the decision of the learned District Judge was wrong and it must be set aside. The learned District Judge will now hear the appeal and determine it according to law.

The appeal is allowed with costs.

KHAJA MOHAMED NOOR, J.—I agree. Apart from the technical objections raised by Mr. Ray on behalf of the respondent which have been dealt with in the judgment of my learned brother and with which I entirely agree, the question involved in this appeal is whether the appeal before the learned District Judge abated either in whole or in part in consequence of no application having been made for substitution of the name of representatives of Musammat Parkalo Kuer inspite of the fact that her co-widow Musammat Pramjanto was already on the record, the two widows having been impleaded in the suit to represent the estate of one Bhiki Ojha.

The strongest case in favour of the view taken by the learned District Judge that an application for substitution was necessary is the case of *Musammat Waleyatunnissa Begam* v. *Musammat Chalakhi*(1), a decision to which I was a party. I will come to this

(1) (1930) I. L. R. 10 Pat. 341.

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decision in a moment, but before I do so I would like to refer to the cases on which it was based. That case was decided on the authority of three earlier decisions of this Court (*1*) *Lilo Sonar* v. *Jhagru Sahu*(1), (*2*) *Daroga Singh* v. *Raghunandan Singh*(2) and(*3*) *Basist Narain Singh* v. *Modnath Das*(3). I have examined these cases and I am clearly of opinion that none of these three cases lays down the proposition which has been urged by the respondent, namely, that even in a case when all the members of a joint Hindu family are sued as such and one of them dies and the right to sue survives against the remaining members of the family alone, an application contemplated by Order XXII, rule 4, is necessary. The case of *Lilo Sonar* v. *Jhagru Sahu*(4) only decides that if one of the representatives of the deceased respondent is already on the record the appellant is not absolved from making an application for bringing the other legal representatives on the record. In that case only one member of the family was on the record, not all of them, and the learned Judges decided that in the circumstances of that case an application was necessary. The second case is that of *Daroga Singh* v. *Raghunandan Singh*(5). It is, as has been pointed out by my learned brother, to some extent in favour of the appellant. There two deaths had taken place, first that of the father and then that of the son. In dealing with the death of the father Dawson Miller, C. J. definitely stated that nothing turned upon that death because the sons of the survivors of the interest of the father were already on the record; but the appeal was held to have abated in consequence of the death of the son later on whose two sons were not brought on the record within the time allowed by law. The observation made by the learned Chief Justice, therefore, indicates that in case of a suit against all the members of the joint family the fact that no

(1) (1924) I. L. R. 3 Pat. 853.
(2) (1925) 6 Pat. L. T. 451.
(3) (1927) I. L. R. 7 Pat. 285.
(4) (1924) I. L. R. 3 Pat. 853.
(5) (1925) 6 Pat. L. T. 451.

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application for substitution is made on the death of one of them, the remaining being his only survivors, would not be fatal to the suit. The third case is *Basist Narain Singh* v. *Modnath Das*(1) in which Kulwant Sahay, J., who was a party with me to the decision in the case of *Musammat Waleyatunnissa Begam* v. *Musammat Chalakhi*(2), while referring to the two cases I have already referred to, observed as follows :—

" These two cases are clear authority for holding that the fact of Narain Singh being on the record did not prevent the abatement of the appeal when admittedly the other two respondents died leaving other members of the family as their legal representatives and those members were not brought on the record ".

This is an observation which clearly indicates that the decision turned upon the fact that all the representatives of the deceased respondent were not on the record.

Having dealt with these three cases on which the decision of the case of *Musammat Waleyatunnissa Begum* v. *Musammat Chalakhi*(2) was based, I come to that case itself. No doubt in that case, as it appears from the judgment, all the heirs of Musammat Tamizan were already on the record, but as has been pointed out by my learned brother that was a case of Mohammadans in which no question of survivorship arose; the other respondents were on the record in their own individual capacities, and what was decided in that case was that they ought to have been impleaded as representatives of the deceased. That is quite a different thing from the present case where the simple question was whether if the two widows are sued as representing the estate of their deceased husband and one of them died an application for substitution of another widow already on the

(1) (1927) I. L. R. 7 Pat. 285.
(2) (1930) I. L. R. 10 Pat. 341.

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record was necessary. Co-widows who hold the estate of their deceased husband jointly are governed by the rule of survivorship. Both of them jointly and severally represent the estate of their deceased husband and if one of them dies the other continues to represent the estate alone. No substitution is necessary.

I agree with my learned brother that this case is clearly governed by the provisions of Order XXII, rule 2. Perhaps it was necessary to file an application that a note be made and the application dated the 11th July, 1931, might have been treated as such an application.

I therefore agree in holding that the appeal did not abate even as against the widow much less it abated as a whole. I agree that the order of the learned District Judge be reversed and that the appeal be heard by him and determined according to law.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Agarwala and Rowland, JJ.

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Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 522, *clause* (*3*)—*time limit, whether imposed by the section—court of appeal, confirmation, reference or revision, whether can pass order after the expiry of one month from the original conviction or the disposal of appellate or revisional proceeding.*

Clause (*3*) of section 522, Code of Criminal Procedure, 1898, does not impose any time limit within which a court of appeal, confirmation, reference or revision must act.

Held, therefore, that it is competent to such a court to pass an order for restoring the property to the complainant even

* Criminal Revision no. 283 of 1933, from an order of M. Hamid, Esq., Additional District Magistrate, Patna, dated the 1st May, 1933.

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after the expiry of one month from the original conviction or from the disposal of appellate or revisional proceedings.

Rameshwar Singh v. *King-Emperor*,(1) followed.

Usman Miya v. *Amir Miya*(2), not followed.

Aziz Ahmad v. *Buddhu Khan*(3), *Emperor* v. *Ashiq Hussain Khan*(4), and *Emperor* v. *Lachman*(5), referred to.

The case was originally heard by Agarwala, J. who referred it to a Division Bench.

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

M. Yasin Yunus, for the petitioner.

Ramnandan Prasad, for the opposite party.

ROWLAND, J.—This application raises the question of the legality of orders passed under section 522 of the Criminal Procedure Code in the following circumstances.

On the complaint of one Sarfaraz Hussain the petitioner was convicted on 22nd August, 1932, by an Honorary Magistrate exercising 2nd class powers, of offences under sections 504 and 323 of the Indian Penal Code. It was alleged that by means of assault and intimidation petitioner Fida Hussain had dispossessed the complainant of certain immoveable property. The petitioner appealed from his conviction to the District Magistrate who on 6th December, 1932, upheld the conviction. The complainant moved the Honorary Magistrate on 12th December, 1932, to pass an order under section 522 of the Criminal Procedure Code to restore the complainant to possession of the immoveable property. The Honorary Magistrate on this application passed an order on 20th December, 1932, directing possession to be

(1) (1925) I. L. R. 4 Pat. 438.
(2) (1927) A. I. R. (Nag.) 131.
(3) (1923) I. L. R. 45 All. 553.
(4) (1922) I. L. R. 45 All. 25.
(5) (1923) I. L. R. 46 All. 92.

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delivered accordingly. The petitioner moved the Subdivisional Officer against this order on 21st December, 1932, and the Subdivisional Officer called for the record under section 435 of the Criminal Procedure Code and on 9th January, 1933, referred the case to the District Magistrate under sub-section (*2*) of that section. On the other hand the petitioner moved the High Court in revision against his conviction and sentence, but his application was rejected on 26th January, 1933. The Additional District Magistrate, who heard the reference made by the Subdivisional Officer, was of opinion that the order of the Honorary Magistrate, dated 20th December, 1932, was without jurisdiction as a period of nearly four months had elapsed between the Honorary Magistrate's judgment of conviction, dated 22nd August, 1932, and the passing of the subsequent order, whereas section 522, clause (*1*), of the Criminal Procedure Code, as amended in 1923, gives the Court by whom a person is convicted power to pass an order

> " when convicting such person or at any time within one month from the date of the conviction ".

He thought, however, on the authority of *Rameshwar Singh* v. *King-Emperor*(1) that he himself had power as a Court of revision under section 522, clause (*3*), to pass such an order. He considered the case to be " emphatically a fit case for passing such an order ", and he passed an order accordingly. This order was dated 1st May, 1933.

It is contended that the power conferred on a Court of appeal, reference, or revision by section 522, clause (*3*), is intended to be exercised only at the time of affirming a conviction or at the latest within a month thereafter and reference is made to *Usman Miya* v. *Amir Miya*(2). This was a case in which the accused had been convicted of certain offences and his application in revision had been dismissed. The

(1) (1925) I. L. R. 4 Pat. 438.
(2) (1927) A. I. R. (Nag.) 131.

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findings of fact showed that the complainant had been dispossessed by the accused by criminal force or show of criminal force. After the disposal of the application in revision the complainant moved the High Court for an order under section 522, and the learned Judicial Commissioner observing that it was a fit case for restoring possession to the complainant passed order accordingly and took the trouble to point out that he was disposing of it within the period of one month from the date of confirming the conviction in revision. On the other hand in *Rameshwar Singh* v. *King-Emperor*(1), which has been relied on by the learned Additional District Magistrate, this High Court was considering a case in which the trial Court had passed an order under section 522 more than six weeks after the conviction of the accused by him. It was observed that strictly speaking the order was beyond the power of the Magistrate. In that case also it seems that a criminal revision had been presented in the High Court against the order of conviction and that criminal revision had been dismissed more than a month before the order under section 522 came under the consideration of the High Court. Jwala Prasad, J. held that clause (*3*) of the section which was newly added in 1923 did not impose any time limit within which a Court of appeal, confirmation, reference or revision must act. Therefore it was competent to such a Court to pass an order for restoring the property to the complainant even after the expiry of one month from the disposal of appellate or revisional proceedings. These are the only cases placed before us arising out of offences committed after the amendment of the Act in 1923. Before the amendment different views had been taken as to the power of an appellate or revisional Court to pass an order under section 522 which the trial Court had omitted to make. In *Aziz Ahmad* v. *Buddhu Khan*(2) Daniels, J. thought that a Court of appeal

(1) (1925) I. L. R. 4 Pat. 438.
(2) (1923) I. L. R. 45 All. 553.

or revision had no such power. On the other hand though there was some judicial opinion that the Court of first instance must pass an order under section 522 at the time of the conviction or not at all, it was held in *Emperor* v. *Ashiq Husain Khan*(1) that an order under section 522 passed by the trial Court shortly after the confirmation of the conviction in appeal was in order. In *Emperor* v. *Lachman*(2) there had been no order under section 522 passed by the trial Court, but the appellate Court in upholding the conviction and sentence directed restoration of possession. The order of the appellate Court had been passed before the amendments to the Criminal Procedure Code came into force, but it came for consideration before the High Court after those amendments became effective. Sulaiman, J. set aside that portion of the appellate Court's order which directed restoration of possession to the complainant and in place of it made a fresh order directing restoration of possession. I can find nothing in section 522, clause (*3*), to limit the jurisdiction of an appellate Court to the passing of an order within one month either of the original conviction or of the appellate order. It can hardly have been the intention of the legislature that the appellate Court's order under section 522 must necessarily be passed within a month of the original conviction, for that would make sub-section (*3*) infructuous in any case in which the pendency of the appeal exceeded one month. As to whether the appellate order under section 522 ought to be within a month of the appellate Court's disposal of the appeal there is no such limitation in the section. It may be that no appeal or application in revision is presented by the accused. Such was indeed the case in *Aziz Ahmad* v. *Buddhu Khan*(3). And then what is to be the starting point for the time limit? I would respectfully agree with the view

(1) (1922) I. L. R. 45 All. 25.
(2) (1923) I. L. R. 46 All. 92.
(3) (1923) I. L. R. 45 All. 553.

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of Jwala Prasad, J. in *Rameshwar Singh* v. *King-Emperor*(1) that no time limit was intended to be set. The legislature, it would seem, thought fit to rely on the discretion of appellate and revisional Courts not to exercise their powers under this section in cases where there has been undue or excessive delay in moving the Court for its use.

In the case before us, the complainant's application to be restored to possession was presented to the Honorary Magistrate only six days after the conviction had been affirmed on appeal, and there can be no question of withholding relief on the ground of excessive delay. The proper course, however, for the complainant was to move the appellate Court, and the proper course for the Honorary Magistrate was to reject or return the application directing complainant to move the appellate Court if so advised. The Additional District Magistrate had, I think, power to deal with the matter, and has done so correctly.

In the result, the application should, in my opinion, be dismissed.

AGARWALA, J.—I agree.

Rule discharged.

LETTERS PATENT.

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July, 19.

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

MAHARAJA KUMAR GOPAL SARAN NARAIN SINGH

v.

CHHAKAURI LALL.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 1, *Articles* 115 *and* 120—*compromise merged in decree, whether is "contract" within the meaning of Article* 115—*suit for compensation based on such compromise—proper article applicable.*

* Letters Patent Appeals no. 111 and 112 of 1932, from a decision of the Hon'ble Mr. Justice Agarwala, dated the 14th December, 1932.

(1) (1925) I. L. R. 4 Pat. 438.

The fact that a compromise between the parties to a suit has merged in a decree of the court none the less makes it a contract within the meaning of Article 115 of the Limitation Act, 1908, which prescribes a period of three years for a suit for " compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for ".

Where, therefore, a suit for compensation was based on a contract contained in a compromise which had merged in the decree of the court, *held*, that Article 115, and not Article 120, Limitation Act, 1908, was applicable.

Smith v. *Kinney, Official Trustee of Bengal*(1), followed.

Arunachalam Chettiar v. *B. Raja Rajeswara Sethupati*(2), distinguished.

Appeal by the defendants.

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

S. N. Ray and *G. P. Sahi*, for the appellants.

Nawal Kishore Prasad II, for the respondent.

WORT, A. C. J.—This is an appeal from a decision of my brother Agarwala in a case in which the plaintiff had claimed damages against the defendant for erecting a bandh across a certain river up to a height in excess of 104.31 feet which height had previously been agreed upon between the parties. The trial Court came to the conclusion that the plaintiff had made out a case, technically at any rate, of breach of contract and allowed him nominal damages to the extent of Re. 1. Against that decision there was an appeal to the learned District Judge and that Judge reversed the decision of the trial Court on the question of damages and allowed a sum of upwards of Rs. 500. Against that there was an appeal to this Court and that appeal was dismissed.

It is contended by Mr. Roy on behalf of the defendant appellant that the decision of Agarwala, J.

(1) (1923) 81 Ind. Cas. 299.
(2) (1924) 91 Ind. Cas. 338.

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is wrong in respect to several points. In order to appreciate those points it is necessary to state briefly the cases of the parties.

In 1909 a compromise was entered into, amongst other parties, between the plaintiff and the defendant in which it was agreed, as I have already stated, that this masonry bandh should be erected across the river Ramrekha to a height of 104.31 feet and there was an undertaking (as appears from the record of another case) in that compromise that the bandh should not exceed that height. The case of the plaintiff was that in breach of the compromise or agreement the defendant had erected the bandh or extended it to a greater height than 104.31 feet with the result that both in the years 1332 and 1334 his, the plaintiff's, land had been flooded and his paddy crops destroyed. Against that case the defendant contended that although it was proved that the plaintiff had suffered the damage alleged as regards his paddy crop, the net result of the flooding of the plaintiff's land was that the rabbi crop which the plaintiff reaped was a bumper one, to use the expression of the defendant, the net result being that the plaintiff had suffered no damage. It is one of the contentions of Mr. Ray on behalf of the defendant that the learned District Judge had not considered the evidence as regards this point. Mr. Ray contends that the learned Judge's decision on this matter was influenced by his opinion that the value of the rabbi crop could not be taken into consideration in estimating the damage which the plaintiff had incurred. The Judge's finding shortly on this point was that he was not satisfied on the defendant's evidence that the benefit which the defendant alleged had accrued to the plaintiff had been proved. There seems to be no reason, in my opinion, to support the contention of the learned Advocate on behalf of the appellant on this point. It is true that Mr. Allanson, the learned District Judge, seems to have been somewhat doubtful as to the legality of taking this question of the rabbi crop into consideration; but his finding

is perfectly clear that he was not satisfied by the defendant's evidence on that point. Had the learned District Judge decided the question on the footing that he could not take into consideration the value of the rabbi crop, then in my judgment the decision of the learned District Judge would have been wrong, because the fundamental principle of law, as was pointed out in the course of the argument, is that the plaintiff is bound to minimise his damage, and what results from that is that if it can be shown as a fact that damage has not accrued, then it is patently obvious that the plaintiff is not entitled to recover damages. But that discussion is unnecessary for the reason which I have pointed out, namely, the finding of fact of the learned District Judge on this point which was binding on Mr. Justice Agarwala as it is binding on this Court. Mr. Ray endeavoured in the course of the argument to put in evidence, which was clearly inadmissible, certain reports which were made by certain officers as to this land and in which it is stated that it was found that the whole of the land or the greater part of it was bhit land and not paddy land. That attempt on the part of Mr. Ray of course was bound to fail. The other substantial question—in fact the only point in the case—is the question of limitation. Agarwala, J., in confirming the judgment of the learned District Judge, has come to the conclusion that Article 120 of the Limitation Act applied, and not Article 36 or Article 115. Article 36 which provides a period of two years reads

> " For compensation for any malfeasance, misfeasance or non-feasance independent of control and not herein specially provided for ".

Article 115 provides a period of three years and this Article reads

> " For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for ".

Article 120 is a residuary Article and gives a period of six years and it is only by applying Article 120 that the plaintiff can succeed as regards the year 1332. It had better be said at once that the point as to

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limitation cannot apply to the year 1334 because whatever Article is applied the action is within the period provided. The point depends, therefore, on the question of whether either Article 36 or Article 115 is the Article applicable in this case.

It is contended by the learned Advocate on behalf of the respondent that this is not a case under Article 36 as that Article provides that misfeasance, malfeasance or non-feasance is independent of any control. Article 115 as construed by the Courts applies either to a case of express or implied contract and not a contract in writing registered, that is to say, it may be an express contract or an oral contract or a written contract so long as it is not registered and it also does apply to a case of implied contract. Assuming for the moment that the learned Advocate's argument is correct as regards Article 36, his argument as regards Article 115 is based on the decision of the Madras High Court in *Arunachalam Chettiar* v. *B. Raja Rajeswara Sethupati*(1) being a decision of the Officiating Chief Justice and Mr. Justice Iyengar. That was a case in which there had been a compromise and an action was brought on the decree of the Court; and it is contended that that decision lays down shortly that as the action was on the decree it could not be a case under Article 115: in other words, it was an action not on a contract. In my judgment there are two reasons for differentiating that case from the present case. One is that in any event in that case the Article could hardly apply because Article 115 applies to cases for compensation whereas the decision in the case to which I have referred was an action for a liquidated sum of money. But the more important feature in the case above referred to is the statement in the judgment at page 341 to this effect: "No doubt a compromise decree has got the features and characteristics both of a compromise and a decree and the question really is whether the suit is based on the declarations contained in a previous decree and should

(1) (1924) 91 Ind. Cas. 338.

therefore appropriately be called a suit upon a decree or a suit on the contract contained in the compromise." In other words, the learned Judges in that case were deciding on the particular facts of the case that the suit before them was a suit on a decree and not on a compromise. The short answer, it seems to me therefore, to be given to this case is that it depends upon the circumstances, and that being so, it must be held in this case that this was a suit, if anything at all, on the compromise which was entered into in 1909. But apart from the decision to which I have referred so far as this Court is concerned the matter has been finally laid at rest in the case of *Smith* v. *Kinney, Official Trustee of Bengal*(1), where the learned Chief Justice and Mr. Justice Foster of this Court had decided that the fact that the compromise merged in a decree, none the less makes it a contract within the meaning of Article 115 of the Limitation Act.

I need not at this stage go into an elaborate discussion of the question of whether the case was partly based on a contract and partly based on tort and therefore comes within Article 115 of the Limitation Act for the simple reason that in this case, as has been held in England for many years, it is not necessary to look at the pleadings but at the substance of the case and in looking at the substance of this case it is quite clear that the plaintiff was bound in any event to base his claim on the compromise of 1909 : in other words, had he been in the first place content with claiming his right under the general law as laid down in *Rylands* v. *Fletcher*(2) he would ultimately have to come back to the contract when the defendant in answer to his claim had pleaded that he was entitled to erect the bandh and that he had not erected it beyond the limits as laid down in the compromise of 1909. To put it in a sentence, the issue in the case would have been whether the contract had been complied with or whether it had been broken.

(1) (1923) 81 Ind. Cas. 299.
(2) (1868) L. R. 3 H. L. 330.

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There was yet another point that was agrued that this was a continuing breach of contract and that the learned Judge in the Court below was right in coming to the conclusion that the cause of action arose in December, 1924. The reason that the learned Judge gave was that paddy had been reaped in December of that year. In my judgment his decision on that point was wrong. The cause of action arose when the breach of contract or compromise occurred and damage was done to the plaintiff's paddy crop. That admittedly was in September, 1923, corresponding to Assin, 1332. There is no evidence and no issue on this point and it appears not to have been argued that the defendant continued in his breach after that month. In the absence of evidence to the contrary or a finding to the contrary it seems to me that the only conclusion that this Court can arrive at is that the breach of the compromise occurred in Assin, 1332, and that being so, the plaintiff's action for that year was clearly out of time having regard to the fact that Article 115 of the Limitation Act applies. In my judgment, therefore, the decision of the learned Judge in the Court below was wrong to the extent of allowing the plaintiff's claim for 1332. His action so far as that year was concerned will be dismissed but his claim for the year 1334 will be allowed.

There was an appeal in the Court below before Mr. Allanson, the District Judge, and there was also an appeal before Mr. Justice Agarwala by the defendant on the question of costs which were allowed by the trial Court. These appeals were dismissed with costs. In my judgment there should be no separate order for costs as regards these appeals.

The net result, therefore, is that the appeals are allowed as regards the year 1334 but dismissed as regards the year 1332 and the order for costs in those circumstances would be that the appellant in this Court will be entitled to costs, according to his success, throughout.

KULWANT SAHAY, J.—I agree.

Appeals allowed in part.

APPELLATE CIVIL.

Before Macpherson and Agarwala, JJ.

RAJA SRI SRI JYOTI PRASAD SINGH DEO BAHADUR 1933.

v. *Aug.* 2.

TARA SANKAR CHATTERJI.*

Chota Nagpur Tenancy Act, 1908 (*Beng. Act VI of* 1908), *sections* 208 *and* 210(*b*)—*decree effective against only a part of the tenancy interest—sale of tenancy, whether without jurisdiction—sale, whether binds the interest of any of the judgment-debtors against whom the decree was valid.*

A sale under section 208, Chota Nagpur Tenancy Act, 1908, is only valid when held in execution of a decree for the rent of the tenancy obtained against the whole of the tenancy interest.

Where the decree was effective against only a part of the tenancy interest and did not affect the interest of the minor tenants who were sued as defendants in the suit, and the whole tenancy was sold in execution under section 208.

Held, (*i*) that the property was sold as a whole and either the sale of the whole property was valid or not binding at all;

(*ii*) that the sale under section 208 was entirely without jurisdiction and that it did not affect the interest of any of the judgment-debtors even though a sale of their interest under section 210(b) might have been valid.

Jagdishwar Dayal Singh v. *Pathak Dwarka Singh*(1), followed.

Appeal by the defendant.

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

J. C. Sinha and *B. B. Ghosh*, for the appellant.

N. N. Rai, for the respondents.

MACPHERSON, J.—The appellant who is the landlord of village Dumdumi in the Raghunathpur

* Appeal from Appellate Decree no. 196 of 1931, from a decision of H. R. Meredith, Esq., I.C.S., District Judge of Manbhum, dated the 4th December, 1930, confirming a decision of Babu Kshetra Mohan Kumar, Munsif of Raghunathpur, dated the 14th June, 1929.

(1) (1938) I. L. R. 12 Pat. 626, P. C.

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munsifi of the district of Manbhum, sued the plaintiffs-respondents and two others for the cess of a six-annas share in the village which these plaintiffs hold. He obtained decree which he executed under section 208 of the Chota Nagpur Tenancy Act, 1908, as a rent decree and on sale of the tenancy, purchased it at auction. The suit out of which this second appeal has arisen, was brought by the plaintiffs, the Chattarjis, to set aside the ex parte decree and the sale on the ground of fraud and want of jurisdiction.

The Courts below have granted all the reliefs prayed for except that the ex parte rent decree was vacated only in so far as plaintiffs nos. 1 to 3 were concerned.

The facts found are that the plaintiffs 1 to 3 were minors when they were sued as defendants in the suit in the rent court, and that accordingly the decree passed in that suit being effective only against some of the persons interested in the tenancy, could not be executed under section 208 of the Act but at most under section 210(*b*) against the major defendants 4 to 8 under which the right, title and interest of those judgment-debtors could be sold by the procedure laid down for execution of a money decree. It has been held by the Courts below that the sale under section 208 which was a sale of the tenancy, was without jurisdiction and did not operate to transfer the tenancy or even the right, title and interest of judgment-debtors 4 to 8 which might have been sold under section 210(*b*) or indeed anything whatsoever.

On behalf of the landlord-appellant it is urged that the sale in execution of the decree is not void but is binding so far as the interest of the judgment-debtors, who were defendants 4 to 8, is concerned.

In my opinion the submission is wholly untenable. The sale under section 208 was entirely without jurisdiction for the reason already given that the decree

upon the basis of which it was held, was against only a part of the tenancy interest whereas a sale under section 208 is only valid when held in execution of a decree for the rent of the tenancy obtained against the whole of the tenancy interest. The suggestion that such a sale, though not valid in respect of the tenancy, should at least bind the interest of those defendants judgment-debtors against whom the decree for cess was valid, will not bear examination for a moment. The effect of a sale under section 208 has recently been considered by their Lordships of the Privy Council in *Jagdishwar Dayal Singh* v. *Pathak Dwarka Singh*(1). It was there held that a sale on a decree for rent which did not include the whole tenancy interest was not a sale under section 208 so as to affect the subordinate interests which were under section 16 of the Bengal Rent Recovery (Under-tenures) Act, 1865, liable to cancellation upon a valid sale under that section. It was further held that neither section 214 nor any other provision of the Chota Nagpur Tenancy Act, 1908, operated to prevent the civil court from entertaining a suit in this regard. As the sale under section 208 was ultra vires, their Lordships pointed out that " to take advantage of section 214 the appellant must first establish that the sale was a sale made under Chapter XVI of the Act which includes sections 135 to 229, which in effect is a question of jurisdiction ". " Under Chapter XVI of the Act ", they proceeded, " a statutory jurisdiction is conferred on the Revenue Courts, but that jurisdiction must be exercised within the statutory powers conferred. If then, as already stated, it is not competent to order a sale of the tenure under section 208 unless the whole interests in the tenure are represented before the Court, it is clear that the order for sale of the tenure in the present case was ultra vires of the Revenue Court, and it follows that the sale was not ' made under this chapter ' and was outside the jurisdiction of that Court ". The sale of

(1) (1933) I. L. R. 12 Pat. 626, P. C.

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the tenancy under section 208 being without jurisdiction did not affect the interest of any of the judgment-debtors even though a sale of their interest under section 210(*b*) might have been valid. The property was sold as a whole and either the sale of the whole property was valid or not binding at all. The sale cannot be split up in the manner desired by the appellant.

Upon this view the judgments under appeal are correct and I would dismiss this appeal with costs.

AGARWALA, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Macpherson and Agarwala, JJ.

RAJA SHIVA PRASAD SINGH

v.

BHUBAN MAHATO.*

1933.

July, 26.
Aug., 3.

Chota Nagpur Tenancy Act, 1908 (*Beng. Act VI of* 1908), *section* 139 (5), 139*A and* 231—*amending Act VI of* 1920—*suit for declaration of title with consequential relief for possession—jurisdiction of Civil Courts to try such suit, whether barred—rule, whether applicable to cases where institution of suit or even cause of action had been subsequent to amendment of section* 139 (5)—*limitation—section* 231, *applicability of—amendment of section* 139 (5) *and introduction of section* 139A, *effect of—old law, whether restored.*

Held, on a review of *Janardan Acharjee* v. *Hardhan Acharjee*(1), *Asman Singh* v. *Shaikh Obeedooddeen*(2), *Khetra Nath Ghattak* v. *Peru Bauri*(3), *Akhouri Parmeshwari*

* Appeal from Appellate Decree no. 22 of 1931, from a decision of Babu Gajadhar Prasad, Subordinate Judge of Dhanbad, dated the 31st July, 1930, affirming a decision of Babu Naresh Chandra Ray, Munsif of Dhanbad, dated the 22nd November, 1929.

(1) (1867) 9 W. R. (Civil) 513, F. B.
(2) (1875) 23 W. R. (Civil) 460.
(3) (1911) 15 Cal. W. N. 387.

Charan v. *Chaudhury Gursaran Prasad*(1), *Dhup Lal Sahu* v. *Bhekha Mahto*(2), *Chotlal Nandkishore Nath Shah Deo* v. *Tula Singh*(3), *Chaudhury Gursaran Das* v. *Akhouri Parmeshwari Charan*(4), *Gobinda Bauri* v. *Kristo Sardar*(5) and *Deonandan Pande* v. *Anhach Kahar*(6),

(*i*) that section 139 (5), read with section 139A, Chota Nagpur Tenancy Act, 1908, as amended by Act VI of 1920, bars the jurisdiction of the Civil Courts only in summary suits for possession and not in suits for declaration of title with the consequential relief of possession;

(*ii*) that this is so even where the institution of the suit or the cause of action has been, or both have been, subsequent to the amendment of section 139 (*5*);

(iii) that the provision of section 231 of the Chota Nagpur Tenancy Act, prescribing one year's limitation, has no application to a suit for declaration of the plaintiff's title with consequential relief as to possession;

(*iv*) that, therefore, the suit of a raiyat for declaration of title to and recovery of possession of his holding from a landlord lies in the civil court and does not lie in the revenue court and the period of limitation is the ordinary one and not one year as it is in possessory suit under section 139 (*5*) of the Chota Nagpur Tenancy Act;

(*v*) that the effect of the new section 139A, read with the amended section 139 (5), was to restore, in cases coming from Manbhum, the law [namely, clause (6) of section 23 of Act X of 1859] as it stood prior to 1909, when the Chota Nagpur Tenancy Act, 1908, was extended to that area.

Appeal by the defendants.

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

S. M. Mullick and *N. N. Rai*, for the appellants.

S. C. Mazumdar, for the respondants.

(1) S. A. 477 of 1923 (Unreported).
(2) (1926) I. L. R. 6 Pat. 64.
(3) (1926) 8 Pat. L. T. 397.
(4) (1926) I. L. R. 6 Pat. 296.
(5) (1926) A. I. R. (Pat.) 64.
(6) (1927) 9 Pat. L. T. 340.

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MACPHERSON, J.—The only question argued in this second appeal is whether the suit was triable in the civil court or was entertainable only by the revenue court under the provisions of section 139 (*5*) and section 139A of the Chota Nagpur Tenancy Act, 1908, as amended. If the decision be that it is triable by the Deputy Commissioner, it is further urged on behalf of the appellants that it is barred by limitation of one year under section 231 of that Act.

The plaintiffs sued in 1928 for a declaration of title and for recovery of possession of their holding in the Jharia estate in Manbhum on the claim that they were occupancy raiyats dispossessed by the zamindar in Asarh, 1330 (corresponding to July, 1923). The defences of the Receiver of the estate and of the other defendants who according to the defence are cultivating the land on bhag under the Receiver, included a denial of the jurisdiction of the civil court. That and other defences having been negatived, it is contended on appeal on behalf of the defendants that the suit was only triable in the revenue court and was when brought long barred by limitation of one year.

