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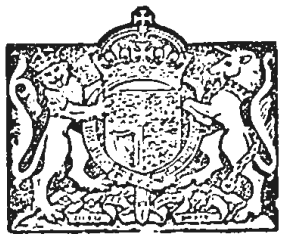

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2. ,, ,, Syed Fazl Ali, Barrister-at-Law.
3. ,, ,, Sir Khaja Mohamad Noor, C.B.E. (*On leave from* 1*st to* 27*th September*, 1939. *Retired on* 28*th September*, 1939.)
4. ,, ,, Sir J. F. W. James, I.C.S. (*Retired on* 3*rd June*, 1939.)
5. ,, ,, S. B. Dhavle, I.C.S.
6. ,, ,, C. M. Agarwala, Barrister-at-Law. (*Services placed temporarily under Crown representative from* 30*th October*, 1939.)
7. ,, ,, S. P. Varma, Barrister-at-Law. (*On leave from* 2*nd to* 17*th October*, 1939.)
8. ,, ,, F. G. Rowland, I.C.S.
9. ,, ,, Manohar Lall, Barrister-at-Law. (*Additional Judge up to* 2*nd June*, 1939. *Appointed permanent Judge from* 3*rd June*, 1939.)

10. The Hon'ble S. C. Chatterji. (*Additional Judge up to* 11*th May*, 1939. *Acting Judge from* 24*th July to* 27*th September*, 1939. *Appointed permanent Judge from* 28*th September*, 1939.)

11. ,, ,, H. R. Meredith, I.C.S. (*Additional Judge.*)

Advocate-General.

Mr. Baldeva Sahay.

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APPELLATE CIVIL.

Before Harries, C.J. and Agarwala, J.

SHAIKH REYASAT

v.

GOPI NATH MISSIR.*

1938.

November, 21, 22.

Bihar Tenancy Act, 1885 *(Act VIII of* 1885), *Schedule III, article* 2(*b*) (*ii*), *whether retrospective—suit for produce rent instituted after the amending Act came into force, whether would be governed by shorter period of limitation—Bihar Tenancy (Amendment) Act,* 1934 *(B. and O. Act VIII of* 1934).

There is a difference between a case where a statute amending the law of limitation comes into force immediately and a case where a period of time is given between the passing of the Act and the date upon which it comes into force during which suits could be brought which would otherwise be barred by the amending Act.

Where, in an Act amending and shortening a period of limitation, a period of time is given between the passing of the Act and the date upon which it is intended that it should come into force, such an Act must be given a retrospective effect.

---

*Appeal from Appellate Decree no. 906 of 1936, from a decision of Nidheshwar Chandra Chandra, Esq., Additional District Judge of Gaya, dated the 26th August, 1936, affirming a decision of Babu Ramjivan Sinha, Munsif, Gaya, dated the 17th April, 1936.

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Therefore, the shorter period of limitation of one year as embodied in the new Bihar Tenancy Act is applicable to a suit for produce rent, the cause of action for which had accrued before the passing of the amending Act, and which is instituted after the 10th of June, 1935, when the new Act came into force.

Rameshwar Prasad Singh v. *Manger Kahar*(1) *Manjhoori Bibi* v. *Akel Mahumed*(2), *Queen* v. *The Leeds and Bradford Railway Company*(3) and *Gopeshwar Pal* v. *Jiban Chandra Chandra*(4), followed.

Badri Narayan Singh v. *Ganga Singh*(5), not followed.

Soni Ram v. *Kanhaiya Lal*(6), relied on.

Maharaj Kumar Chote Lal Nandkishore Nath Shah Deo v. *Tula Singh*(7), distinguished.

Per AGARWALA, J.—The law of limitation being a branch of the adjectival law, the statute of limitation applicable to a particular suit or legal remedy is that which is in force at the date when the suit is instituted or the remedy is sought and not the statute which was in force at the time of the transaction or vesting of the cause of action on which the suit or remedy is based.

Appeal by the defendants.

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

The case was first heard by Wort, A. C. J., who referred it to a Division Bench.

Syed Naqui Imam (with him *Majibur Rahman* and *S. M. Siddique*), for the appellants.

Sarjoo Prasad, for the respondents.

HARRIES, C.J.—This is a defendants' second appeal against concurrent decrees of the Courts below

(1) (1936) 18 Pat. L. T. 193.
(2) (1913) 17 Cal. W. N. 889.
(3) (1852) 21 L. J. (N. S.) M. C. 193.
(4) (1914) I. L. R. 41 Cal. 1125, S. B.
(5) (1937) 18 Pat. L. T. 731.
(6) (1913) I. L. R. 35 All. 227, P. C.
(7) (1926) 8 Pat. L. T. 397.

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decreeing the plaintiffs' claim for arrears of bhaoli rent due for the years 1339 to 1342 F.

It was contended, inter alia, on behalf of the defendants that the claim was barred by limitation. Both the lower Courts, however, came to the conclusion that the suit was not barred and accordingly decreed the plaintiffs' claim in full.