The present law on the point is contained in section 139 (*5*) and section 139A read together. The former runs:—

"The following suits and applications shall be cognizable by the Deputy Commissioner, and shall be instituted and tried or heard under the provisions of this Act, and shall not be cognizable in any other Court, except as otherwise provided in this Act, namely:—..... (*5*) all suits and applications to recover the occupancy or possession of any land from which a tenant has been unlawfully ejected by the landlord or any person claiming under or through the landlord."

Section 139A, so far as material, is as follows:—

"Subject to the provisions of Chapter XII, no Court shall entertain any suit concerning any matter in respect of which an application is cognizable by the Deputy Commissioner under section 139,....."

The origin of section 139(*5*) is to be found in clause 6 of section XXIII of the Recovery of Rents Act, X of 1859, which ran:—

"6. All suits to recover the occupancy or possession of any land, farm, or tenure, from which a raiyat, farmer, or tenant has been

illegally ejected by the person entitled to receive rent for the same:..... .....shall be cognizable by the Collectors of land revenue, and shall be instituted and tried under the provisions of this Act, and, except in the way of appeal as provided in this Act, shall not be cognizable in any other Court, or by any other officer, or in any other manner."

Now this provision was considered by a Full Bench of the Calcutta High Court in *Gurudas Rai* v. *Ram Narain Mitter*(1) and it was held that it " refers only to possessory actions against the person entitled to receive the rent and not to suits in which the plaintiff sets out his title and seeks to have his right declared and possession given him in pursuance of that title ", and does not bar the jurisdiction of the civil courts in such suits for wasilat or not. It was there said that the provision " does not take from the civil court the power to try the question of title as between a raiyat, farmer, or tenant, and the person to whom he pays rent. It follows, therefore, that in the action which is brought setting out a title by plaintiff and asking ' under the above facts ' to be declared ' entitled on the strength of his documents to recover possession of the lands ' he will be entitled, if he makes out his case, to a decree that he be put in possession of the lands with mesne profits.....". In that case the plaintiff raiyat had been ten or eleven years out of possession.

In *Janardan Acharjee* v. *Hardhan Acharjee*(2) the referring Judges said:—

" A suit under clause 6, section XXIII of Act X of 1859 has been already declared by a Full Bench decision of this Court to be merely a possessory suit. No question of right or title can be gone into, and the result of the action depends entirely upon the proof or otherwise of the fact of *illegal ejectment* complained of ".

The Full Bench pointed out that the effect of the previous Full Bench decision was that a suit for a

(1) (1867) 7 W. R. (Civil) 186.
(2) (1867) 9 W. R. (Civil) 513, F. B.

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declaration of right might be brought in the ordinary civil court.

In *Asman Singh* v. *Shaikh Obeedooddeen*(1) it was pointed out that the limitation of one year prescribed by section 27 of Act VIII of 1869 applied only to suits described in it and that the suits to recover the occupancy of any land, etc. referred to therein, were suits which were cognizable by the revenue courts under section XXIII, clause 6 of Act X of 1859.

Act X of 1859 was applicable to Manbhum until the introduction in 1909 of Bengal Act VI of 1908. In the rest of the Chota Nagpur Division, Bengal Act I of 1879, the Chota Nagpur Landlord and Tenant Procedure Act, repealed Act X of 1859. Section 37(*6*) of the new enactment reproduced clause 6 of section XXIII of Act X of 1859 except that the last sentence was altered to read :

" and shall not be cognizable in any other court except in the way of appeal as provided in this Act ".

The alteration merely omits superfluous matter and is not one of substance.

Section 139(*5*) of the Chota Nagpur Tenancy Act, VI of 1908, susbtantially reproduced section 37(*6*) of Bengal Act I of 1879 except that the word " applications " was substituted for " suits " and the expression " unlawfully ejected " for " illegally ejected ". The first change followed upon the introduction of section 71, a provision which empowers the Deputy Commissioner within three years of the date of ejectment (section 237) of a tenant from his tenancy or any portion thereof in contravention of section 68 to replace the tenant in possession. Section 68 provides that a tenant shall not be ejected except in execution of a decree, or in execution of an order of the Deputy Commissioner. The change to " unlawfully ejected " from " illegally ejected " may be due to the language of section 71, but in this collocation

(1) (1875) 23 W. R. (Civil) 460.

there does not appear to be any substantial difference between the two expressions.

The question quickly arose whether possessory suits were still cognizable by the revenne courts as they had been under Act X of 1859 and Bengal Act I of 1879. In 1911 it was held in *Khetra Nath Ghattak* v. *Peru Bauri*(1), a case of the district of Manbhum which arose out of a possessory suit under section 9 of the Specific Relief Act, that the suit could be brought in the civil court and indeed that as a result of the change mentioned, the Chota Nagpur Tenancy Act of 1908 did not refer to suits at all, much less bar them from being brought in a civil court. By the amending Act of 1920, as it came into operation, section 139A was added but there was no change in section 139(5). The change therein came into operation on 1st March, 1924.

The effect of section 139A on the jurisdiction of the civil court was considered by this Court in a series of cases in 1926. Adami, J. sitting singly held in *Akhouri Parmeshwari Charan* v. *Chaudhury Gursaran Prasad*(2) that section 139A barred a civil suit by raiyats forcibly dispossessed in 1916 by the landlord for a declaration that they were occupancy raiyats of the land and for recovery of possession, if the suit was instituted after the introduction of section 139A. The same view was taken by Das and Adami, JJ. in *Dhuplal Sahu* v. *Bhekha Mahto*(3). Adami and Bucknill, JJ. in *Chotlal Nandkishore Shah Deo* v. *Tula Singh*(4), however, took a different view in the same circumstances and held that such a suit was not barred as the cause of action had arisen before the introduction of the amendment in 1920 since thereby the plaintiff would be deprived of his cause of action. The first decision of Adami, J. went in Letters Patent Appeal in *Chaudhury Gursaran Das* v. *Akhouri*

(1) (1911) 15 Cal. W. N. 387.
(2) S. A. 477 of 1923 (Unreported).
(3) (1926) I. L. R. 6 Pat. 64.
(4) (1926) 8 Pat. L. T. 397.

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Parmeshwari Charan(1) and was reversed by Miller, C.J. and Jwala Prasad, J. not only on the ground given in *Chotlal Nandkishore* v. *Tula Singh*(2) but also on a consideration of the object and effect of the new section 139A read with the amended section 139(5) which, it was held is " to bar only the cognizance of the civil courts of purely possessory suits under the Specific Relief Act and to restore the law as it stood prior to 1908. These new provisions in the Act do not in any way take away the jurisdiction of the civil courts to entertain suits for possession based upon the determination of title. Only summary suits for possession, and not title suits, with consequential relief for possession, are barred by these provisions ". In *Gobinda Bauri* v. *Kristo Sardar*(3), Kulwant Sahay, J. considered both provisions and held that section 139(5) contemplates only a case where the relationship of landlord and tenant is admitted to exist between the parties and does not contemplate cases where there is a dispute about title. The decision in Letters Patent Appeal was followed by Das and James, JJ. in *Deonandan Pande* v. *Anhach Kahar*(4) in holding that section 139A did not bar a civil suit for declaration of title with consequential possession and they also held that the general law of limitation applied. Thus both the judges who decided *Dhuplal Sahu* v. *Bhekha Mahto*(5) quickly discarded the view there expressed and indeed the decision in the Letters Patent Appeal has been regarded by all Courts as settling the law on the subject.

[As has been indicated above, " the law as it stood prior to 1908" meant in the case cited which came from Palamau, section 37(6) of Bengal Act I of 1879. In the present case from Manbhum the expression should strictly be "the law (namely, clause 6 of section XXIII

(1) (1926) I. L. R. 6 Pat. 296.
(2) (1926) 8 Pat. L. T. 397.
(3) (1926) A. I. R. (Pat.) 64.
(4) (1927) 9 Pat. L. T. 340.
(5) (1926) I. L. R. 6 Pat. 64.

of Act X of 1859) as it stood prior to 1909 " when the Chota Nagpur Tenancy Act, 1908, was extended to Manbhum].

It was urged by Mr. S. M. Mullick on behalf of the appellants that the decided cases *Chaudhury Gurusaran Das* v. *Akhauri Parmeshwari Charan*(1) and *Deonandan Pande* v. *Anhach Kahar*(2) which are against his contention, are distinguishable, in that the cause of action arose prior to the amending Act of 1920 which introduced section 139A, and further the suits were instituted prior to the 1st March, 1924, on which came into operation, by notification in the Gazette of 27th February 1924, the amendment of section 139(*5*) making that provision apply to " all *suits and* applications " instead of, as formerly, " to all applications ". The present cause of action arose in the interval between the two amendments, so that in this case, precisely as in all previous reported cases, the civil court was at the date when the cause of action accrued, the sole forum for a suit whether for a declaration of title and consequential recovery of possession or for any other relief. The only distinction is that in the present instance the suit was instituted *after* section 139(*5*) had come into operation. But this consideration is material only to the extent that at the date when the suit was instituted, the ground common to *Chotlal Nandkishore* v. *Tula Singh*(3) and the Letters Patent Appeal(1) that the plaintiff would have no forum at all if he could not bring a civil suit, no longer subsisted. The learned Judges who determined the Letters Patent Appeal(1) interpreted section 139A and the amended section 139(*5*) together and the view which they expressed of their effect is not only in accordance with the legislative and judicial history set out above but is the only reasonable construction of the law as it now stands. In my judgment their decision furnishes a complete answer to the

(1) (1926) I. L. R. 6 Pat. 296.
(2) (1927) 9 Pat. L. T. 340.
(3) (1926) 8 Pat. L. T. 397.

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contention in appeal on the question of forum and would equally do so even if the cause of action also had been subsequent to the amendment of section 139(*5*). Section 139A only bars the civil court from entertaining a suit regarding a matter cognizable by the Deputy Commissioner by way of application. So far as recovery of possession of a tenancy is concerned, the only application cognizable by the Deputy Commissioner is one for possession after unlawful ejectment, that is to say, an application under section 71 to be summarily replaced in possession after consideration of the one question whether the applicant's ejectment had been by unlawful method. That is the application contemplated by section 139(*5*). A suit under that provision must contemplate the same circumstances, that is to say, a possessory suit in which the sole question for consideration is whether the ejectment has been unlawful. The legislature resolved that all suits and applications on this matter should be cognizable by the revenue court only. But by neither provision did it bar the civil courts from entertaining a suit for declaration of title to and consequent recovery of possession of a tenancy nor interfere with the period of limitation prescribed for such a suit.

A comparison of section 139(*5*) with section 139(*6*) is also instructive. The latter definitely assigns to the Deputy Commissioner all suits by or against a village-headman for a *declaration of title in*, possession of, ejectment from, or recovery of, his office or land comprised in his village-headman's tenancy. It would have been unnecessary to refer to a declaration of title in his office or the land of his tenancy if in sub-section (*5*) " occupancy or possession " covered the same ground as " declaration of title in, possession of &c." covers in sub-section (*6*).

On the question of limitation it is manifest that section 237 could not apply. Section 231 applies the same limitation of one year to suits under the Act as section XXX of Act X of 1859 and section 42 of

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Bengal Act I of 1879 did in almost identical language and it is obvious that the same class of suit was intended, to wit, a possessory suit for the raiyat after illegal or unlawful ejectment by the landlord, and that the provision has no application to a suit for declaration of the plaintiff's title, with consequential relief as to possession.

Upon this view the suit of a raiyat for declaration of title to and recovery of possession of his holding from a landlord lies in the civil court and does not lie in the revenue court and the period of limitation is the ordinary one and not one year as it is in a possessory suit under section 139(5) of the Chota Nagpur Tenancy Act.

The appeal is without merits and is accordingly dismissed with costs.

AGARWALA, J.—I agree.

Appeal dismissed.

PRIVY COUNCIL.

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J. C.*
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July, 27.

On Appeal from the High Court at Patna.

Privy Council Practice—Criminal Matter—Trial by Jury —Juror ignorant of English.

The eight appellants were tried for murder and rioting by a Sessions Judge sitting with a jury of seven. The jury having found them guilty by a majority of six to one the Sessions Judge convicted and sentenced them, some to death. The convictions and sentences were confirmed by the High Court. Upon an application for special leave to appeal an inquiry was ordered to be made by the High Court as to the truth of an allegation made on appeal to the High Court, and by the petition, that one of the jurors did not understand English. The High Court reported that the juror in question

* *Present*: Lord Atkin, Lord Thankerton, and Sir George Lowndes.

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did not know sufficient English to follow the addresses of the pleaders or the judge's charge or so much of the evidence as was given in English :—

Held, that the convictions and sentences should be set aside as there had been a mis-trial, and that any discretion as to any consequential order should be exercised by the High Court, it being left to the representatives of the Crown in India to take such steps as to a re-trial as were open to them.

Rex v. *Thomas*(1), dissented from.

Appeal (no. 21 of 1933) by special leave from an order of the High Court (June 28, 1932) confirming an order of the Sessions Judge of Patna convicting the appellants of penal offences and sentencing them.

The appellants were convicted under section 302 (murder) and section 148 (rioting armed with deadly weapons) of the Indian Penal Code. Appellants nos. 1 to 7 were sentenced to death, and appellant no. 8 to transportation for life. Appeals to the High Court were dismissed. The sentences of death on appellants nos. 2, 3, 6 and 7 had been commuted to transportation for life.

The facts relevant to the present appeal, which was based upon the alleged inability of one of the jury of seven to understand the English language, are stated in the judgment of the Judicial Committee.

The following provisions of the Code of Criminal Procedure were material:

By section 274, sub-section 2, the jury, in the case of the trial in question, was to

" consist of not less than seven persons and, if practicable, of nine persons ".

By section 278—

" Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed.....(*g*) his inability to understand the language in which the evidence is

(1) (1933) 2 K. B. 489.

given, or when such evidence is interpreted, the language in which it is interpreted."

By section 306(*1*)

"When in a case tried before the Court of Session the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly ".

1933. *July*, 3. *Pritt, K. C.* and *Sidney Smith* for the appellants. It has been intimated that in view of the report of the High Court the Crown does not oppose the view that the conviction and sentences should not stand. It is submitted that the order on appeal should merely set them aside and should not provide for a new trial. The appellants cannot be proceeded against again there having already been a trial.

[LORD THANKERTON.—The statutory jury being seven was there in the circumstances a jury or a trial?]

The juror in question was qualified to sit, the error was in not ascertaining and providing for his ignorance of English.

[LORD ATKIN.—The result of what you say is that the men have been committed and charged but have not been tried in accordance with the ordinary procedure. The present view of the Board is that there has been a trial *coram non judice*. We might leave it to the Court in India to decide what the proper relief is.]

Counsel for the Crown was called on.

Dunne, K. C. and Wallach for the King-Emperor: It is conceded that the convictions and sentences should not stand. The true view is that the appellants have not been tried. The High Court should be put back into the position in which it was under section 423 of the Code of Criminal Procedure and left to make such order as it thinks right. That is much what was

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done in *Sayyapureddi Chinayya* v. *The King-Emperor*(1), a case in which the sentence exceeded the legal maximum; it was there contended unsuccessfully that the High Court was functus officio.

[LORD ATKIN.—Setting aside a conviction on the ground of irregularity does not give rise to a plea of res judicata. But if the conviction is set aside can the High Court be re-invested with jurisdiction to deal with the matter?]

It is submitted that the order of the High Court could be set aside and the case remitted to that Court to make the order which it ought to have made.

[LORD THANKERTON.—If the convictions are set aside is there anything to prevent a fresh trial upon the commitment?]

It is submitted not. But we ask merely that there should be substituted for the order of the High Court an order setting aside the convictions and sending the cases back to that Court to deal with according to the law in India.

In *Jannokee Doss* v. *The King*(2) a new trial was ordered in a criminal matter, but that was in 1836 before the Acts and Orders which now vest in the High Courts appropriate powers.

Pritt, K. C. replied.

July 27. The judgment of their Lordships was delivered by—

LORD ATKIN.—This is an appeal by special leave. The appellants were tried by the Sessions Judge of Patna, sitting with a jury of seven. They were found guilty by a majority verdict of six to one on charges of murder and rioting. Appellants nos. 1—7 were sentenced to death and no. 8 to transportation for life They appealed to the High Court, but their appeal was dismissed. The sentences on appellants nos. 2, 3, 6

(1) (1920) I. L. R. 44 Mad. 297; L. R. 48 I. A. 35.
(2) (1836) 1 Moo. I. A. 67.

and 7 were subsequently commuted by the Local Government to transportation for life.

On their application for leave to appeal to His Majesty in Council it was asserted that one of the seven jurors did not understand English, the language in which some of the evidence appears to have been given, and in which the addresses of counsel were made and the charge of the Sessions Judge was delivered. This contention had been put forward on their behalf in their appeal to the High Court. It was originally supported by an affidavit upon which the learned Judges of that Court properly refused to rely. A second affidavit to the same effect of a more reliable character was tendered on the last day of the hearing, but was rejected as too late, and the appeal was (as already stated) dismissed.

Under these circumstances an enquiry was by order of His Majesty in Council directed to be held by the High Court as to the truth of the allegations so made. The High Court reported that the juror in question did not know sufficient English to follow the address of the lawyers and the Judge's charge or the English evidence. It was after consideration of this report and upon this ground that special leave to appeal was granted.

On the appeal coming on for hearing before the Board counsel for the Crown has not impugned the correctness of the report and has admitted that on this finding the convictions cannot be maintained. In their Lordships' opinion, this is necessarily the correct view. They think that the effect of the incompetence of a juror is to deny to the accused an essential part of the protection accorded to him by law and that the result of the trial in the present case was a clear miscarriage of justice. They have no doubt that in these circumstances the conviction and sentence should not be allowed to stand. They think it was most unfortunate that this matter was not fully enquired into

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by the High Court when the appeal was before it. Had the learned Judges been satisfied then of the truth of the facts now established, it would have been open to them under the provisions of section 423 of the Criminal Procedure Code, if they so thought fit, to have reversed the findings and sentences of the Sessions Judge and ordered the appellants to be re-tried, a course which, in their Lordships' opinion, would have fully met the ends of justice.

Since the hearing of the case their Lordships have had their attention directed to the case of *R.* v. *Thomas*(1), a decision of the Court of Criminal Appeal given on the very date upon which this present case was before their Lordships. Owing to the remarkable fact that there is no official shorthand note of judgments delivered by the Court of Criminal Appeal their Lordships might have been in a difficulty if they had not had the advantage of seeing an advance copy of the report to be published in the Criminal Appeal reports. In that case the appellant had been convicted at the Merioneth Quarter Sessions of sheepstealing He appealed on the ground amongst others, that two of the jurors had not sufficient knowledge of the English language to enable them to follow the proceedings. His counsel sought to use affidavits by the jurors in question to that effect. The Court refused to receive the evidence and dismissed the appeal against the conviction, although on other grounds they reduced the sentence. It would appear from the report that the judgment was based in part upon the well established ground that for the purpose of setting aside the verdict evidence is not admissible by jurors to prove what discussions took place in the jury box or in the jury room. It was further based upon the proposition that when a verdict is delivered in the sight and hearing of all the jury without protest their assent is conclusively inferred. The suggestion was made *arguendo*, but does not seem to have been decided that if a juror was

(1) (1933) 2 K. B. 489.

disqualified by law the objection could not be entertained after verdict. If their Lordships agreed with all the grounds of this decision they would have had to consider whether, notwithstanding the lack of opposition by the prosecution they would have interfered with the decision of the High Court at Patna. But with the greatest respect for the learned members of the Court of Criminal Appeal they are unable to accept the reasons given for this decision. The question whether a juror is competent for physical or other reasons to understand the proceedings is not a question which invades the privacy of the discussions in the jury box or in the retiring room. It does not seek to inquire into the reasons for a verdict. If the alleged defect of the juror could be proved at all *aliunde* there seems to be no reason why the evidence of the juror himself should not be available either for or against the allegation. It would seem remarkable that if evidence of neighbours could be given that a juror did not understand English, it should not be open to the prosecution to produce the strongest evidence possible by calling the juror himself to show that he fully understood the proceedings. Similarly their Lordships are unable to accept the view that any presumption of assent by all the jurors to a verdict given in their presence is decisive of or indeed relevant to the question. The problem is whether the assent so given or inferred is of a competent juror, *i.e.*, in such a case as the present not so incapacitated from understanding the proceedings as to be unable to give a true verdict according to the evidence. The objection is not that he did not assent to the verdict, but that he so assented without being qualified to assent.

It is noteworthy that in the case of *Ellis* v. *Deheer*(1) evidence was permitted to be given that some of the jurors though present in Court were not able to see or hear the foreman give their verdict, and that the evidence of the fact was the evidence of the jurors

(1) (1922) 2 K. B. 113.

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themselves. The judgments draw pointed attention to the distinction between evidence of what takes place in the jury box and jury room, and evidence of what takes place in open Court. Accepting the evidence the Court of Appeal granted a new trial. There is an interesting case of *Ex parte Morris*(1) where a rule for a *certiorari* was applied for to quash a conviction at quarter sessions on the ground that one of the jurors was intoxicated. The only evidence was that of a solicitor based on information. The Court, Phillimore and Walton, JJ., refused the rule on the ground that the evidence was insufficient, but gave leave to renew it, and said that if renewed there should be an affidavit as to the circumstances from one of the other jurymen.

So far as *R.* v. *Thomas* is a decision as to the admissibility of evidence of the juror himself it is true that it does not cover the present case, for in India there was evidence other than that of the jurors concerned, though at the inquiry some of the jurors impugned were in fact, called. Their Lordships have already stated their difficulty in accepting the view that the evidence even of the jurors was inadmissible. But so far as *R.* v. *Thomas* decides that no evidence is admissible after verdict to establish the inability of a juror to understand the proceedings their Lordships definitely disagree with it. A valuable contribution to the discussion is made in the case of *Mansell* v. *The Queen*(2) by Lord Campbell delivering the judgment of the Court of Queen's Bench on a writ of error. The plaintiff in error had been convicted of murder, and one cause of error assigned was that the presiding Judge at the trial had directed a juror not to be sworn who had declared himself to have a conscientious objection to capital punishment; holding this to be no error Lord Campbell said:—

"We are not now to define the limits of this authority; but we cannot doubt that there may be cases, as if a juryman were completely

(1) (1907) 72 J. P. 5.
(2) (1857) 120 E. R. 8, 30; 8 E. & B. 54, 81, 82.

deaf, or blind, or afflicted with bodily disease which rendered it impossible to continue in the jury box without danger to his life, or were insane, or drunk, or with his mind so occupied by the impending death of a near relation that he could not duly attend to the evidence, in which, although from their being no counsel employed on either side, or for some other reason, there is no objection made to the juryman being sworn, it would be the duty of the Judge to prevent the scandal and the perversion of justice which would arise from compelling or permitting such a juryman to be sworn, and to join in a verdict on the life or death of a fellow creature."

This duty has later been held to be a continuous duty throughout the trial. It would be remarkable indeed, if what may be " a scandal and perversion of justice " may be prevented during the trial, but after it has taken effect the Courts are powerless to interfere. Finality is a good thing, but justice is a better. According to ordinary procedure in criminal trials the accused has a right of challenge either peremptory, or for cause; and it may very well be that if knowing the alleged defect he stands by and takes his chance of a verdict he is precluded from thereafter taking the objection. But if the cause of objection is in fact unknown to him, there appears to be no reason why the Court in a proper case should not give effect to it.

The result of upholding the objection is that there has been a mis-trial. In England the ordinary order would be in such circumstances to award a *venire de novo* as in the case of *R.* v. *Wakefield*(1) where a person not qualified and not summoned, personated on the jury a man who was qualified and had been summoned. Their Lordships, however, think it desirable that any discretion as to any consequential order should be exercised by the High Court, and they content themselves, therefore, with humbly advising His Majesty that the appeal should be allowed, that the dismissal of the appeal by the High Court should be reversed, and the convictions and sentences set aside, leaving the representatives of the Crown in India to take such steps in the matter of a re-trial as may be open to them there.

(1) (1918) 1 K. B. 216.

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RAS BEHARI LAL v. KING-EMPEROR.

LORD ATKIN.

Solicitors for appellants: *Hy. S. L. Polak and Co.*

Solicitor for respondent: *Solicitor, India Office.*

APPELLATE CIVIL.

Before Macpherson and Agarwala, JJ.

JUGESWAR PRASAD

v.

RAMDHARI MAHTO.*

1933.

July, 25, 26.
August, 8.

Revenue Sales Act, 1859 (*Act XI of* 1859), *section* 37—*proviso, significance and scope of—circumstances protecting raiyat having occupancy right at a fixed rent.*

Section 37 of the Revenue Sales Act, 1859, provides:—

"The purchaser of an entire estate in the permanently settled districts of Bengal, Bihar and Orissa sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement; and shall be entitled to avoid and annul all under-tenures, and forthwith to eject all under-tenants with the following exceptions:..... .....

....

Provided always that nothing in this section contained shall be construed to entitle any such purchaser as aforesaid to eject any raiyat, having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force, or to enhance the rent of any such raiyat otherwise than in the manner prescribed by such laws, or otherwise than the former proprietor, irrespectively of all engagements made since the time of settlement, may have been entitled to do."

Held, (*i*) that the important circumstance which distinguishes the right of the new proprietor to enhancement from that of the previous defaulting proprietor is that the new proprietor is entitled to enhance "irrespectively of all engagements made since the time of settlement" and the expression

* Appeal from Appellate Decree no. 291 of 1930, from a decision of Babu Radha Krishna Prasad, Subordinate Judge of Patna, dated the 28th June 1929, confirming a decision of Babu Jugal Kishore Narayan, Munsif of Patna, dated the 16th July, 1928.

" since the time of settlement " ordinarily means " subsequent to the Permanent Settlement ";

(*ii*) that the proviso does not save from enhancement of rent all raiyats even of the first class (raiyats having a right of occupancy at a fixed rent) whom it protects from ejectment, but only those of that class whose fixity of rent is founded upon an engagement *not* made after the Permanent Settlement;

(*iii*) that the right of the new proprietor to enhancement is not subject, as in the case of raiyats of under-tenures which are sold up under Act VIII of 1865, to proof that a higher rent would have been demandable at the date of the engagement.

Sarbeswar Patra v. *Maharaj Sir Bejoy Chand Mahatab*(1), followed.

Abdul Gani v. *Makbul Ali*(2) and *Sarat Chandra* v. *Asiman Bibi*(3), observation of Mitra, J., not followed.

Where the raiyat agreed to an enhancement of rent on condition that the enhanced rent was fixed in perpetuity but the condition of fixity failed after a revenue sale and the new proprietor applied for enhancement of the rent.

Held, that the provisions of section 35 of the Bengal Tenancy Act were specially applicable.

Appeal by the plaintiff.

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

The case originally came on for hearing before Jwala Prasad, J. who referred it to a Division Bench.

B. C. Sinha, for the appellant.

No one for the respondents.

MACPHERSON, J.—This second appeal arises out of a suit for arrears of rent of a holding of 8.99 acres at an annual rental of Rs. 95-15-0 which is described as occupancy kaimi, and for an enhancement of that rent under the provisions of section 30(*b*) of the Bengal

(1) (1921) 26 Cal. W. N. 15.
(2) (1914) 20 Cal. W. N. 185.
(3) (1904) I. L. R. 31 Cal. 725.

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Tenancy Act which is claimed in one place in the plaint at eight annas a bigha and at another place at eight annas a bigha or at a rate found after the usual calculations.

The defence to the claim for enhancement was that the holding is held at a fixed rate under a patta of 1901.

The Courts below having decreed the claim for rent only, the landlord appeals against the rejection of the application for enhancement.

The facts found are these. The tenancy was a kaimi occupancy holding not found to have been created before the date of the Permanent Settlement. When the landlord sought enhancement of rent in 1901, the raiyat agreed to the present rent on condition that he should be granted a *doami* patta, the meaning of which is that the rent of the holding was to be fixed and not subject to diminution or enhancement. In 1911 the entry 'kaimi' was made in the record-of-rights. In 1914 the estate in which the holding is situated, was purchased by the plaintiff at revenue sale.

The appellant relies upon the provisions of section 37 of the Revenue Sales Act, XI of 1859, under which the purchaser of a permanently settled estate sold under the Act for the recovery of arrears due on its own account is entitled, except in four cases set out, to avoid and annul all under-tenures and forthwith to eject all under-tenants, subject to the following proviso:

> "Nothing in this section contained shall be construed to entitle any such purchaser as aforesaid to eject any raiyat having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force, or to enhance the rent of any such raiyat otherwise than in the manner prescribed by such laws, or otherwise than the former proprietor, irrespectively of all engagements made since the time of settlement, may have been entitled to do."

The respondents are not represented. Mr. B. C. Sinha on behalf of the appellant urges that under this

provision the landlord who purchased at revenue sale in 1914, is entitled to enhance the rent of the defendants-respondents in spite of their *doami* patta of 1901.

In my judgment, on the above proviso construed both as it stands and in the light of the previous revenue enactments, the contention cannot be gainsaid. The proviso first saves from ejectment to which section 37 makes all save the excepted under-tenants liable, raiyats having a right of occupancy at a fixed rent, or at a rent which though not fixed, is not subject to arbitrary enhancement but is assessable according to fixed rules under the laws in force. These two classes were clear while Act X of 1859 was in force. Though Act X came into force shortly after Act XI, it is evident that section 37 of the latter, here refers to it and that the second class is the new class of raiyat having a right of occupancy (a new expression), which comprised the old class of the khudkasht raiyats and such of the pahikasht raiyats as could prove occupation for twelve years—to whom the privilege of permanence or right of occupancy hitherto peculiar to khudkast raiyats was now extended. The Bengal Tenancy Act, 1885, greatly widened the right of occupancy, but it has been held that this extended occupancy right must now be equated with that of the proviso under discussion [*Sarat Chandra* v. *Asiman*(1)].

The proviso then goes on substantially to prohibit enhancement of " the rent of any such raiyat ", (meaning a raiyat of either of the two classes referred to) otherwise than in the manner prescribed by the laws in force, an expression signifying ' by the laws for the time being in force ', or, with an important exception, otherwise than in the circumstances in which the former proprietor was entitled to secure an enhancement. Now the procedure of the Bengal Tenancy Act in respect of application for enhancement

(1) (1904) I. L. R. 31 Cal. 725.

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is the manner prescribed by the laws at present in force. The important circumstance which distinguishes the right of the new proprietor to enhancement from that of the previous defaulting proprietor is that the new proprietor is entitled to enhance "irrespectively of all engagements made since the time of settlement", and the expression "since the time of settlement" means "subsequent to the Permanent Settlement". The result is that if any such raiyat held at a fixed rent prior to the Permanent Settlement, he has under the proviso a good answer to a suit by the new proprietor for an enhancement of rent, but if the fixity was based upon an engagement subsequent to that settlement, it is to be no answer to the claim. And reasonably so, since the new proprietor having purchased at revenue sale, is not the successor in interest of the defaulting proprietor and so has no privity with the raiyat quoad fixity of the rent. In short, the proviso does not save from enhancement of rent all raiyats even of the first class whom it protects from ejectment, but only those of that class whose fixity of rent is founded upon an engagement *not* made after the Permanent Settlement.

The lease at a fixed rent in perpetuity which since Regulations V and XVIII of 1812, a proprietor of an estate has been competent to grant so as to bind himself, his heirs and assigns, has never been held binding upon a purchaser under a sale for an arrear of revenue of the estate [*see* per Sir Barnes Peacock in *Isshur Ghose* v. *Hills*(1)].

Again in the case of patni taluks and other saleable under-tenures transferable by sale or otherwise for recovery of arrears of rent due in respect thereof, it is provided in Regulation VIII of 1819 by paragraph 11 *Third*, and in section 16 of the Bengal Rent Recovery (Under-tenures) Act VIII of 1865 (which followed it, without taking any notice of the new provisions in Act X of 1859 or of the new language in

(1) (1864) W. R. (F. B.) 148, 153.

section 37 of Act XI of 1859) that the under-tenure is acquired free from all encumbrances which may have accrued thereon by any act of a holder unless the right of making the encumbrance shall have been expressly vested in the holder, and the following proviso is added:

"Provided that nothing herein contained shall be held to entitle the purchaser to eject khudkasht raiyats or resident and hereditary cultivators, nor to cancel bona fide engagements made with such class of raiyats or cultivators aforesaid by the late incumbent of the under-tenure or his representatives, except it be proved, in a regular suit to be brought by such purchaser for the adjustment of his rent, that a higher rent would have been demandable at the time such engagements were contracted by his predecessor."

Something similar is found in respect of the fourth exception to section 37 now under consideration where though certain leases are protected from annulment, yet enhancement is allowable on proof that the original rent was unfair and the land has not been held for over twelve years at a fixed rent equal to the rent of good arable land. From the general policy of the legislating authority which never vested in or acknowledged in the proprietor of an estate a right of making indiscriminate encumbrances which might imperil the revenue, it is natural that the position accorded to subordinate interests, including those of raiyats, would be more favourable in the case of a sale of an under-tenure than in the case of a sale of an estate for arrears of its land revenue. The favour to raiyats in such under-tenures is shown in making bonafides the test of the engagement or contract—the new under-tenureholder has to accept a bonafide engagement and all he can do is to sue for enhancement of the rent fixed therein on the ground that a higher rent would have been demandable at the date of the engagement. I cannot find that even this concession was ever made applicable to the case of a purchase at revenue sale.

It is also reasonable to suppose, as Richardson, J. suggests, that the proviso to section 37, reflected the provisions contained in sections 3 to 6 of Act X of

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1859. In *Sarbeswar Patra* v. *Maharaja Sir Bejoy Chand Mahatab*(1) the learned Judge observes: " All raiyats having a right of occupancy under that Act were protected from ejectment. Where the rent of a holding had not been changed since 1793, it was protected from enhancement but the rent of occupancy raiyats including occupancy raiyats at a fixed rate holding under " engagements made since the time of settlement " became liable to enhancement under the laws in force, irrespective of those engagements. That result was also consistent with the state of things brought about by Regulation V of 1812 referred to above ". At a later point the learned Judge, considering the case of a settled raiyat of a village, who in respect of the holding in connection with which the question arises, is a raiyat at a fixed rate, says: " Such a raiyat would be protected from ejectment but might be liable under the laws in force to enhancement of rent on the ground that he holds ' under an engagement made since the time of settlement '."

The decisions which have been cited before us are *Abdul Gani* v. *Makbul Ali*(2) and *Sarbeswar Patra* v. *Maharaja Sir Bejoy Chand Mahatab*(1) and the decisions mentioned in those cases. Of these *Abdul Gani* v. *Makbul Ali*(2) is the only case where the facts are similar. It was held there that the raiyat could not be ejected. But it was also held that the further prayer for assessment of fair and equitable rent would not arise, inasmuch as the very basis of the protection offered by that section is against any enhancement and enhancement was really what the plaintiff was seeking. The learned Judges added—" It is not within the scope of the suit; if it were, fair and equitable rent of an occupancy raiyat at fixed rates would obviously be the rent which had been fixed for his holding ". These observations, though obiter, are entitled to respect. Apparently they also coincide with the view

(1) (1921) 26 Cal. W. N. 15, 28.
(2) (1914) 20 Cal. W. N. 185.

of Mitra, J. in *Sarat Chandra* v. *Asiman Bibi*(1) where he says of the proviso under discussion "Speaking of enhancement of rent, *where that is possible*, i.e. of the second class" (that is, raiyats whose rents are not fixed as opposed to the first class, consisting of raiyats having rights of occupancy at fixed rents). The point now in controversy did not then really arise for decision, and the senior judge did not deal with it at all. The view indicated in those two cases was clearly not accepted by Richardson, J. in *Sarbeswar Patra* v. *Maharaja Sir Bejoy Chand Mahatab*(2) quoted above. In my judgment while the proviso to section 37 affords complete protection against ejectment to a raiyat holding at a fixed rent, it affords protection to such raiyat against enhancement of rent only in certain circumstances, among which is *not* an engagement for fixity of the rent made between the raiyat and the previous proprietor subsequent to the Permanent Settlement even though valid against such previous proprietor, as it is specially excluded. With the views indicated upon the point before us by Richardson, J. in the last-mentioned case, I would respectfully concur.

Upon this view the appellant is entitled to an enhancement of the rent of the holding in suit, if he can bring the case within section 30(*b*) of the Bengal Tenancy Act. His right is not subject, as in the case of raiyats of under-tenures which are sold up under the Act of 1865, to proof that a higher rent would have been demandable in 1901.

But materials are not available on the present record for a decision as to whether any and if so what enhancement is to be given. The suit was tried with two others in which an enhancement of three annas in

(1) (1904) I. L. R. 31 Cal. 725, 732.
(2) (1921) 26 Cal. W. N. 15.

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the rupee was allowed, but the question of fixed rent did not arise in them. Moreover these holdings appear to have contained bhit as well as dhanhar whereas the defendants' holding consists entirely of dhanhar. There is nothing on the record to show that the maximum rate of enhancement for dhanhar is as much as three annas in the rupee. Indeed on the record of the trial court, as it has been sent up to us, there are no calculations at all showing the maximum enhancement allowable under section 30(*b*). Then another point of importance arises in this case. Manifestly section 35 may be applicable. The enhancement made in 1901 was submitted to by the raiyat in return for a consideration, to wit, a fixed rent in perpetuity. That consideration having failed in and from 1914, it will be a reasonable claim on the part of the raiyat that in the complicated situation which has arisen, the rise in the price of staple food crops is by no means the only matter to be considered. To enable it to do justice a court would at least require to have before it the rent payable in 1901 and the enhancement then made in return for the consideration that has failed, and all relevant matters must be considered together.

Accordingly the decision of the courts below is reversed on the preliminary point, the appeal is allowed and the suit is remanded to the trial court, which will decide what enhancement, if any, can be allowed under section 30(*b*) of the Bengal Tenancy Act. subject to the provisions of section 35 that it may not decree a rent which under the circumstances of the case is unfair or inequitable. For a proper decision it is necessary that the parties should be allowed to adduce such additional evidence as they may desire, and it is so ordered. It should be mentioned that Mr. B. C. Sinha did not challenge the decision that under the engagement of 1901 the raiyat was entitled to hold at a fixed rent under the defaulting proprietor.

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The costs in this Court and the court below, so far as the point in issue in the appeal is concerned, will follow the result.

Let the papers be sent down forthwith and the hearing be expedited.

AGARWALA, J.—I agree.

Appeal allowed.

Case remanded.

APPELLATE CIVIL.

Before Macpherson and Agarwala, JJ.

1933.

July, 14, 17, 18, 19, 20, 24, 25.
August, 9.

SATYA CHARAN SREEMANI

v.

SHIB CHARAN TRIGUNAIT.*

Chota Nagpur Tenancy Act, 1908 (*Beng. Act VI of* 1908), *sections* 80 *and* 84(*3*)—*presumption of correctness, whether attaches to an entry in the record-of-rights with respect to non-agricultural lands—evidence of rebuttal, sufficiency of—incorrectness of entry, whether can be established by reference to the state of things existing before final publication.*

Section 80 of the Chota Nagpur Tenancy Act, 1908, provides :

"(*1*) The Local Government may make an order directing that a survey be made and a record-of-rights be prepared by a Revenue officer, in respect of the lands in any local area, estate, or tenure or part thereof.

(*2*) A notification in the *Calcutta Gazette* of an order under sub-section (1) shall be conclusive evidence that the order has been duly made.

(*3*) The survey shall be made and the record-of-rights shall be prepared in the prescribed manner."

Held, that unless the notification expressly excludes non-agricultural lands there is nothing in the section to indicate

* Appeal from Original Decree no. 105 of 1930, from a decision of Babu Gajadhar Prasad, Subordinate Judge of Dhanbad, dated the 16th of August, 1929.

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that such lands, situated in the area or estate to be surveyed, are to be excluded, and, therefore, that the presumption of correctness attaches to an entry in the record-of-rights with respect to non-agricultural lands under section 84(3) of the Act.

Raja Sasi Kanta Acharjya Bahadur v. *Sandhya Moni Dasya*(1), *Chand Mia Munshi* v. *Tukamia*(2), *Rai Brindaban Prasad* v. *Captain Maharaj Kumar Gopal Saran Narayan Singh*(3) and *Iswar Chandra* v. *Jogendra*(4), followed.

Raniganj Coal Association, Limited v. *Judoonath Ghose*(5), *E. J. Rooke* v. *Bengal Coal Company, Limited*(6), *Bhola Nath Das* v. *Raja Durga Prasad Singh*(7) and *Bipradas Pal Chowdhry* v. *Azam Ostagar*(8), distinguished.

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 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.

Rai Kiran Chandra Roy Bahadur v. *Srinath Chakarvarti*(9) and *Bogha Mower* v. *Ram Lakhan Misser*(10), referred to.

The incorrectness of an entry in the record-of-rights may be established by reference to the state of things existing before the record-of-rights was prepared.

Rama Nath Saut v. *Official Trustee of Bengal*(11), *Adu Mandal* v. *Hira Lal Mistry*(12) and *Chand Ray* v. *Bhagwati Charan Goswami* (13), followed.

(1) (1921) 26 Cal. W. N. 483.
(2) (1923) 28 Cal. W. N. 516.
(3) (1927) 104 Ind. Cas. 514.
(4) (1926) 98 Ind. Cas. 137.
(5) (1892) I. L. R. 19 Cal. 489.
(6) (1901) I. L. R. 28 Cal. 485.
(7) (1908) 12 Cal. W. N. 724.
(8) (1918) I. L. R. 46 Cal. 441.
(9) (1926) 31 Cal. W. N. 135.
(10) (1917) 27 Cal. L. J. 107.
(11) (1923) 29 Cal. W. N. 517.
(12) (1928) 33 Cal. W. N. 196.
(13) (1923) I. L. R. 2 Pat. 814.

Appeal by the plaintiffs.

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

A. B. Mukherji and *U. N. Banerji*, for the appellants.

Khurshaid Husnain (with him *N. N. Roy* and *Gunendra Nath Roy*), for the respondents.

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 gair-mazrua 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*".

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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 and for a declaration that the eastern and southern boundaries of their grants are as shewn 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 plaintiffs' 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.

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 section 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

(1) (1892) I. L. R. 19 Cal. 489.
(2) (1901) I. L. R. 28 Cal. 485.
(3) (1908) 12 Cal. W. N. 724.

limitation contained in Article 116 of the Limitation Act, 1908, or by Article 2 of Schedule III of the Bengal Tenancy Act, 1885. The question whether Chapter 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 Company*(1) 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*(2), 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*(3). None of these cases assist in the solution of the question now under consideration.

Reference was also made to *Bipradas Pal Chowdhry* 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 section 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 a Revenue 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-

(1) (1901) I. L. R. 28 Cal. 485.
(2) (1908) 12 Cal. W. N. 724.
(3) (1892) I. L. R. 19 Cal. 489.
(4) (1918) I. L. R. 46 Cal. 441.
(5) (1921) 26 Cal. W. N. 483.
(6) (1923) 28 Cal. W. N. 516.
(7) (1927) 104 Ind. Cas. 514.

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of-rights had been prepared under section 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*(1) 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*(2). These two cases were cited with approval in the case *Rai Brindaban Prasad* v. *Captain Maharaj Kumar Gopal Saran Narayan Singh*(3). 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*

(1) (1921) 26 Cal. W. N. 483.
(2) (1923) 28 Cal. W. N. 516.
(3) (1927) 104 Ind. Cas. 514.

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*(1) it was held that in the absence of a notification of exclusion under section 101, sub-section (*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 Chapter 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

(1) (1926) 98 Ind. Cas. 137.

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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 status the words ' colliery company ' were written.

(*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 khatian 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* Exhibit 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*(1), *Adu Mandal* v. *Hira Lal Mistry*(2) and *Chand Ray* v. *Bhagwati Charan Goswami*(3). In the first of these cases it was held that the presumption under section 103-B of the Bengal Tenancy Act, 1885, may be

(1) (1923) 29 Cal. W. N. 517.
(2) (1928) 33 Cal. W. N. 196.
(3) (1923) I. L. R. 2 Pat. 814.

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 Bahadur* v. *Srinath Chakravarti*(1), 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*(2) 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

(1) (1926) 31 Cal. W. N. 135.
(2) (1917) 27 Cal. L. J. 107.

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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.

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 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 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 Exhibit 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 is 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

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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 Exhibit 22, the decision of the objections under section 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 paragraph 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 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 had 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 160 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 Exhibit 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 section 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 thereabout. 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

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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 (Exhibit 4-*b*), made by Upendra Mohan Das Gupta (according to which plots 306, 341, 342, 357 and 358 fall within the plaintiffs' lease), a decree for recovery of possession of plots 306, 341, 342 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.

Appeal allowed in part.

SPECIAL BENCH.

Before Wort A. C. J., Kulwant Sahay and Fazl Ali, JJ.

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August, 10, 11, 14, 15, 16.

In the matter of
Biseswar Nath Sahu*.

Advocate—professional misconduct, what amounts to—limits to the conduct of an Advocate in entering into a transaction with his client—appearance without vakalatnama in a criminal case and wrongful retention of copy of judgment with the intention of being engaged in appeal, whether amount to professional misconduct.

The rule of court which demands the filing of a vakalatnama or a mukhtarnama in criminal proceedings is an arbitrary rule. There is no moral sanction behind it. It is a rule which was made for the better administration of justice and which an officer of the court must comply with; but a disregard of that rule in a particular case does not necessarily amount to professional misconduct.

Where an Advocate, without any just cause, wrongly retained the certified copy of a judgment belonging to his client with the intention of being eagaged in the appeal, *held*, that the act of the Advocate amounted to professional misconduct.

The position of an Advocate is a privileged and responsible one and the public have a right to look upon the Bar as consisting of persons in whom they may have the utmost confidence. It may be difficult, and it is certainly inexpedient, to express precisely the limits to the conduct of an Advocate in entering into a transaction, the purpose of which is the provision of fees for his work in a case in which he is engaged by the person with whom such transaction is entered into.

Where, however, the Advocate induced the client, while the relationship of lawyer and client existed, to execute a mortgage bond in the name of his son at an unconscionable rate of interest for the purpose of the provision of fees for himself, and it was found that the advance purported to be made by the son was in fact made by the Advocate, *held*, that the transaction amounted to professional misconduct.

* Miscellaneous Judicial Case no. 18 of 1933.

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Enquiry into the conduct of the Advocate under the Bar Councils Act, 1926.

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

M. Yunus (with him *I. B. Biswas*, *N. C. Ghosh*, *S. S. Rakshit* and *N. K. Biswas*), for the Advocate,

The Government Pleader (with him *A. K. Varma*, *J. K. Prasad* and *R. N. Lal*), for the Bar Council and the Crown.

WORT, A. C. J.—This matter comes before this Court after a decision by a tribunal of the Bar Council appointed by the Chief Justice with regard to the conduct of one Babu Biseswar Nath Sahu an Advocate of this Court. It is unnecessary to state in detail the preliminary stages of this matter except to say that it first came before this Court on a report by Mr. Rowland the then District Judge of Patna. The allegations of alleged professional misconduct relate particularly to certain criminal proceedings in which two persons Mewa Lal and Rambrich Lal were concerned. They were charged with theft and criminal trespass and were ultimately convicted. As I have said it is in relation more particularly to these proceedings that the allegations of professional misconduct are alleged. There is one other matter which formed part of the charge and that related to certain execution proceedings in certain rent suits to which I shall presently refer.

When the matter came before the tribunal of the Bar Council twelve charges were framed but so far as we are concerned it is only necessary to investigate charges 1, 2, 3, 6 and 10. The learned Government Pleader who appeared on behalf of the Bar Council and also appeared on behalf of the Crown both before the tribunal and this Court does not press the others. Substantially the finding of the tribunal was that the Advocate was guilty of three charges, 1, 2 and 3.

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Shortly the facts which it is necessary to mention are these. Certain criminal proceedings to which I have referred were started against the two persons Mewa Lal and Rambrich. They were brought before the Court on the 26th September, 1930. From the record of the proceedings it will be seen that the next date of hearing was the 14th October. There were subsequent hearings to which I shall have presently to refer but ultimately judgment was delivered on the 27th November 1930, convicting the two accused persons. An application was made by the two accused for copies of the judgment and from the petition it appears that the accused persons desired that the copies should be handed to their Advocate who is the Advocate regarding whose conduct we are concerned in this case. Copies were supplied in accordance with the petition and then on the 2nd December, at least that is the date alleged, the accused persons appear to have gone to the Court complaining that Biseswar Sahu, the Advocate, had wrongly retained these judgments. I do not propose at this moment to go into details with regard to this matter but they were sent back to the Advocate and ultimately the Advocate appeared on their behalf in the appeal. I mention this fact at this stage as it was by reason of the allegation of the accused persons that the judgments had been retained by the Advocate that this matter ultimately came before this Court on a report of the District Judge.

There were twelve charges as I have stated but a number of them, including the fourth charge, have not been pressed. I mention the fourth charge because that relates to the introduction of the Advocate to the two accused persons. It was alleged that the Advocate made certain representations to the accused resulting in his being retained in the criminal case. It is unnecessary to deal with the allegations of the complainants in this regard, as I have already indicated, that they were not established before the tribunal and were not pressed before this Court. I mention it

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merely by way of introducting the other facts with which we are concerned in this inquiry.

To come directly to the charges, charge no. 1 relates to the matter which I have just mentioned, namely, the alleged withholding by the Advocate of the judgments. Charge no. 10 also relates to the same matter. The difference with regard to them is the motive which is alleged for which the judgments were withheld. As regards charge no. 1 it was alleged by the complainants that the judgments were withheld by the Advocate with the intention of getting himself retained in the appeal. Charge no. 10 alleges that the judgments were withheld with the intention of the Advocate getting a sum of Rs. 10 each from the two accused persons. Charge no. 6 is an allegation that whilst the relationship of lawyer and client existed the Advocate persuaded the accused persons to enter into a mortgage bond at an unconscionable rate of interest for the purpose of the provision of fees for himself in the case although, as was alleged by the complainants, a consolidated fee of Rs. 150 had already been fixed and paid prior to the date upon which it was alleged the mortgage transaction was entered into.

To come back to charges nos. 2 and 3. The allegation is, as regards charge no. 2, that the Advocate appeared in some three out of six suits or execution proceedings out of rent suits without a vakalatnama and charge no. 3 alleges that the Advocate appeared in the criminal proceeding in its trial stage without a vakalatnama. I think perhaps it would be convenient to deal with charges 2 and 3 in the first instance. It is quite clear that out of the original rent suits there was a vakalatnama in favour of the Advocate in five out of the six, and that in the execution proceedings arising out of the six rent suits there were vakalatnamas in three. It is quite clear, therefore, that as regards some of the execution proceedings the Advocate appeared and acted without a vakalatnama. It is

contended by Mr. Yunus who appears on behalf of the Advocate in this Court that the circumstances disclose nothing more than an excusable mistake. It is pointed out that the documents in the case or rather the rent decrees gave Biseswar Sahu's name as the Advocate, and I imagine there is a good deal in the argument which Mr. Yunus advances in this connection, that is that it was not incumbent upon the Advocate to see whether the rent decrees were correct in this respect; in other words, when the Advocate saw his name appearing in the rent decree he was entitled to assume that a vakalatnama had been filed in all the rent suits and that, therefore, he was entitled to appear in the subsequent execution proceedings: therefore, there was no breach of the rules of the Court relating to the matter. Before dealing with the conclusion at which we have arrived as regards charge 2 I come to the case of charge 3, that is, as I have said, the charge that the Advocate appeared in the criminal proceedings in the trial stage without a vakalatnama. This is a more serious matter because having regard to the facts of the case it is difficult to find an excuse for the Advocate in this particular matter. The tribunal seemed to be under the impression that the vakalatnama which was ultimately filed in the appeal proceedings had been altered so far as its date was concerned. This appears to be correct but the decision of the tribunal as regards the particulars of the alteration appear to me to be incorrect. From a careful scrutiny of the vakalatnama it would appear that the original date of the document was the 27th December, and this had been changed to the 27th November. It was thought, as far as my memory of the decision of the tribunal goes, that the alteration was from the 27th October to the 27th November the alteration being with the intention, it would appear, of shewing that the Advocate when he first appeared, according to his own case, that is on the 31st October, had in fact a vakalatnama. But this is not quite consistent with the story which has been told, because

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in one stage of the proceedings the Advocate was questioned by the peshkar in regard to this matter and he then stated that a vakalatnama was unnecessary as he was appearing on instructions of a mukhtar. So far I have not mentioned this mukhtar but from the facts it would seem that the mukhtar appeared for the accused on the 26th September, when he disappeared from the case according to the complainants, on the representations to which I have already referred and which were the subject-matter of the unsustained charge no. 4. Apart from all unnecessary details it is clearly established that the Advocate did not have a vakalatnama when he appeared in the trial stage of the criminal proceedings.

A very considerable argument has been advanced by Mr. Yunus on the question of whether a vakalatnama was necessary. Mr. Yunus has gone so far as to say that once the mukhtar was in the case, as he admittedly was on the 26th September, unless notice was given to the Court of his discharge from his duties, he still remained, and technically therefore, the Advocate Biseswar Sahu would be entitled to appear without a vakalatnama in his name. That argument, in my judgment, cannot be supported. What is abundantly clear from the facts, and there seems to be no reason whatever for disbelieving the evidence of the mukhtar on this point, is, that he had gone out of the case immediately after the hearing on the 26th September. In his diary the date of the next hearing, namely, the 14th October, is mentioned but he has explained that by stating that that date was put in his diary on the occasion of the 26th September, when the next date of hearing was fixed. As I have already said, there seems to be no reason why the evidence of the mukhtar should be disbelieved on this point. This seems to dispose of this point. Assuming that the fact is established that on two occasions at any rate the Advocate appeared contrary to the rules of the Court without a vakalatnama it remains to be

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seen whether that action on his part amounts to professional misconduct. I hope I shall not be misunderstood in stating that the rule of Court which demands the filing of a vakalatnama or mukhtarnama in criminal proceedings is an arbitrary rule. There is no moral sanction behind it. It is a rule which was made for the better administration of justice and it is a rule which an officer of the Court must comply with but even making these statements it is rather difficult to hold that disregard of that rule in a particular case amounts to professional misconduct. The Government Pleader was pressed on this point as to what object there could be in the Advocate omitting to comply with this rule. The most that could be suggested was that he might have retained the stamps or rather the money for stamps which were required for stamping the vakalatnama. This matter incidentally formed the subject-matter of another charge which has not been sustained or pressed in this Court. It is almost incredible that an Advocate for the sake of a rupee, which is the stamp fee on this vakalatnama, should omit to comply with this rule the result of which at any rate in civil proceedings might get him into very serious difficulties with his client. It appears to us from the evidence in this case that the Advocate as regards these matters, that is, charges 2 and 3, was guilty of gross negligence. Speaking for myself I am not persuaded that that conduct however reprehensible in an officer of the Court does amount in this case at any rate to professional misconduct. It must not be understood that I am laying down any rule that appearance without a vakalatnama or other non-compliance with the rules cannot amount to professional misconduct. There may be instances in which the Court would be forced to hold otherwise but I content myself by saying that in this particular instance having regard to all the circumstances of the case the Advocate was not guilty of professional misconduct in this respect.

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That disposes of charges 2 and 3 and we have to deal only with those charges which relate to the withholding of judgments and with the execution of the mortgage deed. The Advocate in his evidence and explanation contends that he did not withhold the judgments of the trial Court which was delivered on the 27th November, 1930. He says in his evidence and in his explanation that he had no reason for withholding them, asking us therefore to believe that as he had no reason he in fact had not withheld them. There are one or two facts which seem to me to be beyond any possible controversy in this case. First I must repeat what I have already mentioned in an earlier part of this judgment that the accused persons had requisitioned these judgments at the same time asking the Court to hand them to the Advocate. That was on the 28th November. We then have the fact which is indisputable that on the 3rd December a petition was filed by the complainants complaining of the conduct of the Advocate in retaining these judgments. There is some slight discrepancy in the evidence as to what happened prior to the 3rd December. I think it cannot be denied that Mewa was speaking the truth when he said that he had been previously to the Advocate and demanded the judgments. It is almost impossible to explain the petition if that was not the fact. Mr. Yunus on behalf of the Advocate has contended that the dates or rather the evidence as regards the dates is such that the only conclusion at which the Court could arrive would be that no demand was made by Mewa or Rambrich of the Advocate for these judgments and reference is made to the evidence of the peshkar in this connection. The peshkar has stated that after the petition was filed they were then ordered to go back and settle their differences with the Advocate. It seems to me, looking at the matter with the closest possible scrutiny, that the evidence on this point of Mewa is to be accepted. I find that subsequently at any rate though the judgments were not

obtained as we know the Advocate did in fact appear in the appeal. It is only on the hypothesis that not only is the memory of the peshkar at fault but also he is saying that which is deliberately untrue, that I can possibly accept the contention advanced on behalf of the Advocate by Mr. Yunus that no visit was paid by the complainants to the Advocate demanding the judgments. As I have said in the first instance, the petition is only explained on the basis that the complainants had first visited the Advocate; in other words, the petition itself is corroboration of their evidence on this point. I have no reason to disbelieve the statement that they subsequently went back and made the representation to the Advocate for the second time. The tribunal has come to the conclusion, perhaps a somewhat speculative conclusion from one point of view, that the subsequent events resulted from the Advocate having got wind of this petition. The subsequent event to which the tribunal refers is the fact that the Advocate in the appeal appeared for the accused persons without a fee. I am not prepared to say in this case that the evidence is entirely satisfactory as regards details but I am forced back to the conclusion that the story which the complainants have told in this respect is substantially true. Whether there was a second visit before 4-30 on the 2nd December seems to me to be immaterial if the peshkar is right, namely, that a visit had been paid by the complainants with their petition to him at about 4 or 4-30 on the 2nd November. Having regard to the considerations which I have stated it seems to me to be clear, as I have already mentioned, that the complainants had already been to the Advocate and I think also that the evidence establishes that a second visit was paid. But more important than details of that kind is the question of whether the Advocate did in fact retain the judgments. I have personally no doubt whatever that the Advocate did so retain these judgments. At least two motives have been stated by the complainants, one

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is, as I have said, for the purpose of getting himself retained in the appeal, the other for the purpose of extracting two sums of Rs. 10 each. It may not be absolutely essential to discover a motive to establish the fact although it must be clear that that does affect the question which we now have to determine whether the retention amounted to misconduct. It must be remembered in connection with the question of motive that the motive which was alleged in charge no. 1 might well be established without there being any evidence on the part of the complainants that there was any statement of the Advocate as regards his intention in that matter. It is almost impossible in fact to conceive a case in which an Advocate says "I am withholding documents which belong to you so that I may be retained in other litigation which is to follow". I say it is almost impossible to conceive a case of that kind. The Advocate if he had any such intention might give many excuses for his conduct, but the real reason would be the last which he would mention in the circumstances, if that was his intention. I have stated that the Advocate here explains that he had no reason for withholding the judgments. I have no doubt that the inference which can be drawn from the facts is that his intention was that he should be retained in the appeal, and corroboration of this can be found from the evidence of the peshkar who states that in a subsequent interview the Advocate complained of the complainants' treatment of him in that they desired to instruct some other Advocate in the case. The tribunal has made some comment regarding the knowledge of the Advocate of the petition of the accused and that he appeared without fees as he had received information of the petition. The fact is that he did appear in the appeal, although without fees. I can only hold, in the circumstances of this case, that this was a last moment decision on the part of the Advocate and this supports the view that his intention in retaining the judgments was to

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get himself engaged. His excuse as regards appearing for the complainants in the appeal on the ground of their poverty without fees in my judgment is belied by his general conduct in this case, and having come to that conclusion, particularly having regard to the fact that there was no valid excuse for retaining the judgments, the only conclusion the Court can come to as regards this matter is that the Advocate was guilty in this respect of professional misconduct.

I now come to the last remaining charge, that relating to the mortgage deed. The mortgage deed was executed on the 23rd October, and registered on the 24th, the stamp having been purchased, as we now know from the evidence, as early as the 20th October. The property mortgaged was the property of the wife of Mewa. The circumstances under which she came possessed of that property it is not necessary to state. Mewa was asked to execute the mortgage *exabundanti cautela*. The consideration was Rs. 200. There is a second charge as regards this mortgage which I need only mention as again it is not pressed in this Court, and, from the circumstances which have been established, it seems to me that the learned Government Pleader was right in not pressing it. The other charge to which I refer was that the Advocate was guilty of cheating. The cheating is, if I may say so, somewhat undefined. It appears to have relation to whether two bighas or sixteen bighas should have been mortgaged. The complainants were literate persons, they could read and write and the mortgage was in fact of sixteen bighas. Although there may have been some discussion, as the evidence shews, as to whether two bighas or sixteen were to be mortgaged, how can it be said that because sixteen bighas were ultimately mortgaged the Advocate was guilty of cheating. There was no suggestion of attempting to set aside the deed or anything of that kind and the charge appears to me to be an afterthought. The complainants' case was that they got none of the

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Rs. 200 and that it was for the purpose of supplying the Advocate with further money, although in fact a consolidated fee of Rs. 150 had been arranged and paid. The tribunal disbelieved the story. Mr. Yunus contends, as of course was the case before the tribunal, that the Advocate had nothing to do with this mortgage bond. The mortgagees were so far as the bond states the cousin-in-law of the Advocate and the Advocate's son. It is admitted that the Advocate is joint with his son. His explanation as to the way the money was got for the purpose of the advance by the son, is that it represented a number of gifts which were made to the son either from his birth or in his early years up to the time of the execution of the bond or, I should say, between his early years and the date of the execution of the bond. It is important to notice at this stage that the Government Pleader suggested that the son should be called. The evidence of Agnu Sahu, the cousin-in-law, was that Rs. 110 was advanced in cash by him and that Rs. 90 was advanced by the son. It is not surprising, therefore, in circumstances such as these that it should be suggested, and rightly suggested, that the son should be called to substantiate that part of the case on behalf of his father. It was said that he could not be got, an explanation which for myself I do not accept but the fact remains that he was not called. As regards the fund from which the son is supposed to have advanced this Rs. 90, having regard to the fact that he was joint with his father, in other words, was a member of a joint Hindu family, it is a contention which in my judgment it is almost impossible to support. The tribunal has found upon the evidence that the advance was by the father; the Advocate with whose conduct we are concerned. By a process of elimination the tribunal has come to a finding which I consider is correct. It has been shewn that, as regards the Rs. 200, Rs. 110 was required for payment of an execution. Agnu states that the balance was required

for the criminal case. The result of that has been that the tribunal has found, as I have said, that the Advocate got Rs. 90 and with that finding I am in agreement. It seems to me to be quite clear and the only possible inference to draw from the circumstances of the case.

The question which will arise in these circumstances is whether the entering into this mortgage bond, which I should have mentioned was at the rate of Rs. 3 per mensem, with monthly rests, amounted to professional misconduct. The finding of the tribunal in this connection is that it did not amount to professional misconduct because of the fact that the relationship of lawyer and client did not exist on the date of its execution. That conclusion appears to have been arrived at by reason of the other finding that the Advocate appeared for the first time on the 31st October. There are two points of view from which this question can be approached; one is, whether in fact the Advocate appeared before the execution of this bond in these criminal proceedings, and the other is, whether even assuming he did not it can be held that the relationship of lawyer and client did not exist at the time of the execution of the bond. The mukhtar whom I have mentioned states that he went out of the case on the 26th September. It is difficult to believe that once having engaged a lawyer they would proceed without the assistance of one in a subsequent proceeding. In this connection a diary of the Advocate has been produced. The question was, as I have said, whether the Advocate appeared on the 14th October or not. If he appeared the relationship of lawyer and client was existing. The cross-examination of the Advocate on this diary was meagre. There was a suggestion made to him that the diary had been tampered with. We have looked at the diary very closely and it would appear that the two pages, one dated the 13th October and the other dated the

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14th October do not rightly belong to the diary in question. Looking closely into the make up of the book and a similar diary which was produced by the mukhtar it will be seen that the page upon which the 14th October comes forms a part of a previous page in the process of binding upon which the 15th September comes. When these two pages are placed together or their torn edges are placed together, it will be seen that they do not fit. The Advocate in this Court was invited to make an explanation as regards this matter. No satisfactory explanation was forthcoming but this must be remembered that he was not cross-examined about this and, therefore, had no opportunity in re-examination to give any explanation which might in the circumstances have been considered necessary and sufficient, and perhaps in these circumstances it would not be altogether fair to rely upon observations which we might make by inspection of the book in this Court. But apart from the diary it does seem that there is not very much doubt that the Advocate did appear on the 14th October. Perhaps one of the disadvantages with regard to the manner in which these charges have been framed is that each one is interwoven to some extent with the other and this is so in connection with the mortgage deed. When once we find that the mortgage deed was substantially the mortgage deed of the Advocate and his cousin-in-law it is difficult to come to the conclusion other than that he had already appeared in the case but, as I have said, the matter as to whether the relationship existed or not at the date of the bond is to be approached from two points of view and, therefore, even assuming that we do not find that he appeared on the 14th October it remains to be seen whether without establishing that fact it can be said that the relationship existed. It appears to me to be an inevitable conclusion from the facts which are established in this case that the relationship existed. What are the facts? The Advocate had entered into this transaction with the

two complainants; whether he persuaded them or whether they came to him and suggested the mortgage seems to me to be immaterial on this point. The fact remains that the transaction was for the purpose, inter alia, of paying the Advocate his fees. That being so it is impossible to find that the relationship did not exist; in other words, there was a bargain as between lawyer and client as to the payment of fees and from the moment that bargain was entered into it must be held that the relationship existed. I have, therefore, to decide whether the facts which are established disclose professional misconduct on this charge. To recapitulate, the circumstances must be remembered. First, it is impossible to hold, as I have indicated, that negotiations for the bond were the first introduction of the accused to the Advocate. I have no doubt that the purpose of the mortgage bond was, inter alia, the provision of fees to the Advocate and if that be so it is impossible to hold that the relationship of lawyer and client did not exist at the time as I have already stated. The interest was excessive and that is impliedly admitted by the Advocate himself. There was some pressure, it seems, on the part of the Advocate to mortgage 16 bighas and not two as suggested by the complainant, and in this connection I would say that I can hardly agree with the tribunal that the Advocate or mortgagees were more sinned against than sinning. It must also be remembered that the position of an Advocate is a privileged and responsible one and that the public have a right to look upon the Bar as consisting of persons in whom they may have the utmost confidence. It may be difficult, and it is certainly inexpedient, to express precisely the limits to the conduct of an Advocate in entering into a transaction, the purpose of which is the provision of fees for his work, in a case in which he is engaged, by the person with whom such transaction is entered into. But from the surrounding circumstances in this case we are satisfied

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that the Advocate has passed that limit beyond which his action will amount to unprofessional conduct or professional misconduct. I have said little or nothing about the question of whethter the story of the complainants or the story of the Adovcate is true as regards the amount of fees which were agreed upon. This to me appears to be somewhat irrelevant for the purpose of deciding the charges upon which I have stated the finding of this Court.

I have very carefully taken into consideration the circumstances, not forgetful of the fact that the proceedings before the tribunal of the Bar Council lasted for upwards of two years, and I cannot leave this case without saying that this is a somewhat disquieting feature. Possibly and probably the tribunal had every reason or excuse for taking so long in coming to a conclusion in this matter but, as I have said, it is a disquieting feature of the case and in some circumstances might amount to a complete denial of justice. But I must note strongly, as the tribunal did, upon the method which has been adopted by the Advocate in defending himself. Much that he has said is untrue and he has been anything but frank in his evidence. This is regrettable and must be taken into consideration in coming to a conclusion in the case. With these observations I leave the matter.

I find that no order other than that the Advocate should be suspended from practice for one year would be adequate. This order will date from the 17th August. As the proceedings were so protracted and many of the charges were not made out there will be no order as to costs.

KULWANT SAHAY, J.—I agree.

FAZL ALI, J.—I agree.

Order accordingly.

APPELLATE CIVIL.

Before Macpherson and Agarwala, JJ.

TIKAIT RUP RAJ RAI

v.

TIKAIT PERMANAND RAI.*

1933.

August, 15, 16.

Jagir—Ranchi district—lex loci—rule of lineal primogeniture, whether obtains—putraputradhi tenancy in Chota Nagpur estate, incidents of.

The lex loci in the Ranchi district is one of primogeniture not only in the family of the Maharaja of Chota Nagpur himself and its offshoots but also in all the jagirs of the district which are *putraputradhi*. In the Chota Nagpur estate it is beyond all question that a *putraputradhi* tenancy is impartible, is governed by the rule of lineal primogeniture and continues so long as there exists any lineal male descendant of the grantee (or grantees) with khorposh to the widow of the last surviving male holder.

Appeal by the plaintiff.

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

Rai Guru Saran Prasad and *Shiva Shankar Prasad*, for the appellant.

S. M. Mullick and *Pande Nawal Kishore Sahai*, for the respondent.

MACPHERSON, J.—This litigation was hopeless from the start and the fact ought to have been recognized long ago.

The appeal is preferred from the dismissal of a suit for partition of the Ulatu jagir in the Ranchi thana of the same district. It was instituted by Rupraj Rai, the younger brother of the Tikait of

* Appeal from Original Decree no. 203 of 1929, from a decision of Babu Narendra Nath Chakravarti, Subordinate Judge of Ranchi, dated the 29th August, 1929.

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Ulatu whose defence was that under the local custom of primogeniture the tenancy devolved upon the defendant.

The jagir consists of Ulatu and Sidraul. The suit was seemingly based upon the entry in the khewat of both villages where the holder of the tenure is shown as "Tikait Parmanand Rai and Rup (or Rupraj), sons of Tikait Bagh Rai, *bahissa barabar*". There is, however, a further entry (wrongly translated) in the khewat of Sidraul—"*Rupraj Rai jab farq hoga, khorposh paega*", the import of which manifestly is that the custom of the tenancy is the usual one in Ranchi of primogeniture with khorposh to the younger brother or brothers. It is also significant that the record accords the title of Tikait to the elder brother only. Oral evidence was adduced of certain collaterals of the family to the effect that Dandu Rai, brother of the grandfather of the parties, received a share in the jagir. This evidence has been disbelieved by the Court below and in our opinion has beyond question been rightly disbelieved. It is entirely inconsistent with the numerous entries in the khewat of Ulatu which show that all the tenancies of members of the family except the jagir set out in khewat no. 2 are khorposh under the jagir and with the fact that only the holder of khewat no. 2 pays rent to the proprietor, the Maharaja of Chota Nagpur. In short it is ludicrously false and the testimony in this regard of the defendant-respondent is the truth. The quotations from the various authorities which have been cited by the learned Subordinate Judge and to which may be added the Ranchi District Gazetteer which is to the like intent, also leave no room for question that the lex loci in the Ranchi district is one of primogeniture not only in the family and offshoots of the Maharaja of Chota Nagpur himself but also in all the jagirs of the district. They are *putraputradhi*—even the appellant is constrained to admit that the tenure in suit is so. In the Chota Nagpur estate it is beyond

all question that a *putraputradhi* tenancy is impartible, is governed by the rule of lineal primogeniture and continues so long as there exists any lineal male descendants of the grantee or grantees, with khorposh to the widow of the last surviving male holder.

As to the entry in the record-of-rights, it was made when the estate was under the Court of Wards in the minority of the Tikait. That it is faulty is manifest from the fact that it was the estate of the respondent and not that of both brothers that was under the Court of Wards and that the estate was released to the respondent while the plaintiff was still a minor, as would not have been the case if the estate had been that of both the brothers. It may be conjectured that the officer who prepared the khewat of mauza Ulatu, if indeed he gave any thought to the matter, had some idea that until there was separation between the brothers the younger also had some latent ownership of the jagir. The entry of equal ownership seems to have been made inadvertently, the correct entry being made in Sidraul that on becoming separate the right of the younger brother is to receive khorposh. Taking advantage of the incorrect entry, the plaintiff-appellant, apparently at the instigation of his mother and with the help of some of the discontented khorposhdars of the family, illadvisedly started the present untenable litigation. The plaintiff-appellant has no valid claim to anything more than khorposh bearing some relation to the extent of the jagir. Even his mother admits that it is the eldest son only who is the Tikait and that the others are Kuar and Lals as is the invariable custom in a *putraputradhi* jagir of the Ranchi district. A khorposh grant of land was actually given to the plaintiff but he was discontented with the amount which, as his mother stated in her evidence, is not considered sufficient. The real object of the suit seems to have been to extract a larger khorposh grant. The plaintiff

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MACPHERSON, J.

has no right whatsoever to a share in the jagir and his suit for partition entirely fails, the property not being governed by the ordinary Mitakshara law.

Mr. S. M. Mullick appearing for the respondent was not called upon but after judgment was delivered he referred to the decision in *Lal Gajendra Nath Sahi Deo* v. *Lal Mathurlal Nath Sahi Deo*(1). This and the other decisions are not unknown to us but indeed decisions of the courts are entirely superfluous in respect of this extremely well-known custom which it would be ludicrous to question.

I would dismiss the appeal with costs.

AGARWALA, J.—I agree.

Appeal dismissed.

FULL BENCH.

Before Wort, A. C. J., Kulwant Sahay and Fazl Ali, JJ.

1933.

August, 15, 16, 17.

DOMOO KHAN

v.

AGHA ARSHAD KHAN.*

Promissory note—advance of loan independent of the terms of note—suit based on original contract—promissory note inadmissible—plaintiff, whether entitled to succeed.

When a cause of action for money is once complete in itself whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note.

Sheikh Akbar v. *Sheikh Khan*(2), followed.

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* Civil Revision no. 530 of 1932, against a decision of Babu R. C. Mitra, Small Cause Court Judge of Gaya, dated the 26th August, 1932.

(1) (1916) 1 Pat. L. J. 109.

(2) (1881) I. L. R. 7 Cal. 256.

Dhaneswar Sahu v. *Ramrup Gir*(1) and *Abdul Muhammad Khan* v. *Mahananda Upadhyaya*(2), referred to.

Application in revision by the defendant.

The facts of the case material to this report will appear from the judgment of Wort, A. C. J.

The case originally came on for hearing before Macpherson and Agarwala, JJ. who recorded the following order:

"In our opinion this case should be decided by a Full Bench to which therefore we refer it. Place before the Hon'ble the Chief Justice".

On this reference

Khurshaid Husnain (with him *H. R. Kazmi*), for the appellant relied on *Radhakant Shaha* v. *Abhoy Churn Mitter*(3), *Chotalal Sahu* v. *Gumari Chaudhry*(4), *Nazir Khan* v. *Ram Mohan*(5), *Muthu Sastrigal* v. *Visvanatha*(6), *Guru Sahu* v. *Tangi Krishnamma*(7), *Dula Meah* v. *Maulvi Abdul Ruhman*(8), *Ram Bahadur* v. *Dusuri Ram*(9), *Cutter* v. *Powell*(10), *Newlove* v. *Shrewsbury*(11) and *Jardine* v. *Payne*(12).

Sarjoo Prasad, for the respondent, referred to *Golap Chand Marwaree* v. *Thakurani Moñokoom Kooaree*(13), *Sheikh Akbar* v. *Sheikh Khan*(14), *Pramathnath Dey* v. *Dwarka Nath Dey*(15),

(1) (1928) I. L. R. 7 Pat. 845.
(2) (1931) I. L. R. 11 Pat. 135.
(3) (1882) I. L. R. 8 Cal. 721.
(4) (1925) 7 Pat. L. T. 589.
(5) (1930) I. L. R. 53 All. 114, F. B.
(6) (1913) I. L. R. 38 Mad. 660.
(7) (1932) A. I. R. (Mad.) 687.
(8) (1923) 28 Cal. W. N. 70.
(9) (1912) 17 Cal. L. J. 399.
(10) (1795) 2 Sm. L. C. 1, 6.
(11) (1888) 21 Q. B. D. 41.
(12) (1831) 109 E. R. 933.
(13) (1878) I. L. R. 3 Cal. 314.
(14) (1881) I. L. R. 7 Cal. 256.
(15) (1896) I. L. R. 23 Cal. 851.

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Dhaneswar Sahu v. *Ramrup Gir*(1), *Abdul Muhammad Khan* v. *Mahananda Upadhyaya*(2), *Brijbhusan Pande* v. *Ramjanam Kuer*(3), *Muin Baksh* v. *Bodhiya*(4), *Rai Saheb Suraj Lal* v. *Anant Lal*(5), *Ram Narain Sahu* v. *Lachmi Prasad Sahu*(6), *Kunwar Bahadur* v. *Suraj Baksh*(7), *Ram Raghubir Lal* v. *United Reineries*(8) and *Farr* v. *Price*(9).

WORT, A. C. J.—This matter was referred to this Court by a Division Bench consisting of Mr. Justice Macpherson and Mr. Justice Agarwala and in the circumstances we have seisin of and must decide the whole case. It is an application in revision against the decision of a Small Cause Court Judge for the plaintiff for a sum of money lent. A hand-note had been given in the case which is inadmissible and it is said that the general question which comes to be determined is whether the learned Judge was right in allowing parole evidence of what is said to be a written contract. In my opinion no such question can arise in this case by reason of the terms of the judgment itself. We have heard an elaborate argument and a large number of cases have been cited on this question but from any view of the law it is not denied, nor can it be, that the statement of Sir Richard Garth in the case of *Sheikh Akbar* v. *Sheikh Khan*(10) holds good. The statement is as follows:—"When a cause of action for money is once complete in itself whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the

(1) (1928) I. L. R. 7 Pat. 845.
(2) (1931) I. L. R. 11 Pat. 135.
(3) (1931) 13 Pat. L. T. 506.
(4) (1928) I. L. R. 50 All. 839, S. B.
(5) (1920) 1 Pat. L. T. 203.
(6) (1921) 2 Pat. L. T. 323.
(7) (1932) I. L. R. 7 Luck. 666, F. B.
(8) (1930) I. L. R. 9 Rang. 56.
(9) (1800) 1 East, 55.
(10) (1881) I. L. R. 7 Cal. 256.

original consideration, provided that he has not endorsed or lost or parted with the bill or note." Here the learned Judge has stated in the course of his judgment first

> " This is a suit on an oral contract "

and later

> " The factum of advance is a matter quite distinct from the terms of the handnote "

and then the learned Judge appears to rely on certain authorities of this Court. Later he says

> " The plaintiff has proved that there was an independent contract to repay the advance."

That being so, as I have already indicated, on any view of the law no objection can be taken to the judgment of the learned Judge. The question of whether the case of *Dhaneswar Sahu* v. *Ramrup Gir*(1) which was followed in the case of *Abdul Muhammad Khan* v. *Mahananda Upadhyaya*(2) was rightly decided does not arise. Any decision of this Court on that matter would be mere obiter. The case of *Dhaneswar Sahu* v. *Ramrup Gir*(1) appears to proceed on the statement of the law which I have quoted from Sir Richard Garth's judgment.

This disposes of the matter with the exception of one point. It was said by Mr. Khurshaid Husnain, first, that the learned Judge had taken an erroneous view of the law and, secondly, that there was no evidence to support his finding of fact as to there being an independent contract. The answer to the first is that there is nothing in the judgment to shew that the learned Judge misdirected himself, and as to the second this matter was not raised by the petitioner in his petition, and it will in any event have to be an exceptional case for this Court to investigate the evidence in the exercise of its revisional powers. So

(1) (1928) I. L. R. 7 Pat. 845.
(2) (1931) I. L. R. 11 Pat. 135.

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far as the interest is concerned the decree will be varied by allowing interest at six per cent. only, from the date of the suit. The petition is rejected and the rule is discharged with costs. Hearing fee three gold mohurs.

WORT, A. C. J.

KULWANT SAHAY, J.—I agree.

FAZL ALI, J.—I agree.

Rule discharged.

APPELLATE CIVIL.

Before Macpherson and Agarwala, JJ.

JAGARNATH SAHU

v.

BENI PRASAD.*

1933.

August, 17, 18.

Provincial Insolvency Act, 1920 (*Act V of* 1920), *proviso to section* 24(*1*), *clause* (*a*)—*debtor, application for adjudication by—court, whether bound to accept the statement of petitioner—court, duty of, to investigate facts—prima facie proof of inability necessary.*

Before adjudicating an applicant to be an insolvent the court is required to be satisfied that he is not in a position in fact to pay his debts.

The court is not bound to accept the statement of the petitioner, but is required to investigate the facts for itself; in other words, the duty of the court is to be satisfied *prima facie*, that is, after following the necessary procedure and making the necessary investigation, to come to a conclusion that the statement by the debtor is true.

Ganeshi Lāl Sarawgi v. *Sanehi Ram*(1) and *Narayan Mistri* v. *Ram Das*(2), followed.

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* Appeal from Original Order no. 179 of 1931, from an order of G. J. Monahan, Esq., I.C.S., Judicial Commissioner of Ranchi, dated the 16th of July, 1931.

(1) (1932) I. L. R. 12 Pat. 107.

(2) (1928) I. L. R. 7 Pat. 771.

1933.

JAGARNATH SAHU v. BENI PRASAD.

Appeal by the applicant.

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

Rai Gurusaran Prasad and *Ragho Saran*, for the appellant.

Naqui Imam and *S. S. Rakshit*, for the respondents.

AGARWALA, J.—The appellant applied to the Judicial Commissioner of Chota Nagpur to be declared an insolvent, stating his debts to be Rs. 13,000 and his assets to be Rs. 1,645. He attributed his losses to the failure of a cloth business which he had had at Haidarnagar in the years 1333 and 1334 Fs. The learned Judicial Commissioner rejected the application not being satisfied that the applicant was unable to pay his debts. It was admitted by the applicant that the value of the stock in the shop at Haidarnagar was Rs. 10,000 and that the whole of this stock was disposed of before the business was closed down. The only explanation given with regard to what has been done with the money realized from the sale of the stock is that a considerable portion was spent in medical treatment. In support of this he has filed a number of medical prescriptions and reports as to the state of his health. While it appears that since 1926 the applicant has been subject to attacks of asthma, there does not seem to be any reason to suppose that any very considerable sum has been spent in the treatment of this disease. The applicant has failed to convince both the Judicial Commissioner of Chota Nagpur and this Court that he had insufficient means to pay his debts.

It was suggested that, when a person files an application in insolvency, the onus of showing that he is in a position to pay his debts lies on the person asserting it. That view, however, is clearly unsustainable in view of the provisions of the proviso to

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AGARWALA, J.

clause (*a*) of sub-section (*1*) of section 24 of the Provincial Insolvency Act. Before adjudicating an applicant to be an insolvent the Court is required to be satisfied that he is not in a position in fact to pay his debts. As was pointed out by this Court in *Ganeshi Lal Sarawgi* v. *Sanehi Ram*(1), the Court is not bound to accept the statement of the petitioner, but is required to investigate the facts for itself. The tendency of Courts administering the Insolvency Act to believe that the hearing of a petition is more or less a formal matter and that if the petition is, as it were, merely verified by the evidence of the debtor, the court is bound to accede to the petition, was deprecated; and it was pointed out that the duty of the Court is to be satisfied *prima facie*, that is, after following the necessary procedure and making the necessary investigation to come to a conclusion that the statement by the debtor is true. Similarly, in *Narayan Mistri* v. *Ram Das*(2) my learned brother observed: "To my mind that proviso (namely, the proviso already referred to) ought not to be interpreted in such a way as to reduce the requirements of the most salutary new provision that the debtor must prove his inability to pay his debts, to a mere assertion or nominal proof. The least that is required of him is such proof as to satisfy the Court that there are *prima facie* grounds for believing his plea of inability to pay his debts."

The applicant having failed so to satisfy the Court of his inability to pay his debts this appeal must be dismissed with costs.

MACPHERSON, J.—I agree.

Appeal dismissed.

(1) (1932) I. L. R. 12 Pat. 107.
(2) (1928) I. L. R. 7 Pat. 771.

APPELLATE CIVIL.

Before Wort and Kulwant Sahay, JJ.

BAHURIA SARASWATI KUER

v.

BAHURIA SHEORATAN KUER.*

1933.

August, 24, 25, 26.

Hindu Law—maintenance—wife living apart from the husband, whether entitled to separate maintenance—Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 1, *Articles* 128 *and* 132—*claim for maintenance, whether a charge on immoveable property within the meaning of Article* 132—*widow's claim for a certain sum as maintenance for the period during which her husband was living, whether governed by Article* 128—*interest, whether payable on a claim for maintenance.*

Article 132, Schedule 1, Limitation Act, 1908, prescribes a period of 12 years for the enforcement of the payment of money charged upon immoveable property.

Held, that a widow's claim for maintenance under the general Hindu Law cannot, in any sense of the word, be said to be a charge upon immoveable property within the meaning of Article 132.

The mere fact that a Hindu wife is living apart from her husband does not entitle her to separate maintenance during the life-time of her husband, unless indeed she is turned out of the house by the husband.

A claim by the widow for a certain sum as maintenance for the period during which her husband was living is not, strictly speaking, a claim for maintenance, and is not, therefore, governed by Article 128 of the Limitation Act but by the general Article applicable to an ordinary claim for money.

A widow is not entitled to claim interest on the sum which she claims as maintenance under the general Hindu Law. She is, however, entitled to interest under the Code of Civil Procedure, 1908, from the date of the suit until the date of payment at 6 per cent. per annum.

* Appeal from Original Decree no. 191 of 1929, from a decision of Babu Jatindra Nath Ghosh, Subordinate Judge of Muzaffarpur, dated the 10th July, 1929.

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Pattinson v. *Srimati Bindhya Debi*(1), followed.

Hamira Bibi v. *Zubaida Bibi*(2), distinguished.

Appeal by the defendant.

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

Sir Sultan Ahmad, Government Advocate, for the appellant.

Khurshed Husnain and *G. P. Sahi*, for the respondent.

WORT, J.—This is an appeal by the defendant in an action by the plaintiff for maintenance. The only substantial question which we have to determine is the amount to which the plaintiff is entitled.

The plaintiff is the first wife (now a widow) of one Ganesh Prasad Narain Sahi; the defendant is the second wife, who in circumstances which I shall mention, is in possession of the estate of her late husband.

In July of 1914 Ganesh Prasad executed a tamliknama dedicating a large number of properties, more specifically stated in the deed, for religious purposes and made a gift of the remainder to the defendant, the second wife, subject to payment of certain allowances to various persons including himself and the plaintiff. To himself there was an allowance to be paid of Rs. 1,800 per annum and the same to the plaintiff. In 1916 the estate apparently being in debt, it was taken over by the Court of Wards. In 1920 Ganesh Prasad died having in the meantime married a third wife and having had a son by her. In those circumstances the plaintiff claimed in this action the sum of Rs. 150 per mensem from the 20th March, 1916, to the 20th March, 1928.

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(2) (1916) I. L. R. 38 All. 581, P. C.

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The learned Judge in the court below has granted the plaintiff a decree up to the year 1926 at the amount claimed, but having decided that the value of the estate had diminished by one-third from 1926 owing to the sale of certain portions of the estate to pay off debts to which I shall presently refer, reduced the amount to which, in his judgment, the plaintiff was entitled from that date to Rs. 100 a month which is of course two-thirds of the amount claimed. He has given a decree for those sums plus interest.

Now at the very outset of the case it comes to be determined as to whether the plaintiff was suing under the tamliknama of July, 1914, or whether, as the Judge in the court below states, she was suing under the Hindu law: in other words, suing as a Hindu widow entitled to maintenance by the general Hindu law.

Before us Mr. Khurshed Husnain, who appears on behalf of the plaintiff respondent, incidentally has a cross-appeal on the question of reduction of the allowance after 1926. He states that his client was suing under the general Hindu law and also under the tamliknama. It becomes necessary in the circumstances and by reason of certain points which arise in the appeal to determine this matter. It seems to me, if I may say so with great respect to Mr. Khurshed Husnain's argument, that the answer which is given is plainly insufficient. Either the plaintiff was suing under the tamliknama or she was not. In one sense it may be that, although suing under the general Hindu law, reliance was placed on the tamliknama as evidence of the amount to which she would be ordinarily entitled. But the learned Judge in the court below has stated, as I have already indicated, that the plaintiff was suing under the Hindu law and, as he expressed it, not under the contract. His words are these:

"Plaintiff is a Hindu widow and the right to maintenance is not based on the contract but upon Hindu law".

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By the word "contract" I assume he means the tamliknama. In the circumstances it seems to me that we must accept the statement of the learned Judge which gives a proper description on the basis of the plaintiff's claim. This statement, I have no doubt, was made by the Subordinate Judge either with the approval of the plaintiff's advocate and on his authority or at his instigation.

The short points in the case are these.

On behalf of the defendant appellant it is contended that the plaintiff's maintenance must be reduced in accordance with the financial state of the property and that the allowance fixed under the tamliknama was in complete disregard of the estate's ability to pay. It is in this connection that Mr. Khurshed Husnain's alternative argument, based on the tamliknama, arises. He meets the point of Sir Sultan Ahmad's argument by contending that as the tamliknama created a charge on the estate the amount was fixed and not subject to reduction for any reason.

In 1916, when the Court of Wards took over the estate, the position was this. A mortgage had been executed by Ganesh Prasad in 1913 and from the record of this case and the evidence it would appear that the interest on that mortgage had not been paid, and as a result, towards the end of 1920 or the beginning of 1921, the mortgage debt amounted to a sum of Rs. 84,000. Up to that period and even for some time afterwards, it would appear that the income of the estate was approximately Rs. 16,000 per annum, but, as a result of the discharge of the mortgage debt in the manner I shall presently describe, the value of the estate diminished, upon which fact the Subordinate Judge reduced the amount of the maintenance after the year 1926.

What happened was this. On the 28th January, 1921, although no action had been brought or any

decree obtained, the Manager of the Court of Wards proceeded to pay off this mortgage debt of Rs. 84,000. For the purpose of paying off an agreed first instalment of Rs. 40,000 on the date I have mentioned a loan of Rs. 60,000 was obtained. Then in 1926 certain sales were effected of portions of the estate and the sale deeds are represented by Exhibits *A*, *A—1*, *A—2*, *A—3*, *A—4*, *A—5* and *A—8* in this case. The sales realised the sum of Rs. 22,870. In addition to that a sum of Rs. 16,100 was effected by Exhibit *A—6* by the sale of a house at Benares. There is no evidence as to the manner in which the balance of Rs. 40,000 of the instalment for that year was obtained. It is clear, however, that that second instalment of Rs. 40,000 was paid off on the 1st April, 1926.

A loan had been got of Rs. 60,000 to pay off the first instalment of Rs. 40,000. For the purpose of paying off that loan of Rs. 60,000 which, by May of 1926, had reached with principal and interest the sum of Rs. 81,000, a further property was sold, the sale deed of which is Exhibit *A—7*. From the facts to which I have just referred and in the absence of evidence of any other debts other than the mortgage it would appear that the total indebtedness of the estate had been paid off. In 1916 or soon after 1916 when the Court of Wards went into possession, a scheme of expenditure was prepared. By that scheme of expenditure there were a number of payments to be made, which I may describe as fixed charges on the estate, including Government revenue, rent to the superior landlord and so on, and in addition to that the allowances which were provided for by the tamliknama. But under the scheme of expenditure these were reduced and the plaintiff's claim incidentally was also reduced by 50 per cent., that is to say, to Rs. 75 per mensem. Under the scheme of expenditure there appears to have been a net surplus of Rs. 7,313. The document, being the scheme of expenditure, was put in on the admission

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of the defendant. The point that Sir Sultan Ahmad raised was this, that the surplus of Rs. 7,313 was for the payment of various debts of the estate. Mr. Khurshed Husnain points out that, apart from the mortgage which was paid off in the manner which I have just described, there appears to have been no other debts, and as far as the evidence in the case goes there is no indication that this surplus of Rs. 7,313 was either used to keep down the interest on the mortgage in the meantime or to discharge any other legal liability of the estate.

Now this much is clear in favour of the defendant's case that as a result of the sales of 1926—and this is not disputed—the income of the estate was reduced from Rs. 16,000 to Rs. 10,000 per annum and it is on that basis that the claim of the plaintiff has been allowed; in other words, there being a reduction of something like 1/3rd in the income of the estate, the plaintiff's claim has been reduced in proportion. It seems to me that in any event the argument put forward on behalf of the respondent cannot be supported, namely, that the estate is burdened with this payment to the plaintiff, whatever the condition of its finances. The argument put forward amounted to this, that whether the income was Rs. 10,000 or Rs. 300, as Ganesh Prasad had allowed her Rs. 150 per mensem under the tamliknama that amount and no less was her due. The point really is somewhat academic, having come to the conclusion, as I have done, that the plaintiff's claim was based under the general Hindu law, and that being so, the amount to which she is entitled would be a sum in accordance with her position in life and, as the Privy Council has pointed out, in accordance with the condition of the estate.

As to the tamliknama being evidence of the proper amount to be allowed to the plaintiff, the question does not arise for reasons which will be seen. But I think it must be assumed that the income of

the estate being Rs. 16,000 a year it was in the contemplation of Ganesh Prasad that a sum of Rs. 150 per mensem was a proper and appropriate amount to be paid to the plaintiff, and we must also assume, although there is no evidence on the point, that he took the circumstances of the estate into consideration in fixing that amount; and it is in that sense, in my judgment, that the plaintiff can rely upon the tamliknama.

The fact that the plaintiff claims under the general Hindu law is an answer to the point that the allowance is not subject to reduction, and also an answer to the argument that as the reduction in the income of the estate was due to mismanagement by Ganesh Prasad and by defendant no reduction can be supported.

There is one point with which I wish to deal here and that is the question of the Rs. 250 allowance which appears to have been paid by the brother of the plaintiff to the plaintiff. Sir Sultan Ahmad contended that this matter had to be taken into consideration in fixing the amount. There is no doubt that under the general Hindu law a widow claiming maintenance claims it on the basis, as I have said, of her position in life and the position of the estate having regard also to her means. But, in my judgment, a voluntary payment of this sum of Rs. 250 quite clearly cannot be taken into consideration in fixing the amount which she is entitled to from her husband's estate. A sum which is paid voluntarily cannot strictly be described as her "means" by which term I apprehend meant the sum to which she is either legally entitled or can lay claim to or the income of her stridhan estate. The sum payable by her brother was a voluntary payment for which he was not liable and which could be stopped at any moment. It is impossible in those circumstances to consider this amount in fixing the amount to which the plaintiff lays claim.

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The question whether the plaintiff sues under the tamliknama or under the general law is relevant on the question of limitation. The learned Judge in the court below decided that Article 128 or Article 132 of the Limitation Act applies. Article 132 provides for the enforcement of the payment of money charged upon immoveable property. It would be incorrect to say that the widow's maintenance claim under the general Hindu law can in any sense of the word be said to be a charge upon the property in the hands, as in this case, of the defendant. But the charge may be created when a decree is made for that maintenance. Before such a decree is pronounced there can in no sense of the word be a charge on the estate.

It was argued that the claim is based on the tamliknama and on the charge which was created thereby. In this connection even if we did assume that the claim is based on the tamliknama there are no words in it appropriate to create a charge in any sense of the term. That the property was taken by the defendant with the condition to pay these sums is true, but I should still have some doubt on the point whether any charge could properly be said to have been created by the tamliknama. But the point is disposed of, in my judgment, by the decision given in the judgment of the court below that the claim is based on the general Hindu law. That being so, it brings us back to Article 128 of the Limitation Act which provides for a claim by a Hindu for arrears of maintenance. That immediately raises another question. Before going into that, I should state that *prima facie* the claim which the plaintiff has laid in the plaint is not barred by limitation but that she is entitled to the whole amount but subject to this point with which I am about to deal.

Towards the end of the argument it was contended by Sir Sultan Ahmad that the plaintiff had not proved her case; there was no proof, in other

words, that she had not been paid. It is a technical point; it was a point which was not raised in the court below, and it seems to me to be without substance. A plain reading of the plaint would, in my judgment, sufficiently indicate this, especially having regard to the manner in which the case was conducted in the court below, that the plaintiff had not been paid for the years for which she is claiming; and as I have just said the point was not raised by the defendant. There is no plea in the written statement and the point was not gone into. That, in my judgment, is a sufficient answer to the point raised.

But a further question does arise in connexion with that point. Ganesh Prasad died in the year 1920. Until his death as a matter of law and in no way dependent on the facts of the case, except those recited in the tamliknama itself, the plaintiff, the then wife of Ganesh Prasad, would not be entitled to separate maintenance. The deed recites first of all that Srimati Babui Bhagwati Kuer mostly lives in her father's house, and then later, referring to Srimati Sheo Ratan Kuer, it recites:

> "According to the old usual practice, after sometimes (sic) called Babu Bansi Singh her relation from her father's side, through private letter (sic) and went to her father's house at Amawan with great effort and up till now she (first wife) is at father's place and does not like to come to my place, rather Srimati Kuer my daughter from the womb of the said wife lives with her contrary to my wishes."

It is sufficiently clear from the document itself that the absence of the wife from her husband's house was against the husband's wishes, and indeed there is no evidence in the case, nor has it been suggested from start to finish, that she was in any way forced to live away from her husband. I mention this fact because it might be said that the point which was raised at the end of the case depended upon evidence. In my judgment it did not, and if it did depend upon evidence it is evidence which the plaintiff should have given in support of her case, because it must

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be assumed that she knew her position not only as to whether she was suing under the tamliknama or under the general Hindu law but her position generally under the law. It is quite clear that living apart from her husband, unless indeed she was turned out of the house by her husband, she was not entitled to separate maintenance. That raises a very serious question, for a part of the amount which is claimed by the plaintiff is the amount up to the time of the death of her husband Ganesh Prasad in October 1920. The only suggested answer to the point seems to be that the defendant in this case took possession of the estate subject to the payment of this sum of money, that is, assuming the plaintiff is suing under the tamliknama which she is not. It is a claim made by the plaintiff in circumstances in which the husband was not during his lifetime legally liable to pay any amount to the plaintiff. Therefore in no sense of the word could it be described as maintenance. Assuming, however, that this claim was made under the tamliknama, the estate was taken by the defendant subject to a money payment by her to the plaintiff and other persons. It was not maintenance of the plaintiff up to the year 1920 and as it was a money claim it is hopelessly barred by limitation. In my judgment, therefore, the plaintiff is entitled only to maintenance as such from the 12th October, 1920, the date of her husband's death, up to the date of suit.

There is a further question and that is the question of interest. The learned Judge in the Court below has allowed interest on the whole claim. In a recent decision of this Court to which I was a party it was decided that interest is not payable. The claim for interest, having regard to my observations regarding the nature of the plaintiff's case, cannot be brought under the Interest Act of 1839. It is not a claim under the tamliknama but it is a claim under the general Hindu law. No demand

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has been made for interest and the only way that Mr. Khurshed Husnain could put his case for interest is on the authority of the case of *Hamira Bibi* v. *Zubaida Bibi*(1), a decision which was quoted in the judgment in the case of this Court to which I have just referred, namely, the case of *Pattinson* v. *Srimati Bindhya Debi*(2). The contention of Mr. Husnain based on the decision of the Privy Council is that the plaintiff is entitled to interest by reason of her deferring the enforcement of her claim. The authority of the case before the Privy Council, in my judgment, in no way bears out that proposition. The argument is that the case cited is an authority for the principle that interest was payable on equitable considerations. There the question arose as to whether a Muhammadan widow was entitled to dower, she being allowed to take possession of her husband's estate in order to satisfy her dower debt. In that case there was no agreement, express or implied, that she should be entitled to claim any sum in excess of her actual dower. The question there was not that she was entitled to interest on her claim but that it was held on equitable considerations that she was entitled to some reasonable compensation not only for the labour and responsibility imposed upon her for the proper preservation and management of the estate but also for forbearing on her insistence to enforce her legal rights, and therefore the fixing of a sum as compensation in the form of interest was not an unreasonable method to adopt. We know of no authority for the view that the plaintiff in this case is entitled to interest on the amount which she claims and, having regard to the decision, to which I have just referred, of this Court, in my judgment the claim for interest must fail.

There is one other point which I should have mentioned before and that is in regard to the plaintiff's cross-appeal. I have disposed of it by stating

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that the widow was entitled to her maintenance according to her position in life but especially having regard to the condition of the estate and its income. That disposes of the cross-appeal. In my judgment the learned Judge was right in reducing the claim proportionately for the years after 1926.

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In these circumstances the appeal succeeds to this extent, that the decree of the learned Subordinate Judge will be varied by disallowing the claim of the plaintiff prior to the 12th October, 1920, and disallowing the claim for interest on the remainder. The plaintiff will of course be entitled to interest under the Civil Procedure Code from the date of the suit until the date of payment at 6 per cent. per annum.

In the circumstances there will be no costs to either party in this Court. As regards the costs in the court below the parties will be entitled to them in proportion to their success in this Court.

The plaintiff will be entitled to the payment of her decretal amount from the money in the Court deposited in pursuance of the decree of the Subordinate Judge.

KULWANT SAHAY, J.—I agree.

Appeal allowed in part.

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Where in a suit the defendants were the two widows of a Hindu as representing the estate of their deceased husband and during the pendency of the appeal, in which the widows were the respondents, one of them died and no step was taken to bring on the record her legal representative.

Held, (*i*) that on the death of one of the widows the right to sue survived against the other alone and that, therefore, the case was governed by Order XXII, rule 2, Code of Civil Procedure, 1908;

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The rule of court which demands the filing of a vakalatnama or a mukhtarnama in criminal proceedings is an arbitrary rule. There is no moral sanction behind it. It is a rule which was made for the better administration of justice and which an officer of the court must comply with; but a disregard of that rule in a particular case does not necessarily amount to professional misconduct.

Where an Advocate, without any just cause, wrongly retained the certified copy of a judgment belonging to his client with the intention of being engaged in the appeal, *held*, that the act of the Advocate amounted to professional misconduct.

The position of an Advocate is a privileged and responsible one and the public have a right to look upon the Bar as consisting of persons in whom they may have the utmost confidence. It may be difficult, and it is certainly inexpedient, to express precisely the limits to the conduct of an Advocate in entering into a transaction, the purpose of which is the provision of fees for his work in a case in which he is engaged by the person with whom such transaction is entered into.

Where, however, the Advocate induced the client, while the relationship of lawyer and client existed, to execute a mortgage bond in the name of his son at an unconscionable rate of interest for the purpose of the provision of fees for himself and it was found that the advance purported to be made by the son was in fact

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"Where a raiyat has been in occupation of land and a lease is executed with a view to a continuance of his occupation, he is not to be deemed to be admitted to occupation by that lease for the purposes of this Chapter, notwithstanding that the lease may purport to admit him to occupation."

Held, that in order to avail himself of section 47, the raiyat must show that he was in occupation of the land *as a raiyat* before the kabuliyat and that the lease was executed with a view to continuance of that occupation, that is to say, occupation as a raiyat.

If, therefore, a raiyat, who is sued by his landlord in ejectment on the ground that his lease has come to an end, calculates his occupation from a period anterior to the commencement of the *kabuliyat*, he must establish, as a matter of fact, that his relationship with his landlord prior to that created by the *kabuliyat* was that of landlord and raiyat, the onus being upon him to establish that contention of fact. *Maharaja Bahadur Kesho Prasad Singh* v. *Ram Baran Chaubey* 23

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In order to attract the operation of Article 3, Schedule III of the Bengal Tenancy Act, 1885, the dispossession of the raiyat must be by the landlord or at his instance. Therefore, a dispossession of the raiyat by an order of the Court under section 145, Code of Criminal Procedure, 1898, is not a dispossession by the landlord within the meaning of the article.

Likewise, the dispossession of the raiyat on account of an attachment of the lands by the Magistrate is not a dispossession by the landlord.

Held, further, that Article 3 does not apply to a case where the possession of the tenants ceased on account of the land being submerged under water, and after reappearance of the land there was no actual taking of possession by the raiyat and no dispossession by the landlord.

Where limitation has already begun to run before an order of attachment under section 146, Criminal Procedure Code, 1898, there cannot be a fresh start to limitation from the date of the attachment.

Mere non-payment of rent by the tenant during the period of submersion of his lands by the action of the river does not of itself determine the tenancy. The question of abandonment is a question of intention on the part of the tenant.

An attachment made under section 146, Code of Criminal Procedure, 1898, lasts until a competent court has

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determined the rights of the parties to the land in dispute or the person entitled to possession thereof. When there has been such a determination, it is the duty of the Magistrate to withdraw the attachment and to make over possession of the land, as it was before the attachment, to the party entitled to possession.

Any act done by the Receiver appointed under section 146 during the period of attachment cannot prejudicially affect the rights of the party found by the court to be entitled to possession of the land in dispute.

Therefore, a settlement-holder with whom the Receiver settled the land during the period of attachment cannot claim a right of occupancy as against the rightful owner.

Where a land is attached under section 146, it becomes a case of a continuing wrong under section 23 of the Limitation Act, 1908, and the right to sue accrues from moment to moment so long as the attachment lasts; therefore, a suit for declaration is not barred, under Article 120 of the Act, by lapse of six years from the date of the order of attachment.

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Section 24 of the Cess Act, 1880, provides:—

"The Collector may, whenever he may think fit, cause a notice in the form no. 1 in Schedule (B) contained to be served on any person holding any lands or possessing any interest therein, although such person may have been mentioned in any return as a cultivating raiyat; and thereupon such person shall be bound to make a return of the annual value of such land within one month from the service of such notice in the form in Schedule (A) contained and the provisions of sections 17 and 18 regarding extension of time for lodging a return and regarding fine, respectively, shall be applicable to such person."

Held, that section 24 contemplates the case of a raiyat who is not cultivating the land himself directly but has let it out to under-raiyat for actual cultivation. If there is no under-raiyat and if the raiyat is himself cultivating the land, he cannot be called upon to furnish a return of the annual value which he derives in respect of the land.

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CESS ACT, 1880—*concld.*

The scheme of the Cess Act appears to be that the holder of the estate has to pay cesses upon the rent that he receives in respect of the estate. The tenure-holder in his turn has to pay cesses upon the rent that he receives from the raiyat under him and the raiyat has to pay the cesses not upon what he receives from the land but upon what rent he pays to his superior landlord.

Where, therefore, the plaintiffs who were the cultivating raiyats of certain lands in a village had allowed the dealers of cattle to hold a sort of *hat* upon their holding for which they charged a certain fee, and they were assessed with a certain amount of cess upon the income they derived from these dealers of cattle, *held*, that the assessment on the basis of the income derived by the plaintiffs was illegal.

Held, further, that in view of the definition of the term "tenure" in the Act the plaintiffs cannot be construed to have the status of a tenure-holder in respect of the lands held by them when they allow the dealers in cattle to come upon the land and hold a *hat* there.

Persons holding a *hat* upon the land of the cultivating raiyat are not lessees under them but are mere licensees. *Secretary of State for India in Council* v. *Ramasray Singh* 701

CHARGE—*created by decree, whether can be enforced in execution. See* Compromise, no. 2 359

CHOTA NAGPUR INCUMBERED ESTATES ACT, 1876.—

1———*sections* 11 *and* 18—*scheme not contemplating sale —sale without fresh scheme—sale by manager—intervention of Commissioner and Revenue authorities.*

Section 18 of the Chota Nagpur Incumbered Estates Act, 1876, as amended in 1909, prohibits a sale of part of an estate under the Act until a scheme has been approved by the Commissioner under section 11, but does not require a fresh scheme to be prepared and approved to justify a sale not contemplated in the approved scheme if in the opinion of the Commissioner and the Manager a sale is expedient in the interests of the estate.

Section 18 requires that a sale shall be by the Manager, and upon such terms as he thinks fit, but a sale made by him on terms sanctioned by the Commissioner is not invalid because the Commissioner and the superior Revenue authorities have had a controlling voice in considering and negotiating the matter. *Raja Ranbahadur Singh* v. *Nagarseth Kasturbhai Mani* 634

2———*sections* 12-*A and* 23—*Khorposh grant, whether is an "alienation" within the meaning of section* 12-*A—decree for maintenance—properties of disqualified proprietor transferred to decree-holder—validity of transfer—section*

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CHOTA NAGPUR INCUMBERED ESTATES ACT, 1876—*concld.*

23, *whether applies only to suits instituted during the period of management—res judicata, whether a decision on a question of law operates as—Khorposh grant void ab initio—decree in previous suit holding khorposh grant to be valid, whether operates as res judicata.* Section 12-A, Chota Nagpur Incumbered Estates Act, 1876, provides:—

"(1) When the possession and enjoyment of property is restored, under the circumstances mentioned in the first or the third clause of section 12, to the person who was the holder of such property when the application under section 2 was made, such person shall not be competent, without the previous sanction of the Commissioner,—

(a) to alienate such property, or any part thereof, in any way, or

(b) to create any charge thereon extending beyond his life-time."

Sub-section (3) provides that every alienation and charge made or attempted in contravention of sub-section (1) shall be void.

Held, that a khorposh grant is an "alienation" within the meaning of section 12-A and, therefore, that such a grant made without the previous sanction of the Commissioner is void under sub-section (3) of that section.

Although, in a proper case, decision on a question of law attracts the operation of the doctrine of res judicata as effectively as a decision on a question of fact, there may be cases in which a decision on a question of law does not operate as res judicata.

Held, therefore, that where a khorposh grant is void *ab initio*, a decision in a previous suit holding it to be valid does not operate as res judicata in a subsequent suit.

Section 23 of the Act, as amended by Act III of 1909, applies only to certain suits instituted during the period that an estate is under management under the Act.

Where a decree in a suit instituted, not under section 23 of the Act, but under section 9 of the Code of Civil Procedure, entitled the decree-holder to get as maintenance from a disqualified proprietor certain properties belonging to the latter, *held*, that by reason of the provisions of section 12-A the disqualified proprietor was incompetent to give effect to the decree without the sanction of the Commissioner. *Thakur Bagheshwari Charan Singh* v. *Bindheshwari Charan Singh* 147

CHOTA NAGPUR TENANCY ACT, 1908.—

1————*sections 80 and 84(3)—presumption of correctness, whether attaches to an entry in the record-of-rights with respect to non-agricultural lands—evidence of rebuttal, sufficiency of—incorrectness of entry, whether can be established by reference to the state of things existing before final publication.*

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CHOTA NAGPUR TENANCY ACT, 1908—*contd.*

Section 80 of the Chota Nagpur Tenancy Act, 1908, provides:—

"(1) The Local Government may make an order directing that a survey be made and a record-of-rights be prepared by a Revenue Officer, in respect of the lands in any local area, estate, or tenure or part thereof.

(2) A notification in the *Calcutta Gazette* of an order under sub-section (1) shall be conclusive evidence that the order has been duly made.

(3) The survey shall be made and the record-of-rights shall be prepared in the prescribed manner."

Held, that unless the notification expressly excludes non-agricultural lands there is nothing in the section to indicate that such lands, situated in the area or estate to be surveyed, are to be excluded, and, therefore, that the presumption of correctness attaches to an entry in the record-of-rights with respect to non-agricultural lands under section 84(3) of the Act.

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 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.

The incorrectness of an entry in the record-of-rights may be established by reference to the state of things existing before the record-of-rights was prepared. *Satya Charan Braamani* v. *Bhib Charan Tripunait* 829

2——————*sections* 180(*a*), 199A *and* 231 *amending Act VI of* 1920—*suit for declaration of title with consequential relief for possession - jurisdiction of Civil Courts to try such suit, whether barred rule, whether applicable to cases where institution of suit or even cause of action had been subsequent to amendment of section* 199(*a*) *limitation section* 231, *applicability of amendment of section* 199(*a*) *and introduction of section* 199A, *effect of old law, whether restored.*

Held, (i) that section 199(*a*), read with section 199A, Chota Nagpur Tenancy Act, 1908, as amended by Act VI of 1920, bars the jurisdiction of the Civil Courts only in summary suits for possession and not in suits for declaration of title with the consequential relief of possession

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CHOTA NAGPUR TENANCY ACT, 1908—*concld.*

(*ii*) that this is so even when the institution of the suit or the cause of action has been, or both have been, subsequent to the amendment of section 139(*5*);

(*iii*) that the provision of section 231 of the Chota Nagpur Tenancy Act, prescribing one year's limitation, has no application to a suit for declaration of the plaintiff's title with consequential relief as to possession;

(*iv*) that, therefore, the suit of a raiyat for declaration of title to and recovery of possession of his holding from a landlord lies in the civil court and does not lie in the revenue court and the period of limitation is the ordinary one and not one year as it is in possessory suit under section 139(*5*) of the Chota Nagpur Tenancy Act;

(*v*) that the effect of the new section 139A, read with the amended section 139(*5*), was to restore, in cases coming from Manbhum, the law [namely, clause (*6*) of section 23 of Act X of 1859] as it stood prior to 1909, when the Chota Nagpur Tenancy Act, 1908, was extended to that area. *Raja Shiva Prasad Singh* v. *Bhuban Mahato* 802

3———*sections* 208 *and* 210(*b*)—*decree effective against only a part of the tenancy interest—sale of tenancy, whether without jurisdiction—sale, whether binds the interest of any of the judgment-debtors against whom the decree was valid.*

A sale under section 208, Chota Nagpur Tenancy Act, 1908, is only valid when held in execution of a decree for the rent of the tenancy obtained against the whole of the tenancy interest.

Where the decree was effective against only a part of the tenancy interest and did not affect the interest of the minor tenants who were sued as defendants in the suit, and the whole tenancy was sold in execution under section 208.

Held, (*i*) that the property was sold as a whole and either the sale of the whole property was valid or not binding at all;

(*ii*) that the sale under section 208 was entirely without jurisdiction and that it did not affect the interest of any of the judgment-debtors even though a sale of their interest under section 210(*b*) might have been valid. *Raja Sri Sri Jyoti Prasad Singh Deo Bahadur* v. *Tara Sankar Chatterji* 799

4———*sections* 208, 211 *and* 214—*sale for rent—rent decree—recorded tenant not before court—jurisdiction of civil court to set aside sale—tenant not entered in sherista.* *See* Sale 626

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CIVIL COURT—*District board Electoral Rules—Returning Officer, summary rejection of nomination paper by—suit for declaration that order illegal—Civil Court, jurisdiction of, whether ousted. See* Local Self-Government Act, 1885 ... 209

CODE OF CIVIL PROCEDURE, 1908.—

1———*section* 11. *See* Res judicata, no. 1 ... 179

2———*section* 11—*two suits disposed of by one judgment—common issue tried—appeal from one decree only—unappealed decree, whether operates as res judicata in the other suit at appellate stage. See* Res judicata, no. 3 ... 139

3———*section* 48(*1*) (*b*)—*execution of decree—subsequent order directing payment—order in different suit—commencement of the period of limitation, whether postponed. See* Limitation, no. 2 195

4———*section* 66, *scope of—suit by real owner against certified purchaser for declaration of title and confirmation of possession, whether maintainable—deed of relinquishment, whether alone can pass title.*

Per KHAJA MOHAMAD NOOR, J.—The general result of the case law on section 66, Code of Civil Procedure, 1908, and on the corresponding section of the old Codes is that a suit of a plaintiff, who bases it on the ground that he was the real purchaser at a court sale and that the certified purchaser was not really so, must fail.

But if the real owner is in possession of the property and the certified purchaser wants to take advantage of his name being in the sale certificate and brings the suit on that basis the real owner can successfully defend it on the ground of his being the real purchaser.

If, however, the plaintiff does not base his suit upon the title which he has on account of his being the real purchaser at the court sale, but on some other title subsequently acquired, his suit does not come within the mischief of section 66 of the Code.

Per SCROOPE, J.—For the application of section 66 it is immaterial whether the plaintiff, the real owner, is in possession and seeks a confirmation of possession or whether he is out of possession and seeks to recover it.

Title of land cannot pass by admission where the statute requires a deed.

Therefore a *bazidawa*, or a deed of relinquishment, executed by an alleged *benamidar* in favour of the real owner, and containing a mere admission of title with an undertaking not to interfere with the latter's possession, cannot alone pass title from the *benamidar* to the real owuer. *Keshri Mull* v. *Sukan Ram* 616

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CODE OF CIVIL PROCEDURE, 1908—*contd.*

5———*section 73 and Order XXI, rule 89—money deposited under rule 89 of Order XXI, whether becomes assets in the hands of the court within the meaning of section 73.*

Money paid into court for the benefit of a particular decree-holder under Order XXI, rule 89, Code of Civil Procedure, 1908, becomes assets in the hands of the court within the meaning of section 73 of the Code and is available for rateable distribution in the same way as any other money paid in for his benefit, whether realised by sale or paid in to avoid attachment. *Bhatoo Singh* v. *Raja Raghunandan Prasad Singh* 772

6———*section 109(a)—appeal to Privy Council—order refusing the appointment of receiver, whether is "final order".* The appointment of a receiver is in the discretion of the court and the order is an interlocutory order which in no way decides any cardinal point arising for decision between the parties in the suit.

Held, therefore, that an order refusing the appointment of a receiver is not a final order within the meaning of section 109(a), Code of Civil Procedure, 1908. *Rajniti Prasad Singh* v. *Nrisingha Charan Nandy Chaudhury* ... 723

7———*section 145—debtor and surety—decree against principal debtor consented to by surety as such—effect—decree can be executed against surety as though he were a party to the suit. See* Limitation, no. 2 195

8———*section 151—order refusing to exercise jurisdiction whether appealable under clause 10 of the Letters Patent. See* Letters Patent, no. 2 202

9———*Order XXI, rules 15 and 16—decree in favour of two co-parceners of joint Hindu family—death of one co-parcener—execution by the surviving co-parcener decree-holder—rule 16, whether applies—rule 15, applicability of. See* Execution, no. 1 42

10———*Order XXI, rule 53—money decree, whether can be sold in execution—attaching creditor should proceed to execute the attached decree.* A money decree cannot be sold in execution and once such a decree is attached the procedure indicated in Order XXI, rule 53, Code of Civil Procedure, 1908, should be followed, and the attaching creditor may proceed to execute the attached decree as if he was the representative of the holder of that decree. *Domi Lal Sahu* v. *Bijoy Prasad Singh* 36

11———*Order XXI, rule 89—money deposited under the rule, whether becomes assets in the hands of the court within the meaning of section 73. See* no. 5, *supra.* 772

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CODE OF CIVIL PROCEDURE, 1908—*concld.*

12———*Order XXI, rule 90—auction-purchaser, whether is a person " whose interests are affected by the sale ".*

Held, per JAMES and AGARWALA, JJ. (KULWANT SAHAY, J. *dissentiente*), that an auction-purchaser of a property in execution of a decree is a person " whose interests are affected by the sale " within the meaning of Order XXI, rule 90, Code of Civil Procedure, 1908.

Per KULWANT SAHAY, J.—An auction-purchaser is not a person whose interests are affected by the sale within the meaning of the words of Order XXI, rule 90. It is only persons who had any interest in the property before the sale, and which interests are affected by the fact of the property being sold and of its passing out from the judgment-debtor to the purchaser, who can come in under rule 90. *Mahadeo Ram* v. *Raja Mohan Vikram Sah* ... 665

13———*Order XLV, rule 5—Privy Council Practice—Record on appeal—value of subject-matter—report. See* Privy Council Practice, no. 2 679

14———*Order XXII, rules 2 and 4—Hindu co-widows impleaded as defendants as representing the estate of their deceased husband—death of one—right to sue, whether survives against the other alone—substitution, whether necessary—rule 2, applicability of. See* Abatement ... 778

15———*Order XXI, rule 90—sale held in lots—irregularity extending to all the lots—inadequacy of price in respect of some only of the lots—sale, whether should be set aside in respect of all the lots.* In a proceeding under Order XXI, rule 90, Code of Civil Procedure, 1908, where both the irregularity and the injury to the objector can be satisfactorily allotted to one part only of the sale, the court may be justified in setting aside the sale of that part only, but in cases where the irregularity extends to the whole property and to all the lots, it is not justifiable to retain the efficacy of the sale with respect to some of the plots only in which the sale price obtained cannot be shewn to be inadequate. *Chhaterbijai Singh* v. *Damodar Das* 181

16———*Order XXIII, rule 3—enquiry, scope of—contract to compromise a pending suit, specific performance of—analogy between enquiry under rule 3 and a suit for specific performance of contract—" lawful ", meaning of—court, whether bound to record lawful compromise—decree following an order recording a compromise, whether appealable. See* Compromise, no. 2 359

17———*Order XLI, rule 33—discretion to be exercised to further ends of justice. See* Bengal Tenancy Act, 1885, no. 6 261

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CODE OF CRIMINAL PROCEDURE, 1898.

1——————*section* 123—*person affected by the order, whether should have opportunity of being heard before final order.* The person affected by the order under section 123, Code of Criminal Procedure, 1898, must have an opportunity of being heard before the final order is made under that section. *Sitaram Ahir* v. *King-Emperor* 770

2——————*section* 145—*dispossession of raiyat by an order of magistrate, whether is dispossession by landlord. See* Bengal Tenancy Act, 1885, no. 6 261

3——————*section* 146—*attachment, whether amounts to dispossession by landlord—attachment of land—Receiver, appointment of—settlement by Receiver, whether binding on the rightful owner—act of Receiver, whether can prejudicially affect the rights of party entitled to possession. See* Bengal Tenancy Act, 1885, no. 6 261

4——————*sections* 145 *and* 146—*dispute concerning land, one party claiming joint possession while the other claiming exclusive possession—sections, whether applicable.* A dispute between two parties one of whom claims joint possession while the other claims exclusive possession over the disputed land and contests the opposite party's right is within the contemplation of section 145 (and, therefore, of section 146), Code of Criminal Procedure, 1898.

The only condition for a proceeding under section 145, terminating in a finding under sub-section (4) and an order under sub-section (6) or an order under section 146, is that the magistrate should be satisfied on information before him that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction. Thereupon he is to call for written statements from the parties concerned in the dispute " of their respective claims as respects the fact of actual possession of the subject of dispute ", and he is to determine whether any and, if so, which of the parties was at the date of the order initiating proceedings in such possession of the said subject. Because one set of persons claim exclusive possession over the major portion of the land while another set of persons claim to be in joint possession along with them of the entire land, the dispute may be difficult to decide, but it is in principle no less a question of disputed actual possession than if each party claimed exclusive possession of the entire area. *Nandkeshwar Prasad Sahi* v. *Sita Saran Sahi* ... 87

5——————*section* 173—*order disposing of police report under section* 173, *whether is a judicial order—magistrate, whether is competent to call for charge sheet after disposing of police report under section* 173. A magistrate's order directing a case, reported to him by the police under section

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CODE OF CRIMINAL PROCEDURE, 1898—*contd.* ...

173, Code of Criminal Procedure, 1898, to be struck off, is a purely administrative or ministerial order and the principle of " *autrefois acquit* " cannot apply to it.

Therefore, a magistrate, having disposed of a police report under section 173, is competent to revise his order and call for a charge sheet. *Uma Singh* v. *King-Emperor* 234

6———————*sections* 190(*1*) *and* 191—*Magistrate, cognizance taken by, under section* 190(*1*) (*b*) *on a police report—different offence disclosed by evidence—cognizance taken of the new offence—Magistrate, whether deemed to have taken cognizance under section* 190(*1*)(*c*)—*section* 191, *whether applies in such circumstances—principle applicable to summons cases, whether applies to warrant cases—taking of cognizance, significance of—court, power of, to frame charges as may be justified by evidence irrespective of offence or offences of which cognizance is initially taken.*

If a Magistrate takes cognizance of an offence under section 190(*1*)(*c*), Code of Criminal Procedure, 1898, his further proceedings are bad unless he informs the accused that he is entitled to have the case tried by another court.

But where the Magistrate has before him a Police report disclosing one offence of which he takes cognizance, and if in the course of taking evidence a different offence is disclosed and he takes cognizance of it, he would be deemed to have taken cognizance of the latter offence, not under clause (*c*) of section 190(*1*), but under clause (*b*), and therefore he is competent to hold the trial in respect of the new offence disclosed without first informing the accused under section 191 that he was entitled to have the case tried by another court.

In summons cases, whatever may be the nature of the complaint or summons, the Magistrate who is trying the case may convict the accused of any offence triable under Chapter XX which on the facts he appears to have committed. In warrant cases, although the principle is not so explicitly stated, the legislature did not intend to lay down a principle different from that applicable to summons cases.

Per DHAVLE, J.—Taking cognizance under section 190(*1*) is a very particular, technical matter confined to the initiation of proceedings. Cognizance is taken under clauses (*a*), (*b*) and (*c*) of section 190(*1*) before the taking of any evidence.

The power of the court to frame charges, which comes into operation well after the initial requisite of taking cognizance under section 190(*1*), is governed by the general provisions contained in Chapter XIX which seem to enable the court to frame such charges as may be justified by the

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CODE OF CRIMINAL PROCEDURE, 1898—*contd.*

evidence produced irrespective of the particular offence or offences of which cognizance may have been taken under section 190(*1*) at the initial stage.

When a Magistrate has taken cognizance of an offence upon a complaint or upon a police report, any offence that may be disclosed by the evidence may be dealt with at the trial, and section 190(*1*)(*c*) and section 191 have no application in such circumstances. *Baldeo Prasad* v. *King-Emperor* 758

7 ————*section* 192(*1*)—" *case of which he has taken cognizance* " *meaning of—subdivisional magistrate, cognizance taken by, on charge-sheet submitted by police—case transferred to subordinate magistrate* " *for disposal* "—*order, effect of—subordinate magistrate alone in seisin of the case—order of subdivisional magistrate calling for supplementary charge-sheet against other accused persons concerned in the offence, whether legal.* Section 192(*1*), Code of Criminal Procedure, 1898, lays down :

" Any Chief Presidency Magistrate or Subdivisional Magistrate may transfer any case, of which he has taken cognizance, for inquiry or trial, to any Magistrate subordinate to him."

Held, that " case of which he has taken cognizance " occurring in section 192(*1*), means nothing more than " the judicial investigation into any offence of which he has taken cognizance ".

Where, therefore, a subdivisional magistrate, having taken cognizance of an offence on a charge-sheet submitted by the police, made over to a subordinate magistrate the charge-sheet and the accused forwarded by the police with an order that the transfer was " for disposal ", and subsequently, on an application being made to him, the subdivisional magistrate called for a charge-sheet against some of the other accused persons named in the original charge-sheet but whom the police did not propose to send up for trial.

Held, (*i*) that the effect of the order of transfer was that the whole case, namely, the judicial investigation into the offence, and not merely the judicial investigation into the offence so far as regards the particular accused, was made over to the subordinate magistrate;

(*ii*) that the subordinate magistrate alone had seisin of the case and no other magistrate was competent to deal with it and, therefore, the order of the subdivisional magistrate calling for a supplementary charge-sheet against some other accused persons concerned in the offence was without jurisdiction. *Deonarain Singh* v. *King-Emperor* 341

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CODE OF CRIMINAL PROCEDURE, 1898—*concld.*

8———*section* 196A(2)—*commitment on a charge of criminal conspiracy—Penal Code*, 1860 (*Act XLV of* 1860), *sections* 467 *and* 471—*sanction of Local Government not obtained—Sessions Judge, refusal of, to record a sentence either of acquittal or conviction—order, whether improper or illegal—initiation of proceeding under Chapter XVIII, whether legal—High Court, power of, to quash illegal commitment at any stage. See* Criminal Trial ... 853

9———*sections* 209, 253 *and* 446(1)—*commitment, whether can be made without recording evidence for prosecution.* Before the magistrate makes a commitment under section 446(1), Code of Criminal Procedure, 1898, he must consider whether there are grounds for discharging the accused under section 209 or section 253 of the Code. *K. T. Keshan* v. *King-Emperor* 707

10———*section* 386 (1) (a)—*attachment of undivided share of offender in moveable property belonging to joint family, whether legal.* An undivided share of the offender in a moveable property belonging to the joint family of which the offender is one of the members cannot be attached under section 386 (1) (a), Code of Criminal Procedure, 1898. *Rajendra Prasad Missir* v. *King-Emperor* 29

11———*section* 522, *clause* (3)—*time limit, whether imposed by the section—court of appeal, confirmation, reference or revision, whether can pass order after the expiry of one month from the original conviction or the disposal of appellate or revisional proceeding.*

Clause (3) of section 522, Code of Criminal Procedure, 1898, does not impose any time limit within which a court of appeal, confirmation, reference or revision must act.

Held, therefore, that it is competent to such a court to pass an order for restoring the property to the complainant even after the expiry of one month from the original conviction or from the disposal of appellate or revisional proceedings. *Fida Hussain* v. *Sarfaraz Hussain* ... 787

COMPROMISE—

1———*authority to effect compromise and authority to file compromise petition, distinction between. See* Jurisdiction 117

2———*of disputed claim, significance of—family arrangement, whether stand on different footing—compromise, when can be set aside—petition of compromise attached to formal decree, binding effect of—charge created by decree, whether can be enforced in execution—Specific Relief Act*, 1887 (*Act I of* 1887), *section* 42, *scope and significance of—"able to seek further relief", meaning of—court, whether can pass executable decree for future maintenance—Civil*

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COMPROMISE—*contd.*

Procedure Code, 1908 (*Act V of* 1908), *Order XXIII, rule* 3 *—enquiry, scope of—contract to compromise a pending suit, specific performance of—analogy between enquiry under rule* 3 *and a suit for specific performance of contract— " lawful " meaning of—court, whether bound to record lawful compromise—decree following an order recording a compromise, whether appealable—Contract containing several promises—legal part separable from illegal part—validity of legal part—subject-matter of contract uncertain —election, effect of—executor, whether can compromise suit by agreeing to creation of charge on the estate—will, absence of restriction in—petition of compromise, whether requires registration—Registration Act*, 1908 (*Act XVI of* 1908), *section* 17*—construction of statute, rule of—Pardanashin ladies, law as to—transaction with pardanashin, binding effect of—what should be proved—different considerations arising in different cases—Hindu Law—law of the Mithila school, whether is the law of the Mitakshara —wife, position of, under the Mitakshara—Mithila wife, whether is a co-parcener of her husband and co-owner of property—wife, whether can demand partition in Mitakshara and the Mithila—Mithila husband, power of, to make a gift or bequest without the consent of the wife—prohibition as to gift of entire wealth (sarvasva), whether is a moral or religious injunction only—law of wills, whether is a development of law of gifts inter vivos—wife's right to maintenance —abandonment of suit by claimant to office of shebait— whether amounts to transfer of office—validity of the transaction—failure of appointment of successor by shebait —absence of provision in the deed—management of trust, to whom reverts—Vivada Chintamani, relative authority of, in the Mithila school—evidence of translators playing the part of interpreters, whether admissible, when questions raised are not questions of foreign law—court-witness, examination of lawyer appearing in the case as, whether undesirable—lawyer supposed to be material witness— undesirability of his appearing in the case—such lawyer, whether can give evidence while appearing in the case.*

The court will not examine a lawyer as a court-witness at the instance of a party who had ample opportunity of examining him but did not choose to do so, and when the person, proposed to be examined, has come to know perfectly well every detail of the transaction in question which the party engaging him expects to elicit from him and the other party might reasonably say that he has had undue facilities for concentrating his mind upon every point of importance and preparing himself to meet every attack that might be made in cross-examination.

Although it is undesirable that a lawyer should appear in a case in which he knows or has reason to believe that

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COMPROMISE—*contd.*

he would be an important witness, there is no harm in his giving evidence in the case.

The protection which is given to pardanashin ladies of India is not peculiar to them. Such protection has always been given by the Courts to persons who are weak, ignorant and infirm, and unable to look after themselves. In such cases generally the person claiming protection has to prove that as a matter of fact he was on account of the weakness of his power of understanding and intellect, liable to be imposed upon by those who would take advantage of his position and, therefore, needs protection.

In the case of pardanashin ladies, however, the law presumes them, from the very fact that they live in seclusion, to be incapable of protecting themselves and therefore entitled to protection.

The court when called upon to deal with a deed executed by a pardanashin lady must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorized by her with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and thirdly, as has been sometimes said, that she had independent and disinterested advice in the matter.

Independent advice is not, however, essential and in a case where there was no independent advice, the Court will have to consider the probable effect of such advice, if it had been given, on the mind of the lady.

The rules laid down by the courts of law for assisting them in determining whether a pardanashin lady understood the nature and effect of a document executed by her are rules of prudence rather than of law, and thier application depends upon the particular facts of each case.

Documents executed under the influence of fraud or by persons who are ignorant, weak and infirm, such as pardanashin ladies, will not be given effect to unless the courts are first satisfied that the mind accompanied the hand in the act of execution. In the one case the party alleging fraud must prove it, by placing before the court facts from which it can irresistibly be found. In the other the person who wants to take the benefit of the document must prove that the intellectual deficiency was made good by proper explanation given to her. The quantum of proof necessary will depend on the facts of each case.

There may be cases in which, on the admitted facts of the case, the court, taking into consideration the personality of the lady and the circumstances of the case,

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COMPROMISE—*contd.*

is satisfied that the onus has been discharged, that there was no actual defficiency to be made up and that the lady did fully understand the transaction in question.

The Vivada Chintamani does not seem to support the proposition that a Mithila widow is entitled to get the cost of her husband's sradh from those who may have taken his estate. The obligation of the widow to perform the *sradh* would seem to be dependent upon her taking the husband's estate.

Where a *shebait* does not apopint his successor and where there is no other provision for the appointment of the next *shebait*, the management of the endowed trust would revert to the heir of the founder.

The law of the Mithila school is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila school has departed from the law of the Mitakshara.

Under the Mitakshara, as also under the Mithila school, a woman is by marriage transferred from the father's *gotra* to that of her husband, so much so that a married woman can have no other *gotraja* relations than those of her husband.

Where property is held in co-parcenary by a joint Hindu family, there are ordinarily three rights vested in co-parceners—the right of enjoyment, the right to call for partition and the right to survivorship. The wife's interest in her husband's family property does not under the Mitakshara include two of these three rights of a co-parcener, and though her right to maintenance (which is unquestionable) has sometimes been referred to her position as a co-sharer in a subordinate sense, the contention that she is a co-parcener has been frequently raised but never accepted by the Courts.

Too much strees should not be put on any of the (Mitaksbara and other) texts which speak of the ownership of the wife in her husband's property.

The wife's interest in the husband's property under the Mithila is even weaker than under the Mitakshara.

Under the Mithila School the wife is not a co-parcener of her husband and co-owner of property with him, and she is not regarded as such on the dictum *dampatyor madhyagam dhanam*, which does not appear to have been adopted in any of the leading Mithila authorities on *Vyavahara* or Law proper.

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COMPROMISE—*contd.*

The Vivada Chintamani does not give the Mithila wife the right unconditionally to demand partition, and all that that authority can be said to have laid down is that, as under the Mitakshara, she is to receive a share equal to that of a son when her husband chooses to make an equal division of his self-acquisitions, or chooses or is forced by the sons to divide the ancestral property.

Vachaspati Misra's comment of the Narada's verse as regards the prohibition of a gift means on the *yathasankhya* principle of interpretation among other reasons, that what is necessary to the gift of a son, a wife and *sarvasva* (entire wealth) is the consent, *respectively* of the son, the wife and the like, the *anvaya* (*putradaranvayanam* or even *putradaradyanvayanam.*)

The term *anvaya* does not include the wife and, therefore, her consent is not essential to her husband's bequest of his entire estate (*sarvasva*).

The prohibition of the gift of the entire wealth without the consent of the *anvaya* is nothing more than a moral or religious injunction and the excess of the limit thus laid down cannot be a ground for holding the gift invalid.

The wife's right to maintenance is a different matter from a right to avoid a gift of the entire property made by the husband. This right to maintenance may be reconciled with the *factum valet* view of a gift of his entire property by the husband; the gift may stand and the wife's maintenance charged on the property.

The law of Wills and bequests by Hindus is a development of the law of gifts inter vivos, and wills are generally to be regarded as gifts to take effect upon death as to the property which they can transfer.

When the questions raised are not questions of foreign law, the evidence of translators who have played the part of interpreters is not admissible in evidence.

Observations on the relative authority of the Vivada Chintamani in the Mithila School.

A compromise of a disputed claim stands upon a different footing from a transfer of a vested interest. It is an agreement to put an end to disputes and terminate or avoid litigation; and in such cases the consideration which each party receives is not the sacrifice of a right but abandonment of a claim.

When there is a supposition of right in both parties and the right is a doubtful one, an agreement of compromise entered into by the parties is binding on them irrespective

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COMPROMISE—*contd.*
of the fact whether in truth the properties in dispute belonged to one party or to the other.

Different considerations arise when the compromise is not between strangers but substantially between members of the same family. A family arrangement may be such as the court will uphold, although there are no rights in dispute, and if sufficient motive for the arrangement is proved, the court will not consider the quantum of the consideration.

Although a family arrangement may be set aside on the ground of mistake, inequality of position, or undue influence, coercion, fraud or any other similar ground, any such allegation must be clearly established.

Under the Indian law, should a grossly unfair compromise come before a court, as, for example, where a helpless person has been induced to agree to an unconscionable bargain, such a compromise would be ignored or relieved against, for the court will be entitled in the circumstances to presume that such a compromise would not have been entered into by the helpless person except under the influence of fraud, coercion, etc., or that it could not have been intelligently entered into; in other words, that the act of physical execution was not accompanied by the necessary mental act.

Where the plaintiff, entitled to other reliefs, does not seek them, he is not entitled to a pure declaration. The court will not merely make a declaration of a hypothetical or an abstract right without any reference to its practical utility. But where a fully effective executable decree can be passed, section 42 of the Specific Relief Act, 1877, does not operate as a bar.

If a charge is created by the decree itself, it can be enforced by putting the decree into execution and no fresh suit is necessary for its enforcement.

In India a compromise attached to a formal decree has the same effect as if it were embodied in the decree itself.

Therefore, as soon as a petition of compromise is adopted as a part of the decree it passes from the domain of mere contracts into that of decrees and the promise of a party to pay is converted into an order of the Court to that party to pay.

A court can pass an executable decree for future maintenance, that is, a decree entitling the decree-holder to realise such maintenance in execution proceedings.

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COMPROMISE—*contd.*

Section 42 of the Specific Relief Act, 1877, is intended to avoid a multiplicity of suits. But there is nothing in law to prevent a plaintiff, after he has brought a suit for all the reliefs from contenting himself with a pure declaration if that be all that is necessary in the circumstances.

If, therefore, a plaintiff chooses to seek a declaration only for future maintenance for which the cause of action has not accrued, section 42 cannot stand in his way as the words " able to seek further relief " mean " able to seek " it on the date of the suit.

The provision in Order XXIII, rule 3, Code of Civil Procedure, 1908, for an enquiry about the fact and lawfulness of a compromise of a suit in the suit itself is devised as a speedier alternative to a separate suit for specific performance of the contract to compromise the suit on certain terms.

But the analogy between an enquiry under Order XXIII, rule 3, and a suit for specific performance of contract does not get over the distinction between specific performance of a contract to compromise a pending suit and specific performance of the undertaking to be carried out by one party or the other after the decree in that suit. The former merely means the compelling the party who backs out of the compromise to have the pending suit disposed of by a decree on the terms agreed upon by the parties but, it does not mean the specific performance of obligations arising under the decree.

The analogy between a suit for specific performance of contract and a proceeding under Order XXIII, rule 3 should not be carried too far. The one obvious difference between them is that while the Specific Relief Act gives the court discretion to refuse specific performance of a contract and specifies cases in which it cannot be granted, no such exception has been made in Order XXIII, rule 3, under which it is obligatory upon the Court to record a compromise if the court is satisfied that the parties have settled their disputes by a lawful compromise.

Ordinarily, when investigating the fact and lawfulness of a compromise under Order XXIII, rule 3, it is irrelevant to examine the strength or weakness of the suit itself.

The word " lawful " in Order XXIII, rule 3, means lawful within the meaning of the Contract Act; that is to say, the rule contemplates an agreement which is legally enforceable, but not necessarily one that is specifically enforceable.

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COMPROMISE—*contd.*

While the court is debarred from passing a decree on contest for specific performance of a contract which requires the personal skill of the defendant, such a decree must be passed by consent if that be the way the parties agree to compromise the suit.

Where a contract contains several promises, or a promise to do several matters, some of which are illegal, a promise which can be separated from the illegal promise may be valid.

The uncertainty of a term of the contract may be got over by the election of one party to the contract to abandon his rights under that term where the effect of the contract is to give such a right of election.

Where there are two sets of promises one by the plaintiff to the defendant to let her suit for other claims be dismissed, and the other by the defendant to the plaintiff to let a decree be passed against himself for maintenance, etc., and both of them are to be simultaneously performed, and the plaintiff refuses to perform his part, the defendant can insist on the plaintiff performing it, so long as he is ready and willing to perform his own part simultaneously with the part to be performed by the plaintiff.

It is open to a plaintiff to compromise his suit with some of the defendants only, leaving the others altogether alone, or proceeding with the suit against them.

Where there was an abandonment of a suit by a claimant to the office of *shebait* without any personal gain to herself, in favour of a man who was in possession as a *shebait*, and who would, at any rate, have been entitled to the *shebaitship* after her death even if she had succeeded in the suit.

Held, that the transaction was valid under the Hindu law.

An executor under a will has power, in the absence of any restriction in the will, to compromise a suit by agreeing to the creation of a charge for maintenance on the estate of the testator.

But assuming he has no such power, the transaction would be not altogether void, but only voidable.

A petition of compromise asking the court to pass a decree on certain terms does not require registration under section 17 of the Registration Act, 1908.

It is a well settled principle of construction that the legislature is presumed to know not only the general

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COMPROMISE—*concld.*
principles of law but also the construction which the courts have put upon particular statutes.

Where a section of an Act which had received a judicial construction is re-enacted in the same words, such re-enactment must be treated as a legislative recognition of that interpretation.

An appeal lies from an order recording a compromise, but an appeal from the decree following the order is barred under section 96(3) of the Code.

Where, therefore, an application for leave to appeal in forma pauperis from the decree itself was rejected on the ground that no appeal lay from the decree, and the appeal also was dismissed for non-payment of the court-fee, *held*, that the effect of the order of dismissal was as if no appeal had been preferred and that it did not preclude the court from hearing the appeal against the order recording the compromise. *Srimati Sabitri Thakurain* v. *Mrs. F. A. Savi* 359

COMPANIES ACT, 1913—*company incorporated under the Act, whether is a separate legal entity. See* Interest ... 216

CONTEMPT OF COURT—*marrying a minor girl while in the custody of a guardian appointed by court, whether constitutes an offence under section* 228 *of the Penal Code. See* Penal Code, 1860, no. 2 1

CONTEMPT OF COURTS ACT, 1926—
1————*section* 2, *sub-section* (3), *scope and meaning of—High Court, cognisance by, barred only when contempt of court is punishable as such under Penal Code*, 1860 (*Act XLV of* 1860)—*section* 228 *of the Code, whether is the only section dealing with contempts of court.* The Contempt of Courts Act, 1926, enables the High Court to punish contempt of the inferior courts notwithstanding that such contempt as is complained of is not an offence (as contempt) against any of the sections of the Penal Code; only those contempts which are punishable by the Code as contempt of court are excluded from the jurisdiction of the High Court by the Act.

Sections 175 to 179 of the Penal Code define as offences various acts and those acts are offences not against the court itself because they are applicable whether or not in many cases a court is concerned at all. The only section of the Penal Code which deals with contempts committed against a Judicial Officer, that is to say a court, is section 228.

Per KHAJA MOHAMAD NOOR, J.—It is of the utmost importance for the administration of justice that citizens should submit to the orders and authority of courts.

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CONTEMPT OF COURTS ACT—*concld.*

By obstructing the execution of a process of law the offender commits two offences: one is the alleged obstruction and the other is the contempt of court, the offender being deemed to have undermined the authority of that court. The first offence is covered by the Penal Code, while the second one is not.

Sub-section (*3*) of section 2 of the Contempt of Courts Act obviously excepts those cases of contempt which are punishable under the Penal Code as contempt and not if they are punishable independently of that contempt. *Jnanendra Prasad Bose* v. *Gopal Prasad Sen* 172

2————*section* 2(*3*), *significance of—single act, whether may be both an offence under Penal Code and a contempt of court. See* Penal Code, 1860, no. 2 1

CONTRACT—*several promises—legal part separable from illegal part—validity of legal part—election, effect of. See* Compromises, no. 2 359

CONTRACT ACT, 1872—*section* 73—*money wrongfully detained—no stipulation as to interest—interest, whether recoverable. See* Interest 216

COURT-FEES ACT, 1870.—

1————*section* 11 *and Schedule* 1, *Article* 1—*final decree determining amount of mesne profits, appeal from—ad valorem court-fee payable on amount of decree—liability of defendants joint—appeal, value of, what should be—ad valorem court-fee paid on the appeal from preliminary decree, whether allowance should be made for—Taxing Judge, whether can make reference to Division Bench.* Where the amount of mesne profits is definitely ascertained and embodied in a final decree, and an appeal is presented against that decree, the appellant must pay on the memorandum of appeal ad valorem court-fee calculated on the amount of the decree which is the subject-matter of the appeal and not merely on the value of the mesne profits claimed in the plaint. The second part of section 11, Court-fees Act, 1870, applies only to a claim for mesne profits accruing subsequently to the date of suit of which the plaintiff is unable to calculate the approximate value and to a case in which the mesne profits calculated in execution exceed the original claim. It does not apply to mesne profits accruing before suit on which a definite valuation has been placed in the plaint.

Where the liability of the defendants under a decree for mesne profits was joint and some only of them preferred an appeal from the decree adopting a valuation calculated on the proportion which the area held by them bore to the total area of which the plaintiff had been dispossessed,

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COURT-FEES ACT, 1870—*contd.*

held, that the value of the appeal must be the value of the whole decree, and that the ad valorem court-fee payable was to be calculated on that amount.

Held, further, that in calculating this court-fee allowance should be made for the ad valorem court-fee already paid on the appeal from the preliminary decree, since the appellant was not required to pay ad valorem court-fee twice.

A Taxing Judge must himself decide the point referred to him for his decision and he cannot make a reference to a Division Bench. *Dhanukdhari Prasad Pandey* v. *Ramadhikari Missir* 188

2———*section* 12—*appeal against decision determining amount of mesne profits—ad valorem court-fee payable—rule applicable whether the profits may have accrued before suit, or after the date of the institution of the suit—memorandum accepted by Stamp Reporter as sufficiently stamped and duly admitted and registered—question not decided by Taxing Officer—appeal pending—change in practice brought about by subsequent decision—Stamp Reporter, whether can reopen the question and call upon appellant to pay ad valorem court-fee—Patna High Court Rules, Chapter VII, rule* 19, *scope of.* The rule in *Dhanukhdhari Prasad's*[1] case that ad valorem court-fee is payable on a memorandum of appeal against a decision determining the amount of mesne profits applies to all appeals from such decisions, whether the profits may have accrued before suit, or after the date of the institution of the suit.

Rule 19, Chapter VII, of Rules of the Patna High Court provides :—

" Whenever the Stamp Reporter finds that a document which ought to bear a stamp under the Court-fees Act, 1870, has been through mistake or inadvertence received, filed, or used in the Court without being properly stamped, he shall report the fact to the pleader who presented such document. Such pleader shall at once initial the report and shall within three weeks thereafter, or within such further time as the Taxing Officer may allow, note on it whether he accepts or disputes the accuracy thereof. If such note is not made within such time, it shall not be open to such pleader to dispute the accuracy of the report."

When an appeal, at the time of its presentation was accepted by the Stamp Reporter as sufficiently stamped in accordance with the practice then prevailing and was duly admitted and registered, but subsequently, while the appeal was still pending, the Stamp Reporter following a decision of the court which interpreted the law and changed the practice, reopened the question and called upon the appellant to pay ad valorem court-fee on the memorandum of appeal.

[1] (1933) I. L. R., 12 Pat., 188.

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COURT-FEES ACT, 1870—*concld.*

Held, (*i*) that the memorandum of appeal would be deemed to have been received through mistake or inadvertence so as to attract the operation of rule 19;

(*ii*) that the Stamp Reporter was not functus officio and that, so long as the appeal may remain pending, he had the power under rule 19 to reopen the question of whether a document is sufficiently stamped, where the matter has not already been decided by the Taxing Officer.

Query: (*i*) whether it is proper to treat an appellant, whose memorandum of appeal may have been duly admitted and registered, where the matter of what may be the court-fee payable has not been left open, but has been decided in a manner which appears to be final, as liable to be called upon to pay additional court-fee during the pendency of the appeal, owing to a change in the view of the law taken by the court after the appeal has been admitted.

(*ii*) whether the first part of section 12 of the Court-fees Act, 1870, can be held to empower the Bench hearing the appeal to reject a memorandum as insufficiently stamped. *Sideshwari Prasad* v. *Ram Kumar Rai* ... 694

CRIMINAL TRIAL—*commitment on a charge of criminal conspiracy—Penal Code*, 1860 (*Act XLV of* 1860), *sections* 467 *and* 471—*sanction of Local Government not obtained—Code of Criminal Procedure*, 1898 (*Act V of* 1898), *section* 196*A* (2)—*Sessions Judge, refusal of, to record a sentence either of acquittal or conviction—order, whether improper or illegal—initiation of fresh proceeding under Chapter XVIII, whether legal—High Court, power of, to quash illegal commitment at any stage.*

The accused persons were committed for trial by the magistrate on a charge of criminal conspiracy punishable under sections 467 and 471 of the Penal Code, 1860. By the provisions of section 196A(2) of the Code of Criminal Procedure, 1898, the sanction of the Local Government was necessary to the initiation of proceedings before the court could take cognizance of the offence: but the sanction had not been obtained. The trial proceeded to the stage at which the opinion of the assessors was taken when it was brought to the notice of the Assistant Sessions Judge that he had no power to deal with the case. The Judge then held that the trial which had taken place was ab initio void, and he passed no sentence of conviction or acquittal. He directed that the District Magistrate should be informed of the facts and that the accused persons should remain in the position in which they were before the enquiry began. After the order had been recorded by the Judge, sanction from the local Government was obtained to the prosecution under sections 467 and 471 read with section 120B of the

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CRIMINAL TRIAL—*concld.*

Penal Code. A fresh complaint was made and the magistrate proceeded to hold a new enquiry under Chapter XVIII of the Code. The accused moved the High Court for staying further proceedings in this enquiry on the ground that the Judge acted illegally in failing to deliver final judgment, and that the trial before him must be treated as still pending.

Held, (*i*) that no court had power to take cognizance of the offence of criminal conspiracy unless the local Government had by an order in writing consented to the initiation of the proceedings, so that the whole proceedings were ab initio void, the commitment was void, and the trial was void and the judge had no jurisdiction to pronounce a verdict either of acquittal or conviction;

(*ii*) that, therefore, the order of the judge was neither improper nor illegal;

(*iii*) that although the High Court has power to quash an illegal commitment at any stage of the case, there were in fact no proceedings pending under the illegal commitment which required to be quashed:

(*iv*) that, therefore, there was nothing which stood in the way of the fresh proceeding under Chapter XVIII of the Code which called for an interference by the High Court. *Hari Charan Misra v. The King-Emperor* ... 353

DECREE.—

1———*money, whether can be sold in execution. See* Code of Civil Procedure, 1908, no. 10 36

2———*person in one capacity, decree obtained against, whether can be resisted by him in another capacity. See* Hindu Law, no. 1 727

DEED—*construction of. See* Hindu Law, no. 1 727

DISTRICT BOARD ELECTORAL RULES—*rules 29 and 68—Returning Officer, summary rejection of nomination paper by—suit for declaration that the order was illegal—civil court, jurisdiction of, whether ousted—District Magistrate, how far empowered to hear election petitions. See* Local Self-Government Act, 1885 209

EVIDENCE.—

1———*bequest in favour of "a son" of* L *or* G—*extrinsic evidence, whether admissible to show which of the living sons of* L *or* G *was intended to be benefited. See* Will 708

2———*evidence of translators playing the part of interpreters, whether admissible, when questions raised are not questions of foreign law—lawyer supposed to be a material*

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EVIDENCE—*concld.*

witness—undesirability of his appearing in the case—such lawyer, whether can give evidence while appearing in the case—court-witness, examination of lawyer appearing in the case as. whether undesirable. See Compromise, no. 2 359

EVIDENCE ACT, 1872—

1———*section* 13—*right, meaning of.* The word "right" as used in section 13 of the Evidence Act, 1872, means incorporeal right as distinct from ownership of property. *Ram Kishun* v. *Niranjan Pande* 285

2———*section* 24—"*person in authority*", *meaning of—statement by a person that he has committed an act which amounts to an offence, whether is a confession by an "accused person" exculpatory statement by accused, whether admissible against co-accused—strength of evidence against the accused is a matter to be considered before and not after conviction.*

The words "person in authority" occurring in section 24 of the Evidence Act, 1872, have reference to a person who has authority to interfere in the matter under enquiry as, for example, a person engaged in the apprehension, detention or prosecution of the accused, or who is empowered to examine him. The section excludes a confession procured by inducement, threat or promise having reference to the charge, only when the inducement, threat or promise is sufficient to give the accused person reasonable grounds for supposing that by making it he will gain any advantage or avoid any evil in reference to the proceedings against him. When the inducement, etc., is by a person who has no power to interfere in the matter under inquiry it is not reasonable for the accused to suppose that he will benefit by confessing.

Where an extra judicial confession was made to a tahsildar who was a person of some influence in the village but had no interest in the prosecution of the accused other than the interest which every citizen has in the maintenance of law and order, and the confession was made in consequence of questions put, and a promise made by him.

Held, that the tahsildar not being a person empowered to examine the accused or one who could legitimately influence the course of proceeding, the confession was not excluded by section 24.

When a person states that he has done certain acts which amount to an offence, he accuses himself of committing the offence and the statement is, therefore, a confession by an "accused person" within the meaning of section 24.

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EVIDENCE ACT, 1872—*concld.*

Obiter: if such person makes the statement to a police officer, as such, he submits to the custody of the officer within the meaning of section 46(*1*) of the Code of Criminal Procedure, 1898, and is then " in the custody of a police officer " within the meaning of section 27 of the Evidence Act, 1872.

Semble, that an exculpatory statement made by an accused is inadmissible against a co-accused.

The strength of the evidence against an accused person is a matter to be considered before, and not after conviction. Therefore, a Judge is wrong when, after he has convicted the accused of murder, he sentences him to transportation for life on the ground that the evidence was not of a sufficiently convincing character to justify the capital sentence. *Santokhi Beldar* v. *King-Emperor* ... 241

3————*section* 25—" *Excise Officer* ", *whether is a* " *Police Officer* "—*confession made to Excise Officer in course of investigation, whether is admissible. Held, per curiam*, that an Excise Officer is not a " Police Officer " within the meaning of section 25 of the Evidence Act, 1872, and, therefore, that a confession made to such an officer in course of his investigation is admissible in evidence.

Per COURTNEY TERRELL, C. J.—Courts of Justice are not concerned with the objects with which the legislature enacts any particular law unless in the particular enactment the object is stated as a guiding principle to be followed in interpretation. Where, therefore, the legislature has not thought fit to express its intention otherwise than by the use of the words of the section, those words must be followed.

Per FAZL ALI, J.—The definition of the term " Police Officer " in section 1 of the Police Act is not exhaustive and the term is not confined merely to persons enrolled under the Police Act. The distinction between a person who is nothing but a Police Officer and one who is primarily not a Police Officer is material and cannot be ignored for the purpose of construing section 25 of the Evidence Act.

Per AGARWALA, J.—No person is a Police Officer unless he is enrolled in, or appointed a member of, the Police force or is declared by statute to be a member of that force.

The mere possession of certain of the powers of a Police Officer even though those powers include the power of investigation under the Code, does not suffice to convert into a Police Officer one who has no other claim to that status. *Radha Kishun Marwari* v. *King-Emperor* ... 46

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EXCISE OFFICER—*whether is a Police Officer within the meaning of section 25 of the Evidence Act. See* Evidence Act, 1872, no. 3 46

EXECUTION—

1———*decree in favour of two co-parceners of joint Hindu family—death of one co-parcener—execution by the surviving co-parcener decree-holder—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXI, rule* 16, *whether applies—rule* 15, *applicability of—omission to mention fact of death of the deceased decree-holder, whether fatal to execution.* Upon the death of a co-parcener of a joint Hindu family his share and interest in the family property becomes extinct and the surviving co-parceners become the full owners of the whole estate. It is really not a case of the transfer of the interest held by the deceased co-parcener but the total extinction or absorption of that interest.

Order XXI, rule 16, Code of Civil Procedure, 1908, is intended primarily for those cases where the name of the applicant for the execution of the decree does not appear as a decree-holder in the decree and he bases his right to execute the decree on the ground that the interest of one or more of the decree-holders has been assigned to him in writing or transferred to him by operation of law.

Where, therefore, the application for execution is on behalf of one of the decree-holders as the sole surviving co-parcener and he bases his title not as a transferee but as the surviving decree-holder, the provision of Order XXI, rule 16, does not apply. *Held, further*, that the provision of Order XXI, rule 15, applies to such a case and that the mere omission to mention the fact of death of the deceased decree-holder in the application for execution is not such a vital omission as to entitle the court to reject the petition. *Rameshwar Prasad Bhagat* v. *Ram Ratan Ram* 42

2———*mortgage decree laying down order in which mortgaged properties are to be sold—executing court, whether can change the order—High Court, privilege and prerogative of, to vacate erroneous order in the ends of justice when entire record is before the court—order without jurisdiction—whether such order can be validated by consent of parties.* While it is true that an executing court may, in certain exceptional cases where equities demand it, prescribe the order in which the mortgaged properties are to be sold, it has no such jurisdiction where the mortgage decree has definitely laid down the order in which the mortgaged properties are to be sold.

It is the privilege and prerogative of the High Court, once a record is before it and it is found that the order

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EXECUTION—*concld.*
passed is erroneous and so erroneous as manifestly to amount to an injustice, to exercise its power of superintendence to revise such order, or set it aside and direct such further proceedings to be taken as justice may require.
Bibi Mehdatunnissa Begam v. *Sewak Ram* 77

EXECUTOR—*whether can compromise suit by agreeing to creation of charge on the estate—will, absence of restriction in.* *See* Compromise, no. 2 359

EXTRADITION ACT, 1903—*sections 7, 8A and 18—Treaty with Nepal—Article V—" neither Government shall be bound to surrender ", meaning of—provisions of the Act, whether take away the discretion given by Treaty—Article V, whether excludes the operation of section 7—extradition sought against British subject—discretion in Local Government under the terms of Treaty—procedure to be followed—Government, exercise of powers under the Act by—Municipal courts, whether can interfere on the ground that Government had undertaken to act otherwise by Treaty.*

The Indian Extradition Act, 1903, is the law of the land, not, so far as the third Chapter is concerned, to be applied for this or that country by Order in Council or by any special means. If some special procedure has been arranged by Treaty, section 18 of the Act provides that it may be followed; but if the Government should choose to exercise the powers given by the Act, no Municipal court can interfere on the ground that the Government had undertaken to act otherwise by Treaty.

Article V of the Treaty between the East India Company and the Nepal State provides:—

"In no case shall either Government be bound to surrender any person accused of an offence, except upon requisition duly made by, or by the authority of, the Government within whose territories the offence shall be charged to have been committed, and also upon such evidence of criminality, as according to the laws of the country in which the person accused shall be found, would justify his apprehension, and sustain the charge if the offence had been there committed."

Held, (*i*) that the provision that neither Government shall be bound to surrender is to be read in its ordinary sense, as implying that each Government retains a right to exercise its discretion in the matter of the surrender of its own subjects;

(*ii*) that the provisions of the Extradition Act do not take away the discretion of the local Government or injuriously affect its exercise in such a way as to derogate from the provisions of the Treaty, and, therefore, that Article V does not exclude the operation of section 7 of the Act;

(*iii*) that if the person whose extradition is sought is a British subject in whose favour this discretion might possibly

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EXTRADITION ACT, 1903—*concld.*

be exercised by the Local Government, he should raise the point before the District Magistrate, who would then refer the matter for the orders of the Local Government under section 8A of the Act. *Moonga Lal Koot* v. *The King-Emperor* 347

HIGH COURT—*privilege and prerogative of—power of superintendence. See* Execution, no. 2 77

HINDU LAW—

1————*adoption—widow having authority to adopt according to the opinion or advice of husband's father—adoption by widow after death of husband's father—adoption whether invalid—deed, construction of—surrounding circumstances—Hindu widow, limitations to the power of, to dedicate property for pious and charitable purposes—Letters Patent of the Patna High Court, clause 9—failure to record reasons, whether a mere irregularity not affecting jurisdiction—decree obtained against a person in one capacity, whether can be resisted by him in another capacity—Specific Relief Act*, 1887 (*Act 1 of* 1887), *section* 56(*b*), *whether applicable where both proceedings pending in one court—suit for declaration and perpetual injunction—plaintiff, whether entitled to mere declaration when injunction cannot be granted—right to sue, when is deemed to accrue.* The failure to record reasons on the proceedings of the court, as required by clause 9 of the Letters Patent, in removing a case from a Subordinate Court, is a mere irregularity which does not affect the jurisdiction of the High Court and does not make its decision illegal.

A decree obtained against a person in one capacity can be resisted by him in another capacity.

In construing a deed the duty of the court is to ascertain the intention from the words used in the document, and the surrounding circumstances are to be looked into merely with the object of ascertaining the real intention of the executant from the words used by him.

R, a Hindu governed by the Dayabhaga, died in 1869, having executed an *anumatipatra* by which, after stating that it was necessary for him to have an adopted son to inherit his property, he authorized his wife, then thirteen or fourteen years of age, to adopt his half-brother and if there was (as was the case) an obstacle to take him in adoption, then to adopt whom she wanted " according to the opinion or advice of " (*matanusare*) his father. The widow made an adoption in 1885 without consulting her father-in-law, he having died in 1873.

Held, on a construction of the deed and on a consideration of the surrounding circumstances, that the motive of the husband being more secular than religious, his intention was not to give an unrestricted power to his young

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HINDU LAW—*contd.*

wife to adopt, that the adoption was to be made according to the advice and opinion of the husband's father which the widow was not at liberty to disregard and that, therefore, the adoption was invalid.

The powers of a Hindu widow who holds the property of her deceased husband are wider with reference to the religious acts in connection with the actual obsequies of the deceased and the periodical performance of the obsequial rights prescribed in the Hindu religious law which are considered as essential for the salvation of the soul of the deceased, than in respect of the acts which although not essential or obligatory are still pious observances which conduce to the bliss of the deceased's soul, and if performed are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case if the income of the property, or the property itself, is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case, she can alienate a small portion of the property for pious or charitable purpose, she may have in view, on appropriate occasions.

Where, therefore, a dedication alleged to have been made by a widow was found to be of almost one-third of the entire estate and it was not shown that it was made on some appropriate occasion, *held*, that the dedication could not be supported as a valid endowment.

Section 56, Specific Relief Act, 1887, lays down:

"An injunction cannot be granted.....

.....

(*b*) to stay proceedings in a court not subordinate to that from which the injunction is sought."

Held, that clause (*b*) of section 56 has no application where both the proceedings are pending in the same court; the prohibition contained in the clause operates only in respect of courts which are not subordinate in the sense that they are co-ordinate or superior and not in respect of the court itself, which must always be taken as competent to regulate its own proceedings.

Where a plaintiff asks for a declaration and also prays for a perpetual injunction under section 56(*b*) of the Specific Relief Act, 1887, he is not debarred from getting the declaration sought for, merely because the perpetual injunction cannot be granted.

There can be no right to sue until there is an accrual of the right asserted in the suit and further its infringement or at least a clear and unequivocal threat to infringe that

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HINDU LAW—*contd.*

right by the defendant against whom the suit is instituted. *Radha Madhab Jiu* v. *Rajendra Prasad Bose* 727

2———*adoption—widow's power of adoption—death of natural son unmarried—son attaining over 20 years—property not vested in widow—limits to exercise of power—religious efficacy.* A Hindu governed by the Benares school of the Mitakshara law was survived by an infant son and by a widow, to whom he had given authority to adopt in the event of the son dying. The son succeeded to the impartible zamindari held by his father, but died unmarried at the age of twenty years and six months. Thereupon the widow, the son's mother, made an adoption to his father. By a custom of the family females were excluded from inheriting. In a suit claiming inheritance against the adopted son.

Held, that as the natural son had left no son to continue the line nor a widow to provide for its continuance by an adoption, the adoption by his mother was valid, although the zamindari was not vested in her, and although the son had attained the age above stated.

Review of the authorities as to the limits to the exercise of a power to adopt possessed by a Hindu widow. *Amarendra Mansingh* v. *Sanatan Singh* 642

3———*co-widows representing the estate of their deceased husband, whether governed by the rule of survivorship.* See Abatement 778

4———*guardian of infant, whether can contract loans on behalf of the minor for the latter's necessities and benefit—guardian, whether can impose personal liability on the minor—minor's estate, whether is liable for the debt.* A guardian of a Hindu infant has power to contract loans on behalf of the minor for the latter's necessities and benefit and, although the guardian cannot impose any personal liability on the minor, the estate of the minor is liable for such a debt. *Suchit Chaudhuri* v. *Harnandan Singh* ... 112

5———*law of the Mithila School, whether is the law of the Mitakshara—wife, position of, under the Mitakshara—Mithila wife, whether is a co-parcener of her husband and co-owner of property—wife, whether can demand partition in Mitakshara and the Mithila—Mithila husband, power of, to make a gift or bequest without the consent of the wife—prohibition as to gift of entire wealth (sarvasva), whether is a moral or religious injunction only—law of wills, whether is a development of law of gifts inter vivos—wife's right to maintenance—abandonment of suit by claimant to office of shebait—whether amounts to transfer of office—transaction, validity of—failure of appointment of successor by shebait—absence of provision in the deed—management*

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HINDU LAW—*concld.*

of trust, to whom reverts—Vivada Chintamani, relative authority of, in the Mithila School—evidence of translators playing the part of interpreters, whether admissible, when questions raised are not questions of foreign law. See Compromise, no. 2 359

6———*maintenance—wife living apart from the husband, whether entitled to separate maintenance—Limitation Act,* 1908, (*Act IX of* 1908), *Schedule* 1, *Articles* 128 *and* 132—*claim for maintenance, whether a charge on immoveable property within the meaning of Article* 132—*widow's claim for a certain sum as maintenance for the period during which her husband was living, whether governed by Article* 128—*interest, whether payable on a claim for maintenance.*

Article 132, Schedule 1, Limitation Act, 1908, prescribes a period of 12 years for the enforcement of the payment of money charged upon immoveable property.

Held, that a widow's claim for maintenance under the general Hindu Law cannot, in any sense of the word, be said to be a charge upon immoveable property within the meaning of Article 132.

The mere fact that a Hindu wife is living apart from her husband does not entitle her to separate maintenance during the life-time of her husband, unless indeed she is turned out of the house by the husband.

A claim by the widow for a certain sum as maintenance for the period during which her husband was living is not, strictly speaking, a claim for maintenance, and is not, therefore, governed by Article 128 of the Limitation Act but by the general Article applicable to an ordinary claim for money.

A widow is not entitled to claim interest on the sum which she claims as maintenance under the general Hindu Law. She is, however, entitled to interest under the Code of Civil Procedure, 1908, from the date of the suit until the date of payment at 6 per cent. per annum. *Bahuria Saraswati Kuer* v. *Bahuria Sheoratan Kuer* 869

HINDU WILLS—*cardinal rule governing. See* Will 708

INCOME-TAX—

1———*when income accrues—realization of profit—mortgage for principal and interest due under earlier mortgage—mortgage decree—purchase by mortgagee—assessment of profit so realized—Income-tax Act,* 1922 (*Act XI of* 1922), *section* 10. When a mortgage has been accepted in discharge of the principal and interest due under an earlier mortgage, and the mortgagees' books of account do not treat

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INCOME-TAX—*contd.*

the interest as being thereby paid, the interest does not become a profit or gain assessable to income-tax until the mortgage is realized. If the mortgaged property is sold under a mortgage decree, and is purchased by the mortgagee, then so far as the purchase price exceeds the principal sums advanced there is a realization, and therefore payment, of the interest. In assessing the profit so arising sums paid by the mortgagee in respect of claims upon the mortgaged property which he knew of when he purchased are not permissible deductions from the purchase price. The purchase price can properly be taken as the value of the property although the valuation by the Civil Court for purpose of the sale proclamation is lower. *Raja Raghunandan Prasad Singh* v. *Commissioner of Income-tax, Bihar and Orissa* 305

2———*interest on loans—interest carried to suspense account—sums paid on account of principal and interest—appropriation as between principal and interest—assets received in satisfaction—realization—profit from colliery—deductions—arrears of rent—Income-tax Act*, 1922 (*Act XI of* 1922), *sections* 10, 12, 13, 66. For the purposes of the Income-tax Act, 1922, the income derived by an assessee during a particular year from interest on loans may properly be computed, having regard to the proviso to section 13, as consisting in part of sums actually received in that year and in part of sums carried by the assessee to income account in that year out of receipts in previous years, which he has held in suspense account and of which no part has been previously returned as income or taxed.

Where the assessee has received a sum on account of principal and interest due without an appropriation between them by the debtor, the income-tax officer can appropriate the sum first to outstanding interest, although the assessee in his accounts has not credited any receipt of interest.

Where, however, the assessee has received, not on open account but in satisfaction of principal and interest due, assets which are realizable and therefore equivalent to cash, together with promissory notes of the debtor, the assessee is entitled to have the realizable assets allocated towards the discharge of principal, with the result that there is no payment of interest, the testator's promissory notes not being equivalent to cash.

One of the transferred assets being a sub-lease of a colliery, taken at a valuation and stated to be free of incumbrances, the assessee is not entitled under section 10, sub-section 2, to deduct from the annual profits from working a sum which he has paid to the landlord for fixed or dead-rent accrued before the transfer; a sum so paid is a capital loss by over-valuation of the asset, not a loss on

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INCOME-TAX—*concld.*

income account. *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraja of Darbhanga* 318

INCOME-TAX ACT, 1922—

1———*section* 10—*income, when accrues—realization of profits—mortgage for principal and interest due under earlier mortgage—mortgage decree—purchase by mortgagee—assessment of profit so realized. See* Income-tax, no. 1 ... 305

2———*sections* 10, 12, 13, 66—*interest on loans—interest carried to suspense account—sums paid on account of principal and interest—appropriation as between principal and interest—assets received in satisfaction—realization—profit from colliery—deductions—arrears of rent. See* Income-tax, no. 2 318

3———*section* 10(2) (*vi*)—" *original cost thereof to the assessee* ", *meaning of—words, whether refer to the original cost to the assessee or his predecessor—cost must be taken to refer to genuine original cost.* Section 10, Income-tax Act, 1922, provides :—

" (*1*) The tax shall be payable by an assessee under the head " Business " in respect of the profits or grains of any business carried on by him.

(*2*) Such profits or gains shall be computed after making the following allowances, namely :—

.....

(*vi*) in respect of depreciation of such buildings, machinery, plant, or furniture being the property of the assessee, a sum equivalent to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed....."

Held, (*i*) that the words " original cost thereof to the assessee " occurring in section 10(2) (*vi*), mean the original cost to the assessee and not to his predecessor, the previous owner of the business;

(*ii*) that the words must be strictly construed and must be taken to refer to the genuine original cost to the assessee and not necessarily to anything which the assessee may have stated to be the original cost. *Motiram Rosan Lal Coal Co., Ltd.* v. *Commissioner of Income-tax* 12

4———*section* 26(2), *meaning and significance of—* " *succession* " *what amounts to—test—legal opinion, statement of, in petition, whether proper.* Section 26(2) of the Income-tax Act, 1922 (as amended by Act III of 1928) provides :—

" Where, at the time of making an assessment under section 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding as if he had been carrying on the business, profession or vocation throughout the previous year and as if he had received the whole of the profits for that year."

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INCOME-TAX ACT, 1922—*concld.*

Held, (*i*) that the words, " where at the time of making an assessment under section 23 " merely mean " when the time comes to make an assessment ";

(*ii*) that the plain meaning of the words " succeeded in such capacity by another person " is that if a business, profession or occupation which was formerly carried on by a person has been taken over by another person who continues the business, that transference of ownership, whether it be by operation of law or by transfer inter vivos, amounts to a succession. The real test of whether there has been a succession or not is to be decided by an examination of the business. Where, therefore, there had been no change in the character of the business or in its management or where the business had not been wound up and restarted, and where the business was continued after a change of ownership in the business, *held*, that there was succession within the meaning of section 26(*2*).

No petition to any officer who has to administer the law should contain or have annexed to it any opinion by members of the legal profession. The correct course for the tribunal in such cases is to state that the petition cannot be considered until the statements as to the opinion are removed. *Maharajadhiraj of Darbhanga* v. *Commissioner of Income-tax* 5

INJUNCTION—*suit for declaration and perpetual injunction—plaintiff, whether entitled to mere declaration when injunction cannot be granted. See* Hindu Law, no. 1 ... 727

INTEREST—*Interest Act*, 1839 (*Act XXXII of* 1839)—*proviso—money wrongfully detained—no stipulation as to interest—interest, whether recoverable in law or equity—Contract Act*, 1872 (*Act IX of* 1872), *section* 73, *scope of—equity, justice and good conscience, rule of, when applicable—Courts, duty of—company incorporated under Companies Act*, 1913 (*Act VII of* 1913), *whether is a separate legal entity—both principal and agent joined in an action—liability, whether attaches to both.* Section 73 of the Contract Act, 1872, is only declaratory of the right of damages for breach of contract.

Unless the matter can be brought within the Interest Act, 1839, or the proviso, there is no warranty under section 73 of the Contract Act for awarding interest for the mere detention of money, however wrongful, from the date upon which it should have been paid.

Held, further, that in the absence of an agreement, express or implied, interest on money wrongfully detained is not recoverable either under the Interest Act or by law as contemplated by the proviso.

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INTEREST—*concld.*

Cases in India, as in England, in which interest is already " payable by law " within the meaning of the proviso includes cases in which interest is allowed on equitable principles.

Courts in India are enjoined to apply the rule of equity, justice and good conscience where there is no rule of law applicable to the facts; but that does not mean that each Judge may decide a case as he thinks fit and bound by no rules. The decision of the case must depend on rules and not upon caprice.

Often the rule of equity, justice and good conscience means the rule of the Common Law of England or rules of equity, not as binding upon Indian Courts, but as a guidance in determining the matters which come before them in which there is no rule of Indian Law.

A company incorporated under the Indian Companies Act, 1913, is a separate legal entity.

If an agent for an undisclosed principal is sued as such, he would be liable, but where both the principal and the agent are joined in an action, only one would be liable. *J. H. Pattinson* v. *Srimati Bindhya Debi* 216

INTEREST ACT, 1839—*proviso—no stipulation as to interest—money wrongfully detained—interest, whether recoverable in law or equity—Contract Act*, 1872 (*Act IX of* 1872), *section* 73, *scope of. See* Interest 216

JAGIR—*Ranchi district—lex loci—rule of lineal primogeniture, whether obtains*—putraputradhi *tenancy in Chota Nagpur estate, incidents of.*

The lex loci in the Ranchi district is one of primogeniture not only in the family of the Maharaja of Chota Nagpur himself and its offshoots but also in all the jagirs of the district which are *putraputradhi.* In the Chota Nagpur estate it is beyond all question that a *putraputradhi* tenancy is impartible, is governed by the rule of lineal primogeniture and continues so long as there exists any lineal male descendant of the grantee (or grantees) with khorposh to the widow of the last surviving male holder. *Tikait Rup Raj Rai* v. *Tikait Permanand Rai* 859

JAINS—*rights of worship—Parasnath Hill—works by Swetambaris—suit by Digambaris—limitation—suit for declaration—continuing wrong—Specific Relief Act* (*I of* 1877), *section* 56—*Limitation Act* (*IX of* 1908), *section* 23; *Schedule* 1, *Article* 120. Parasnath Hill, which is regarded as sacred by both sects, the Swetambaris and the Digambaris, of the Jain community, is not debottar property of the Jain deities installed thereon, but the property of

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the Swetambaris by purchase in 1918 from the zamindar with whose ancestors it was permanently settled. The Swetambaris in erecting on the hill buildings for the accommodation of temple servants, and dharmsalas for the use of pilgrims, and in putting sentries and night watchmen thereon, have not unlawfully interfered with the rights of worship of the Digambaris. But alterations made by the Swetambaris in the character of the charans in certain shrines was an interference with those rights. A suit for a declaration brought by Digambaris more than six years after the alterations was not barred as to that matter by article 120 of the Limitation Act, 1908, because the alterations were a continuing wrong within section 23 of that Act; the plaintiffs had not, by acquiescence or otherwise, disentitled themselves under section 56 of the Specific Relief Act, 1877, to the relief prayed. *Hukum Chand* v. *Maharaj Bahadur Singh* 681

JURISDICTION—*inherent lack of jurisdiction and want of jurisdiction on grounds to be determined by the court itself, distinction between—Bengal Tenancy Act*, 1885 (*Act VIII of* 1885), *section* 109, *bar of, whether affects the inherent jurisdiction of the court—objection as to the bar of section* 109 *not raised by parties—decree on consent by court—decree, whether is a nullity—validity, whether can be challenged in collateral proceeding—section* 109, *bar of, whether applies when suit under section* 106 *withdrawn—bona fide dispute between landlords and tenants—tenancy disputed—suit by landlord for declaration of title—compromise effected—tenants accepting to pay increased rent—compromise, whether offends against section* 29*—non-compliance with section* 147*A, whether makes the decree a nullity—minors sued as majors—appearance through mother guardian—compromise by guardian with the sanction of the court—cause title of suit not amended—minors, whether properly represented—defect, whether a mere irregularity—authority to effect compromise and authority to file compromise petition, distinction between.* There is a distinction between an inherent want of jurisdiction in a court and want of jurisdiction on grounds which have to be determined by the court itself. The first makes the decree a nullity which can be ignored and need not be set aside. The second does not make the decree a nullity but only voidable; such a decree can be set aside by adopting the proper procedure, but cannot be collaterally impeached.

A court, which is empowered by law to try a suit has power to try it either rightly or wrongly; the validity of a decree does not depend on whether it embodies a correct decision. A judgment of a court having jurisdiction over the subject-matter and the parties of the suit and having territorial and pecuniary jurisdiction, however erroneous, cannot be a mere nullity and cannot be collaterally challenged.

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JURISDICTION—*contd.*

If the question of jurisdiction is to be decided by the court itself with reference to the existence or otherwise of a particular fact in bar of the trial, there is no want of inherent jurisdiction, and the judgment pronounced may be erroneous but not void and cannot be collaterally impeached. The question of jurisdiction in such a case is like other questions of fact or law to be decided by the court itself which otherwise has jurisdiction to try the suit. Ordinarily, if a party does not raise the question of jurisdiction during the trial he should not be allowed to do so after the proceedings were carried to completion provided the question of jurisdiction depends upon the decision of some fact or point of law.

The bar created by section 109 of the Bengal Tenancy Act, 1885, does not affect the inherent jurisdiction of the court but depends on the existence of some extraneous facts which is a matter for the court itself to decide.

Where, therefore, no objection as to the bar of section 109 was raised in a previous suit and the court entertained the suit and passed a decree on consent.

Held, that the decree was not a nullity and could not be impeached in a collateral proceeding.

The prohibition of section 109 of the Bengal Tenancy Act applies even if the suit under section 106 of the Act was withdrawn.

Where there was a bona fide dispute about the very existence of the tenancy between the landlords and the tenants, the former denying the tenancy altogether and the latter claiming to hold the land as occupancy raiyats at Rs. 5 per bigha, and in a suit brought by the landlords for a declaration of their title the parties compromised, the landlords recognising the defendants' tenancy at a higher rent of Rs. 7-8-0 per bigha.

Held, that the compromise did not offend against section 29 of the Bengal Tenancy Act, 1885.

Held, *further*, that non-compliance with the provision of section 147A of the Act does not make the decree a nullity.

Where certain minors were sued as sui juris and the fact of their being under age having been brought to the notice of the court, the plaintiffs were directed to take necessary steps but before any step could be taken the minors appeared through the guardianship of their mother and filed a written statement and later on she compromised the suit, the other major defendants whose interest was

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JURISDICTION—*concld.*
similar to that of the minors also compromising on the same terms, and the court accepted the guardian by permitting her to compromise, but the cause title of the suit was not amended.

Held, (*i*) that in the absence of the father, the mother was the natural guardian of the minors and was entitled to compromise on their behalf;

(*ii*) that the minors were properly represented in the suit and the fact that the heading of the plaint was not amended or a formal order for the appointment of the guardian was not made by the court was a mere irregularity and did not vitiate the decree.

There is a difference between an authority to effect a compromise and an authority to file a compromise petition. The latter may be covered by general authority to represent a client in court, while the former stands upon a different footing.

Once a decree is passed the party relying upon it need not prove facts anterior to the decree. It is for those who challenge it to show that it is not binding. *Girwar Narayan Mahton* v. *Kamla Prasad* 117

KHORPOSH GRANT—*whether is an "alienation" within the meaning of section 12A of the Chota Nagpur Incumbered Estates Act. See* Chota Nagpur Incumbered Estates Act, 1876, no. 2 147

LAWYER—*supposed to be material witness—undesirability of his appearing in the case—such lawyer, whether can give evidence while appearing in the case—court-witness, examination of lawyer appearing in the case as, whether undesirable. See* Compromise, no. 2 359

LESSEE—*person holding* hat *on the land of cultivating raiyat, whether is a lessee or a licensee. See* Cess Act, 1880 ... 701

LETTERS PATENT—

1————*clause* 9—*failure to record reasons, whether a mere irregularity not affecting jurisdiction. See* Hindu Law, no. 1 727

2————*clause* 10—*order refusing to exercise jurisdiction under section* 151 *of the Code of Civil Procedure*, 1908 (*Act V of* 1908), *whether is appealable.* A decision of a single judge refusing to exercise jurisdiction under section 151, Code of Civil Procedure, 1908, and to recall his order is not appealable under clause 10 of the Letters Patent.

Per KHWAJA MOHAMAD NOOR, J.—Where a judge, rightly or wrongly, after hearing all the parties and taking into consideration all that can be said one way or the other,

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LETTERS PATENT—*concld.*

adopts a particular course and passes a particular order and later on one of the parties comes and asks that judge to recall the order either under his power of review or under his inherent power and that judge merely refuses to take any step in the matter, such an order is not a " judgment " within the meaning of clause 10 of the Letters Patent.

The word " judgment " as used in clause 10 of the Letters Patent is incapable of any exhaustive definition to cover all cases which may come up before the court of appeal; but in each case the court has to make up its mind whether the particular order in question is a " judgment " or not, having regard to the nature of the order. *Lala Banwari Lal* v. *Sheikh Shukrullah* 202

LICENSEE—*person holding* hat *on the land of cultivating raiyat, whether is a lessee or a licensee. See* Cess Act, 1880 ... 701

LIMITATION—

1———*adverse possession—religious endowment—sale or permanent lease of property of Math—when possession becomes adverse—Limitation Act*, 1908 (*Act IX of* 1908), *Schedule I, article* 144.

Although an assignment or disposition of a math and its properties by the mahant is void, either a sale or permanent lease by him of an item of property appertaining to the math, even if not for necessity, is valid during the tenure of office of the mahant; consequently, upon an alienation of that nature the possession of the purchaser or lessee does not become adverse so as to cause time to run under the Limitation Act, 1908, Schedule 1, article 144, until the alienating mahant ceases to be mahant, either by death or otherwise. *Mahanth Ram Charan Das* v. *Naurangi Lal* 251

2———*execution of decree—subsequent order directing payment—order in different suit—order staying execution—debtor and surety—Limitation Act* (*IX of* 1908), *section* 15—*Code of Civil Procedure*, 1908 (*Act V of* 1908), *sections* 48(*1*)(*b*) *and section* 145. Under section 48(*1*)(*b*) of the Code of Civil Procedure, 1908, a subsequent order directing payment does not postpone the commencement of the period limited for making a fresh application for execution of a decree, unless the order is made in the suit in which the decree was made and directs payment by the debtor or surety of money due under the decree; the provision does not apply, therefore, where a receiver having been appointed in a different suit he is directed to make payments in discharge of the decree sought to be executed. Further, a statement in an order in that different suit that the holders of the decree sought to be executed must wait for payment is not an injunction or order staying execution of the decree within section 15 of the Limitation Act, 1908.

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LIMITATION—*concld.*

Semble, if a person in his capacity as surety consents to a decree against the principal debtor the effect of section 145 of the Code of Civil Procedure, 1908, is that the decree can be executed against him as though he were a party to the suit and the principal debtor. *Raja Kirtyanand Singh* v. *Raja Prithi Chand Lal Chaudhury* ... 105

LIMITATION ACT, 1908—

1 ——— *section* 15—*statement in an order made in different suit that decree-holders must wait for payment, whether is an injunction within the meaning of the section. See* Limitation, no. 2 195

2 ——— *section* 20—*mortgage by a single mortgagor—debt single and indivisible—decree on mortgage—payment towards interest by person inheriting part of mortgaged property—payment, whether effective against purchaser of equity of redemption in another part of mortgaged property—"person liable to pay", meaning of.*

Where the mortgage is entered into by a single mortgagor and the debt is a single debt and the liability is one and indivisible, a payment towards interest, due under the mortgage decree, made before the expiry of the period prescribed for the execution of the decree, by a person who has inherited a part of the mortgaged property, is effective to give a fresh start to limitation under section 20 of the Limitation Act, 1908, not only against the successor of the mortgagor who made the payment but also against a person who, prior to the payment, has purchased the equity of redemption in another part of the property.

Per AGARWALA, J.—In the case of a debt secured by a mortgage the debt is one although the property pledged as security for its repayment may consist of more than one item and although the various items may belong to more than one person.

The liability for a mortgage debt is indivisible and no splitting up of the security avails to split up the liability unless the mortgagee consents to it. A payment of interest by a mortgagor judgment-debtor, therefore, is a payment by a "person liable to pay the debt" within the meaning of section 20(*1*) of the Limitation Act. *Badri Das* v. *Pasupati Banarji* 93

3 ——— *section* 23 *and Schedule* 1, *article* 120—*Jains—rights of worship—Parasnath Hill—works by Swetambaris—suit by Digambaris—suit for declaration—continuing wrong—limitation. See* Jains 681

4 ——— *section* 23—*lands attached—case of continuing wrong—right to sue accrues from moment to moment during attachment. See* Bengal Tenancy Act, 1885, no. 6 261

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LIMITATION ACT, 1908—*concld.*

5———*articles* 30 *and* 31—*suit for compensation for non-delivery of goods—proper article applicable—terminus a quo. See* Railways Act, 1890 67

6———*Schedule* 1, *Articles* 115 *and* 120—*compromise merged in decree, whether is "contract" within the meaning of Article* 115—*suit for compensation based on such compromise—proper article applicable.*

The fact that a compromise between the parties to a suit has merged in a decree of the court none the less makes it a contract within the meaning of Article 115 of the Limitation Act, 1908, which prescribes a period of three years for a suit for "compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for".

Where, therefore, a suit for compensation was based on a contract contained in a compromise which had merged in the decree of the court, *held*, that Article 115, and not Article 120, Limitation Act, 1908, was applicable. *Maharaja Kumar Gopal Saran Narain Singh* v. *Chhakauri Lall* 792

7———*Article* 120—*lands attached—suit for declaration, whether barred by lapse of six years from date of attachment. See* Bengal Tenancy Act, 1885, no. 6 ... 261

8———*Articles* 128 *and* 132—*Hindu woman's claim for maintenance, whether is a charge on immoveable property within the meaning of Article* 132—*claim for a certain sum as maintenance for the period during which the husband was living, whether governed by Article* 128. *See* Hindu Law, no. 6 869

9———*Article* 144—*religious endowment—sale or permanent lease of property of math—possession, when becomes adverse. See* Limitation, no. 1 251

LOCAL SELF-GOVERNMENT ACT, 1885—*as amended by B. & O. Act I of* 1923—*District Board Electoral Rules framed under the Act—rules* 29 *and* 68—*Returning Officer, summary rejection of nomination paper by—suit for a declaration that the order was illegal—Civil Court, jurisdiction of, whether ousted—Specific Relief Act*, 1877 (*Act I of* 1877), *section* 42—*District Magistrate, how far empowered to hear election petitions.*

Rule 68 of the District Board Electoral Rules framed by the Local Government under the Local Self-Government Act, 1885, as amended by B. & O. Act I of 1923, provides :—

"All disputes arising under these rules in regard to any matter other than a matter the decision of which by any other authority is declared by these rules to be final, shall be decided by the District Magistrate whose decision shall be final".

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LOCAL SELF-GOVERNMENT ACT—*concld.*

Held, (*i*) that the provision in rule 68 is only a precautionary measure to see that some authority is provided by the rules for the decision of disputes, necessary when rules are being framed, since it is difficult to make provision for possible grounds of dispute over the observance of every rule.

(*ii*) that the District Magistrate is not empowered to hear election petitions which are based on anything more than some irregularity in the election rules; in other words, the rules do not empower him to hear applications which are based on the grounds of improper rejection or acceptance of nomination papers, bribery or corruption, intimidation or personation discovered after the election.

M was nominated as a candidate for election in a particular circle of the Aurangabad subdivision, being eligible by the fact that his name was borne on the electoral roll of Aurangabad. At the time of election the Returning Officer, without examining the electoral roll of the subdivision, rejected the candidate on the ground that his name was not found on the electoral roll of the circle and no certified copy of any other electoral roll had been filed by him. The candidate was, however, correctly described in the nomination paper as on the roll of the subdivision and his number in that roll was specified. *M* instituted a suit in the Civil Court praying for a declaration that the order of the Returning Officer rejecting his nomination was invalid.

Held, (*i*) that the order of the Returning Officer was without jurisdiction and that, in the absence of any express provision excluding the jurisdiction of the Civil Court, it had jurisdiction to entertain the suit and to grant the declaration sought for under section 42 of the Specific Relief Act, 1877.

(*ii*) that rule 29(2) did not imply that absence of a certified copy could be treated as if it afforded proof that the candidate's name was not on the electoral roll. *Kali Prasad Singh* v. *Makutdhari Prasad Sinha* 209

MAINTENANCE—*wife living apart from the husband, whether entitled to separate maintenance—claim for maintenance, whether a charge on immoveable property within the meaning of Article* 132, *Limitation Act—widow's claim for a certain sum as maintenance for the period during which her husband was living, whether governed by Article* 128—*interest, whether payable on a claim for maintenance.* See Hindu Law 869

MALICIOUS PROSECUTION—*suit for damages—order for issue of process recorded by magistrate—process not actually issued—plaintiff, whether has cause of action.* Where an order for

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MALICIOUS PROSECUTION—*concld.*

the issue of process under section 204 of the Code of Criminal Procedure, 1898, and of a search warrant was formally recorded by the magistrate but before any process could issue, the accused appeared in court, *held*, that the prosecution of the accused had commenced and, therefore, that on the dismissal of the complaint he had a cause of action for a suit for damages for malicious prosecution.

Per SCROOPE, J.—The stage at which the accused appeared in court may affect the question of the amount of damages, but the fact that he appeared before the processes had actually been issued does not justify his case being thrown out. *Zahiruddin Mohammad* v. *Budhi Bibi* 292

MESNE PROFITS.—

1———*appeal against decision determining amount of mesne profits—ad valorem court-fee payable—rule applicable whether profits may have accrued before suit, or after the date of institution of the suit. See* Court-fees Act, 1870, no. 2 694

2———*final decree determining mesne profits, appeal from—ad valorem court-fee, whether payable—liability of defendants under decree joint—appeal by some only of the defendants—value of the appeal must be the value of the entire decree. See* Court-fees Act, 1870, no. 1 188

MINOR—

1———*guardian of Hindu minor, whether can contract loan for the benefit and necessities of the minor—minor, whether personally liable—minor's estate, whether bound. See* Hindu Law, no. 4 112

2———*minor sued as major—appearance through mother guardian—compromise by guardian with court's sanction—cause title not amended—minor, whether properly represented—defect, whether a mere irregularity. See* Jurisdiction 117

MORTGAGE—*sole mortgagor—debt single and indivisible—decree on mortgage—payment towards interest by person inheriting part of mortgaged property—payment, whether effective to give fresh start to limitation against purchaser of equity of redemption in another part of mortgaged property. See* Limitation Act, 1908, no. 2 93

MUHAMMADAN LAW—*Dower—payment postponed until demanded by the wife—whether prompt dower—transfer of property by husband in lieu of real dower debt, whether can be impeached—Transfer of Property Act*, 1882 (*Act IV of* 1882), *section* 53. A dower the payment of which may be postponed until demanded by the wife would be classed as

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MUHAMMADAN LAW—*concld.*

prompt dower. A transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the power of the creditors for the benefit of the debtor. As soon as it is found that the transfer was made for an adequate consideration in satisfaction of a genuine debt and without reservation of any benefit to the debtor it follows that no ground for impeaching it lies.

Therefore, a transfer of property by a Muhammadan husband in favour of his wife, in lieu of a real dower debt equal to or exceeding the value of the property transferred, cannot be impeached under section 53 of the Transfer of Property Act, 1882, on the ground that it defeated or delayed other creditors, so long as it is a genuine transfer. *Mahadeo Lal Jwala Prasad* v. *Musammat Bibi Maniran* ... 297

NON-AGRICULTURAL LANDS—*Presumption of correctness, whether attaches to an entry in the record-of-rights. See* Chota Nagpur Tenancy Act, 1908, no. 1 829

PARDANASHIN—*law as to—transaction with pardanashin ladies, binding effect of—what should be proved—different considerations arising in different cases. See* Compromise, no. 2 359

PATNA HIGH COURT RULES—*Chapter VII, rule* 19—*memorandum accepted by Stamp Reporter as sufficiently stamped and duly admitted and registered—question not decided by Taxing Officer—appeal pending—change in practice brought about by subsequent decision—Stamp Reporter, whether can reopen the question and call upon appellant to pay ad valorem court-fee—rule* 19, *scope of. See* Court-fees Act, 1870, no. 2 694

PENAL CODE, 1860—

1———*section* 21, *clauses* (4) *and* (9)—"*apprentice*" *peon serving process without remuneration, whether is a* "*public servant*"—*clause* (9)—*unpaid peon authorized by Munsif to serve process, whether is* "*specially authorized*" *within the meaning of clause* (4). Section 21 of the Penal Code, 1860, provides:—

"The words 'public servant' denote a person falling under any of the description hereinafter following, namely.....
Fourth.—Every officer of a Court of Justice whose duty it is as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court; and every person specially authorized by a Court of Justice to perform any of such duties;.....

Ninth.....and every officer in the service or pay of Government or remunerated by fees or commission for the performance of any public duty....."

Held, per COURTNEY TERRELL, C.J., and AGARWALA, J. (SCROOPE, J., *dissentiente*).—(*i*) When a person who has no

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PENAL CODE, 1860—*contd.*
general power to execute a Judicial process is authorized by a court to execute such a process, he is " specially authorized " within the meaning of section 21(*4*);

(*ii*) where a person is enrolled as a candidate or apprentice peon getting no pay or remuneration by fees or commission for the performance of any public duty, but accepts the duties and responsibilities of executing a warrant entrusted to him and the court recognises him as filling the position of a process-server, he falls within the description of " public servant " as defined in the ninth clause of section 21.

Per SCROOPE, J.—(*i*) The mere fact that the Munsif himself has made over a process to an " apprentice " peon for service, does not bring that peon within the words " specially authorized by a Court of Justice " of the fourth clause of section 21. That expression has reference to an ad hoc appointment, as for example, that of a commissioner in a Civil case who receives a writ of commission from the Civil Court and thereby becomes a public servant for the purpose of the particular duty assigned to him;

(*ii*) a " candidate " or " apprentice " peon who serves processes without any remuneration whatsoever is not a " public servant " within the meaning of the ninth clause of section 21, as he cannot be called " an officer in the service of Government ". *King-Emperor* v. *Ram Chandra Sahu* 184

2————*section* 228—*marrying a minor girl while in the custody of a guardian appointed by court, whether constitutes an offence under section* 228—*Contempt of Courts Act*, 1926 (*Act XII of* 1926), *applicability of—section* 2(*3*), *significance of—single act, whether may be both an offence under Penal Code and a contempt of court.* Where *K* gave away in marriage a minor girl while she was in the custody of a guardian appointed by the court, the appointment being well understood to involve the forbidding of anybody to deal with the minor by marriage or otherwise while she was under that guardianship.

Held, that the conduct of *K* was merely a disobedience of the order of the court, and did not constitute an offence punishable under section 228 of the Penal Code, 1860.

Held, however, that the facts of the case attracted the operation of the Contempt of Courts Act, 1926, which empowers the High Court to punish the contempts of courts subordinate to it in just the same way and in just the same circumstances as if the contempt had been of the High Court itself.

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PENAL CODE, 1860—*concld.*

Section 2(3) of the Contempt of Courts Act, 1926, provides:—

"No High Court shall take cognisance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code."

Held, that the meaning of clause (3) of section 2 is that where under the Penal Code there is already a provision for punishing a contempt of court as a contempt of court, the Contempt of Courts Act itself shall have no application: it does not mean that when the act which has constituted the contempt of court also constitutes an offence under the Penal Code it may not be punished under the Contempt of Courts Act.

A single act may be both an offence under the Penal Code and may also be a contempt of court and may be punishable in either or both capacities. *Kaulashia* v. *King-Emperor* 1

3———*sections 467 and 471—commitment on a charge of criminal conspiracy—sanction of local Government not obtained—effect. See* Criminal Trial 353

PRIVY COUNCIL PRACTICE—

1———*Criminal matter—trial by jury—juror ignorant of English.*

The eight appellants were tried for murder and rioting by a Sessions Judge sitting with a jury of seven. The jury having found them guilty by a majority of six to one the Sessions Judge convicted and sentenced them, some to death. The convictions and sentences were confirmed by the High Court. Upon an application for special leave to appeal an inquiry was ordered to be made by the High Court as to the truth of an allegation made on appeal to the High Court, and by the petition, that one of the jurors did not understand English. The High Court reported that the juror in question did not know sufficient English to follow the addresses of the pleaders or the judge's charge or so much of the evidence as was given in English.

Held, that the convictions and sentences should be set aside as there had been a mis-trial, and that any discretion as to any consequential order should be exercised by the High Court, it being left to the representatives of the Crown in India to take such steps as to a re-trial as were open to them. *Ras Behari Lal* v. *King-Emperor* ... 811

2———*record on appeal—value of subject-matter—report—Code of Civil Procedure (Act V of 1908), Order XLV, rule 5.* When on a petition to the High Court for a certificate that a case is a fit one for appeal to the Privy Council a question has arisen as to the value of the subject-matter and a report thereon has been ordered

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PRIVY COUNCIL PRACTICE—*concld.*
under Order XLV, rule 5, the report and full information on the matter should be included in the record in the appeal to the Privy Council. *Anup Mahto* v. *Mita Dusadh* 679

PROMISSORY NOTE—*advance of loan independent of the terms of note—suit based on original contract—promissory note inadmissible—plaintiff, whether entitled to succeed.*

When a cause of action for money is once complete in itself whether for goods sold, or for money lent, or for any other claim and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note. *Domoo Khan* v. *Agha Arshad Khan* ... 862

PROVINCIAL INSOLVENCY ACT, 1920—
1———*sections* 13 *and* 24—*petition by debtor—requirements of law—court, duty of, to be satisfied as to the truth of the statements in the petition—creditors, whether entitled to adduce evidence to throw discredit on the statements of the debtor—petition, hearing of, not a formal matter—tendency of courts deprecated.* Section 13 of the Provincial Insolvency Act imposes upon the petitioning debtors the obligation to state the amount and particulars of all his property and of all his debts and he is to make a statement that he is unable to pay his debts.

Section 24 of the Act lays down:—

"(1) On the day fixed for the hearing of the petition, or on any subsequent day to which the hearing may be adjourned the Court shall require proof of the following matters, namely:—

(*a*) that the creditor or the debtor, as the case may be, is entitled to present the petition:

Provided that, where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are prima facie grounds for believing the same and the Court, if and when so satisfied, shall not be bound to hear any further evidence thereon;

.....

.....

(2) The Court shall also examine the debtor, if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, and the creditors shall have the right to question the debtor thereon."

Held, that the court must treat the evidence produced by following the procedure prescribed in section 24 as material to its decision as to whether or not to allow the petition and in deciding whether such evidence has satisfied the court that there are prima facie grounds for believing the statements in the petition.

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PROVINCIAL INSOLVENCY ACT, 1920—*contd.*

The statements in the petition by themselves, if merely repeated formally in the evidence, are not sufficient prima facie grounds for believing such statements.

The creditors are equally entitled to adduce such evidence as they think fit to throw discredit upon the statements in the petition.

There is a wrong tendency for courts administering the Insolvency Act to believe that the hearing of a petition is a more or less formal matter and that if the petition is, as it were, merely verified by the evidence of the debtor the court is bound to accede to the petition. It is the duty of the court to be satisfied prima facie and after following the necessary procedure and making the necessary investigation to come to a conclusion that the statements by the debtor are true.

The procedure of insolvency is for the protection of creditors quite as much as for the protection of debtors. *Ganesh Lal Sarawgi* v. *Sanchi Ram* 107

2———*proviso to section* 24(*1*), *clause* (*a*)—*debtor, application for adjudication by—court, whether bound to accept the statement of petitioner—court, duty of, to investigate facts*—prima facie *proof of inability necessary.*

Before adjudicating an applicant to be an insolvent the court is required to be satisfied that he is not in a position in fact to pay his debts.

The court is not bound to accept the statement of the petitioner, but is required to investigate the facts for itself; in other words, the duty of the court is to be satisfied prima facie, that is, after following the necessary procedure and making the necessary investigation, to come to a conclusion that the statement by the debtor is true. *Jagarnath Sahu* v. *Beni Prasad* 866

3———*section* 37, *significance of*—" *as the court may, by order in writing, declare* ", *meaning of—words, whether govern the vesting of the property in the debtor only—vesting order, whether must be passed simultaneously with the order of annulment.* Section 37 of the Provincial Insolvency Act, 1920, lays down :—

" (*1*) Where an adjudication is annulled, all sales and disposition of property and payment duly made, and all acts theretofore done, by the court or receiver shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the court may, by order in writing, declare....."

Held, (*i*) that the words " as the court may, by order in writing, declare " govern the vesting of the property in the debtor only and they mean that the vesting of the property in him, in the absence of any other person being

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PROVINCIAL INSOLVENCY ACT, 1920—*concld.*

appointed by the court, shall be subject to any condition which the court may declare and that in the absence of any declaration of condition it will vest in the debtor unconditionally;

(*ii*) that, therefore, in the absence of appointment of any person by the court, the property of the debtor would, on the annulment of the insolvency, revert to him;

(*iii*) that an order directing the debtor's property to vest in someone need not, however, be passed simultaneously with the order of annulment.

Where, therefore, the court annulled the adjudication on the 14th June, 1928, and by a subsequent order, dated 1st August, 1923, directed the debtor's property to vest in the receiver appointed by the court, *held*, that after the order of annulment the court did not cease to have jurisdiction in the matter and that his vesting order was valid and operative. *Chouthmal Bhagirath* v. *Jokhiram Surajmal* 163

PROVINCIAL SMALL CAUSE COURTS ACT, 1887—*section* 17—*unregistered security bond duly executed, attested and stamped, filed along with application—security found sufficient and bond registered after period of limitation—whether sufficient compliance with law—"security", significance of.* Where an unregistered security bond duly executed, stamped and attested, was filed along with the application for setting aside a Small Cause Court decree, and the security having been found sufficient by the court, the bond was registered after the expiry of the period of limitation for filing the application, the delay in getting it registered not being due to any fault of the applicant himself.

Held, that there was sufficient compliance with the provisions of section 17 of the Provincial Small Cause Courts Act, 1887.

Per AGARWALA, J.—(*i*) The word "security", occurring in the first clause of section 17 of the Provincial Small Cause Courts Act, is not a word which has been defined either in this Act or in the General Clauses Act. Generally speaking, that word signifies anything that makes the money more assured in its payment or more readily recoverable;

(*ii*) when once the Judge accepts a bond as security, it is not open to the court subsequently to say that the security is not to its satisfaction.

Rajeshwari Prasad Singh v. *Brahmanand Lal* ... 745

RAILWAYS ACT, 1890—*sections* 77, 80 *and* 140—*notice of claim, whether may be served on any person authorized by the*

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RAILWAYS ACT, 1890—*contd.*

railway administration to receive such notice—section 140 —" *may be served* ", *meaning of—suit for compensation for non-delivery—Limitation Act*, 1908 (*Act IX of* 1908), *article* 30 *or* 31, *applicable—terminus a quo—contract with one railway company—goods carried on another railway—suit against latter company, whether is suit founded in tort or statutory liability—contract silent as to date of delivery—time, how should be determined—single contract—part of goods not delivered—cause of action, when arises.* Section 140 of the Railways Act, 1890, provides :—

" Any notice or other document required or authorized by this Act to be served on a railway administration may be served..... in the case of a railway administered by a railway company on the Agent in India of the railway company."

Held, that the words " may be served " do not mean " must be served "; the section merely provides a safe and unanswerable method for serving a claim upon the railway administration and enacts in effect that service upon the Agent is service upon the company. Therefore, a notice contemplated by section 77 of the Act need not necessarily be served on the Agent, but may be served on any person who is in fact authorized by the railway administration to receive notice of the claim.

If the company by its course of business holds up any particular official as competent to deal with claims, service of notice of a claim upon such an official must be taken as against the company to be service upon the company.

The loss or injury referred to in Article 30 of the Limitation Act, 1908, is the loss or injury to the goods and not the loss or injury to the consignee. Where the defendant wishes to take advantage of Article 30, the onus is upon him to prove when the loss or injury to the goods actually occurred and that more than one year has elapsed from that date.

Where, however, the claim is for compensation for non-delivery of the goods, Article 31 applies and the period of limitation is to be counted from the time when the goods ought to have been delivered.

A suit under section 80 of the Railways Act for compensation for non-delivery may be brought either against the company with whom the contract for carriage was directly made or against the railway administration on whose railway the loss occurred. If the latter course is to be taken it does not follow that the suit is one founded in tort. The suit is founded on statutory liability which is attached to the contract though that contract be made with a railway other than the defendant in the suit. If no particular date for delivery is specified in the contract it must be determined as a matter of what is reasonable

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RAILWAYS ACT, 1890—*concld.*
having regard to the circumstances of the contract, and this criterion must be applied as much in favour of the plaintiff as in favour of the defendant.

Where the contract is a single contract in respect of a single consignment, the cause of action for a claim for compensation arises not merely on non-delivery of a part of the goods consigned, but when the entire contract purports to have been fulfilled. *Bengal and North-Western Railway Company* v. *Maharajadhiraj Kameshwar Singh Bahadur* ... 67

RAIYAT—*cultivating—income derived by allowing dealers of cattle to hold* hat *on the land—assessment of cess on the basis of income so derived, whether legal. See* Cess Act, 1880 701

RECEIVER—*order refusing the appointment of, whether is "final order" within the meaning of section* 109(*a*), *Code of Civil Procedure—order interlocutory. See* Code of Civil Procedure, 1908, no. 6 728

REGISTRATION ACT, 1908—*petition of compromise, whether require registration. See* Compromise, no. 2 359

RELIGIOUS ENDOWMENT—*sale or permanent lease of property of math—possession, when becomes adverse. See* Limitation, no. 1 251

RENT—*non-payment of, during period of submersion of land, whether of itself determines tenancy. See* Bengal Tenancy Act, 1885, no. 6 261

RES JÚDICATA.—
1———*application for amendment of decree dismissed for default—subsequent application, hearing of, whether barred—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order IX, rule* 4, *principle underlying applicable.* Where an application for the amendment of a decree was dismissed for default, the petitioner having failed to file the process forms, and an application for review of that order was also dismissed, and a second application for amendment was subsequently made.

Held, that the previous application having been rejected without adjudication on merits, the dismissal of that application did not operate as a bar, on the principle of res judicata, to the hearing of the subsequent application. *Raja Framatha Nath Malia* v. *Mr. I. S. Mackey* 179

2———*decision on a question of law, how far operates as res judicata—alienation void ab initio under statute—decision in a previous suit holding the alienation to be valid, whether operates as res judicata in a subsequent suit. See* Chota Nagpur Incumbered Estates Act, 1876, no. 2 147

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RES JUDICATA—*concld.*

3————*doctrine based on general principles of law and not dependent on section* 11 *of Code of Civil Procedure*, 1908 (*Act V of* 1908)—*two suits disposed of by one judgment—common issue tried—appeal from one decree only—unappealed decree, whether operates as res judicata in the other suit at appellate stage.* *O* brought a suit against *D* praying for an injunction restraining her from carrying on another hotel business contrary to the Articles of Partnership and the main issue in the case was whether the partnership had been dissolved. Later *D* brought a suit against *O* for rent for her portion of the partnership premises and one of the issues involved in this suit was the same, viz., whether the partnership had come to an end. Both the suits were decided by the Munsif and on appeal by the Judicial Commissioner by one judgment. The suit of *O* failed while *D*'s action succeeded. *O* appealed to the High Court from the decree made in *D*'s suit while no further appeal was preferred from the decree in the other suit.

Held, that the decision in *O*'s suit, which had become final operated as res judicata, as regards the common issue, in the suit of *D* at the appellate stage.

Held, further, that the doctrine of res judicata is not dependent on the limited provisions of section 11 of the Code of Civil Procedure, 1908, but is based on the general principles of law that multiplicity of suits should be avoided. *Mrs. Gertrude Oates* v. *Mrs. Millicent D'Silva* ... 139

REVENUE SALES ACT, 1859.

1————*sections* 2 *and* 3—kistbandi *date and latest date, distinction between—kist date, significance of—original* kistbandi *fixed according to Fasli era—7th June latest date under section* 3—*payment not made on 7th June—sale held in September, whether valid.*

In Bihar the *kistbandi* fixed under the engagement entered into with the proprietors for the payment of the Government revenue were almost invariably according to the Fasli era, and the four dates in June, September, January and March fixed for the payment of the Government revenue are the latest dates of payment determined by the Board of Revenue under section 3 of the Revenue Sales Act, 1859.

Where the original *kistbandi* under section 2 of the Act is unknown and forgotten, the latest dates fixed under section 3 are popularly known as the kist dates. They are not the *kistbandi* dates as provided by section 2 but only the latest dates of payment as fixed by the Board of Revenue under section 3.

Where, therefore, it appeared that the original *kistbandi* fixed in respect of the estate in arrear was according to the Fasli era, and the 7th of June was not the

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REVENUE SALES ACT, 1859—*concld.*

kistbandi date under section 2 but the latest date under section 3 and the June instalment was not paid on the latest date, viz., the 7th of June, *held*, that it was within the jurisdiction of the Collector to sell the estate after that date and that, therefore, the sale held on the 20th of September was a valid sale. *Jadunandan Singh v. Srimati Savitri Devi* 750

2————*section 37—proviso, significance and scope of—circumstances protecting raiyat having occupancy right at a fixed rent.*

Section 37 of the Revenue Sales Act, 1859, provides:—

"The purchaser of an entire estate in the permanently settled districts of Bengal, Bihar and Orissa sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement; and shall be entitled to avoid and annul all under-tenures, and forthwith to eject all under-tenants with the following exceptions:.....

.....

Provided always that nothing in this section contained shall be construed to entitle any such purchaser as aforesaid to eject any raiyat, having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force, or to enhance the rent of any such raiyat otherwise than in the manner prescribed by such laws, or otherwise than the former proprietor, irrespectively of all engagements made since the time of settlement, may have been entitled to do".

Held, (*i*) that the important circumstance which distinguishes the right of the new proprietor to enhancement from that of the previous defaulting proprietor is that the new proprietor is entitled to enhance "irrespectively of all engagements made since the time of settlement" and the expression "since the time of settlement" means "subsequent to the Permanent Settlement";

(*ii*) that the proviso does not save from enhancement of rent all raiyats even of the first class (raiyats having a right of occupancy at a fixed rent) whom it protects from ejectment, but only those of that class whose fixity of rent is founded upon an engagement *not* made after the Permanent Settlement.

(*iii*) that the right of the new proprietor to enhancement is not subject, as in the case of raiyats of under-tenures which are sold up under Act VIII of 1865, to proof that a higher rent would have been demandable at the date of the engagement.

Where the raiyat agreed to an enhancement of rent on condition that the enhanced rent was fixed in perpetuity but the condition of fixity failed after a revenue sale and the new proprietor applied for enhancement of the rent.

Held, that the provisions of section 35 of the Bengal Tenancy Act were specially applicable. *Jugeshwar Prasad v. Ramdhari Mahto* 820

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SALE—*for rent—rent decree—recorded tenant not before court—jurisdiction of civil court to set aside sale—tenant not entered in sherista—Chota Nagpur Tenancy Act (Ben. Act VI of 1908), sections 208, 211, 214.*

In order to justify a sale of a tenure under section 208 of the Chota Nagpur Tenancy Act, 1908, all parties interested in the tenure must be joined as defendants in the rent suit, or be sufficiently represented. Cases decided on the construction of section 159 of the Bengal Tenancy Act, as regards this point are equally applicable to the construction of section 208 of the Chota Nagpur Tenancy Act. Where all the parties are not joined or represented section 211 does not apply, and the Revenue court has no jurisdiction to order a sale, consequently section 214 does not preclude the civil court from entertaining a suit to set it aside.

That a recorded tenure-holder has not got her name entered in the landlord's sherista, nor paid rent, nor been recognized by him as a tenure-holder, are not circumstances which justify him in selling if she has not been joined or represented in the rent suit. *Jagdishwar Dayal Singh* v. *Pathak Dwarka Singh* 626

SPECIFIC RELIEF ACT, 1887—

1———*section 42—District Board Electoral Rules—Returning Officer, summary rejection of nomination paper by—suit for declaration that order illegal—Civil Court, jurisdiction of, whether ousted. See* Local Self-Government Act, 1885 209

2———*section 42, scope and significance of—"able to seek further relief", meaning of—court, whether can pass executable decree for future maintenance. See* Compromise, no. 2 359

3———*section 56—Jains—rights of worship—Parasnath Hill—works by Swetambaris—suit by Digambaris—limitation—suit for declaration—continuing wrong. See* Jains ... 681

4———*section 56(b), whether applicable where both proceedings pending in one court—suit for declaration and perpetual injunction—plaintiff, whether entitled to mere declaration when injunction cannot be granted. See* Hindu Law, no. 1 727

STAMP REPORTER—*memorandum accepted as sufficiently stamped and duly admitted and registered—question not decided by Taxing Officer—appeal pending—change in practice brought about by subsequent decision—Stamp Reporter, whether can reopen the question and call upon appellant to pay ad valorem court-fee—Patna High Court Rules, Chapter VII, rule 19, scope of. See* Court-fees Act, 1870, no. 2 ... 694

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STATUTE—*rules as to construction of. See* Compromise, no. 2 859

SUCCESSION ACT, 1925—

1———*section* 112, *scope of—Restriction* (*1*) *of Schedule III of the Act—bequest not postponed nor legatee alive at testator's death—exception to section* 112, *whether applicable—bequest in favour of "a son" of* L *or* G*—bequest, whether void for uncertainty—extrinsic evidence inadmissible to show which of the living sons of* L *or* G *was intended to be benefited—charitable bequest for the relief of "any poor and deserving* Karan *family or families or individuals", whether operative. See* Will 703

2———*section* 124, *meaning of—specified uncertain event must happen before the testator's death when the fund or property is distributable.* Section 124, Succession Act, 1925 (corresponding to section 111 of Act X of 1865), provides :—

"Where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable."

Held, that the word "period" referred to in the section does not mean an indefinite period after the testator's death during which the specified uncertain event may happen but the lawful period for distribution by the executors and that the words "before the period" mean "before the commencement of such period".

Where, therefore, the testator bequeathed a part of his estate to *S* and, in the event of his death without issue, to certain deities, and *S* survived the testator, having died issueless after the testator's death.

Held, that the specified uncertain event having happened after the death of the testator, the legacy to the deities could not take effect, and, therefore, that *S* took an absolute and indefeasible estate. *Bashist Narain Sahi* v. *Sia Ramchandra Sahi* 18

SURETY—*decree against principal debtor consented to by surety as such—effect—decree can be executed against him as though he were a party to the suit. See* Limitation, no. 2 195

TAXING JUDGE—*whether can make a reference to Division Bench. See* Court-fees Act, 1870, no. 1 188

TENURE-HOLDER—*cultivating raiyat allowing persons to hold* hat *on his land, whether deemed to have the status of tenure-holder. See* Cess Act, 1880 701

TRANSFER OF PROPERTY ACT, 1882—*section* 53—*Transfer of property by husband in lieu of real dower debt, whether can be impeached. See* Muhammadan Law 297

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TRIAL BY JURY—*Juror ignorant of English—effect. See* Privy Council Practice, no. 1 811

WILL—*construction—Hindu wills, cardinal rule governing—bequest in favour of person not living at testator's death, whether void—Succession Act*, 1925 (*Act XXXIX of* 1925), *section* 112, *scope of—Restriction* (1) *of Schedule III of the Act—bequest not postponed nor legatee alive at testator's death—exception to section* 112, *applicability of—bequest in favour of " a son " of* L *or* G*—bequest, whether void for uncertainty—extrinsic evidence inadmissible to show which of the living sons of* L *or* G *was intended to be benefited—charitable bequest for the relief of " any poor and deserving* Karan *family or families or individuals whether operative* ". Section 112 of the Succession Act, 1925, lays down :

" Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

Exception—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or, if he is dead, to his representatives."

Held, that section 112 is subject to the restriction (1) of Schedule III of the Act which says—

" Nothing therein contained shall authorise a testator to bequeath property which he could not have alienated inter vivos."

The cardinal rule governing the Hindu wills is that a person capable of taking under a will must be such a person as could take the gift inter vivos and, therefore, must either in fact or in contemplation of law be in existence at the date of the death of the testator.

Where a will, after making certain bequests, provided :

" (1) Lalmohan's first male child by the present wife to be heir, in default of any male child being born to him or dying in childhood either a son of Lakshmidhar or Gopal to be heir. The boy should live with the daughter-in-law as her adopted son.....

(3) Rs. 10,000 should be set apart in a fund the income of which the executors shall apply to the relief of any poor and deserving Karan family or families or individuals in shape of necessaries of life in times of distress, medical or educational aid, help for marriage of daughter or such other deserving cause.

(4) The residue to be administered by the executors for the benefit of heir to pass to him absolutely on his attaining the age of 21 years."

Held, (i) that *LM* having no male child living at the death of the testator, the bequest under the first part of clause (1) of the will could not take effect;

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WILL—*concld.*

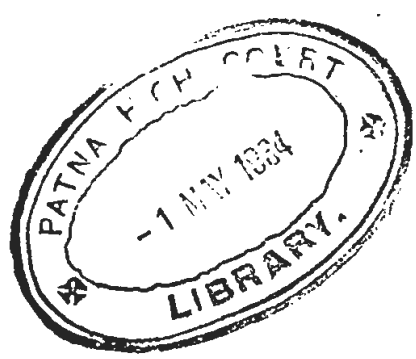
(*ii*) that there being no male child alive and the testator not having intended, by the terms of the will, that the operation of the bequest should be suspended indefinitely until a son was born to *LM*, no matter how long after the death of the testator that event might take place, the exception to section 112 was inapplicable to the case;

(*iii*) that the second part of clause (1) was void for uncertainty as extrinsic evidence was not admissible in order to show which particular son of *LD* or *G* (both having got more than one son) was intended to be benefited by the testator;

(*iv*) that the charitable bequest under clause (*3*) was operative as the words used by the testator were sufficiently certain and descriptive to indicate the class of persons whom the testator intended to benefit. The essential feature of most of the charitable trusts is that the beneficiaries are an uncertain and indefinite class of persons described in general, often fluctuating and changing in their individual numbers.

A will should be construed as liberally as possible and every attempt should be made to give effect to the intention of the testator. *Nakshetramali Dei* v. *Brajasunder Das* 708

BOGP (ILR) 9 & 9(*a*)—2,500—11-4-1934—JS & others.


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