Before us it has been contended by the appellants that the claim for rent with respect to the years 1339 and 1340 F. is barred by time, though it is conceded that no such defence can apply to the claim for rent due for the years 1341 and 1342 F.

Previous to the year 1934 a landlord had three years in which to bring his suit. The matter was governed by section 184 and Schedule III, Article 2(*b*) (*ii*), Bihar Tenancy Act. In the year 1934 an amending Act was passed and this period of three years was reduced to one year. The time from which the period began to run was the same in both these Acts, namely, the last day of the agricultural year in which the arrear fell due. The amending Act of 1934 received the assent of the Governor-General on the 14th of November, 1934, and it was provided that it should come into force at such time as was provided by an order to be made under the provisions of the Act. By an order made under the Act this provision relating to limitation came into force on the 10th of June, 1935. It is clear, therefore, that all persons in this province were given a period from the 14th of November, 1934, to the 10th of June, 1935, to bring their suits, which, if not brought within that period, would be barred by the amending Act.

It has been argued by Mr. Naqui Imam on behalf of the defendant-appellants that this amending Act applied to all suits instituted after the 10th of June, 1935, whether the cause of action had accrued or not before that date. On behalf of the respondents it has been contended that this amending Act of 1934

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cannot have the effect of taking away rights which had accrued before that Act came into force. This case came first before a single Judge, who has referred it to a Bench because there is a conflict of opinion concerning the matter in this Court.

In the case of *Rameshwar Prasad Singh* v. *Manger Kahar*(1), Rowland, J., held that where a statute introduces a shorter period of limitation suits instituted after the amendment in respect of causes of action accruing before such amendment will be governed by the amending law, the rule ordinarily applicable being the law which is in force at the time of the institution of the suit, and this principle will apply especially where there is an interval of time between the passing of the new Act and its coming into force. Consequently the shorter period of limitation of one year will apply to a suit for produce rent the cause of action for which accrued before the passing of the 1934 Act amending the Bihar Tenancy Act. This is a case upon the statute with which we are now concerned. Rowland, J., stresses the fact that there was an interval of time between the passing of this amending Act and the date upon which it came into force.

In the case of *Badri Narayan Singh* v. *Ganga Singh*(2), another case on the effect of this amending Act, Courtney Terrell, C.J., came to a different conclusion. He held that a new law ought to be construed so as to interfere as little as possible with vested rights and a statute is, therefore, not to be construed with greater retrospective operation than its language rendered necessary. Accordingly he held that the shorter period of limitation of one year as embodied in the new Bihar Tenancy Act was not applicable to a suit for produce rent the cause of action for which had accrued before the passing of

(1) (1936) 18 Pat. L. T. 193.
(2) (1937) 18 Pat. L. T. 731.

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the new amending Act. There can be no question whatsoever that this case is in direct conflict with the case decided by Rowland, J. It is clear, however, from Courtney Terrell, C. J.'s judgment that it was not present to his mind that there was an interval of time between the passing of the Bihar Tenancy (Amendment) Act of 1934 and the date upon which it came into force, namely, the 10th of June, 1935. At page 734 he observes :—

"Applying these principles of construction to the Bihar Tenancy Act and to the facts of this case, it becomes manifest that the period of limitation prescribed has not affected the vested right of the plaintiff who formally proceeded to sue in respect of the year 1340; and indeed upon general principles of justice this view has the further justification that by the time the Act was published, that is to say, on the 14th November, 1934, the period of limitation which the Judge has held to be applicable would have already expired, with the result that the plaintiff's right of action would have been destroyed without notice to him."

In short, it is clear that the late learned Chief Justice was of opinion that the Amending Act of 1934 put an end to landlords' rights the moment it was passed, though clearly this was not so. In my judgment, this case of *Badri Narayan Singh* v. *Ganga Singh*(1) is no authority on the facts of the present case, because the learned Chief Justice wrongly assumed that the Amending Tenancy Act came into force on the day upon which it was passed. The point under consideration was considered at considerable length in the case of *Manjhoori Bibi* v. *Akel Mahumed*(2). In that case the statute which amended the Law of Limitation came into force immediately. The learned Judges of the Calcutta High Court held

(1) (1937) 18 Pat. L. T. 731.
(2) (1913) 17 Cal. W. N. 889.

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that such a statute had no retrospective effect and could not affect rights which had become vested before it was enacted. Mookerjee, J., observed:

"In my opinion, the cardinal and fundamental point in the case before me is that the Eastern Bengal and Assam Tenancy Amendment Act of 1908 came into operation the very moment it became law: consequently, if it were taken to affect pre-existing causes of action, the effect would be absolutely to bar at once all actions where the cause of action had accrued more than the limited time before the statute was passed."

A little later in his judgment he observed:

"On the other hand where a new statute of limitation reduces the time previously allowed for commencement of the suit, but does not come into operation forthwith and allows a reasonable time for the enforcement of existing causes of action, the Court will not hestitate to hold that the statute may affect causes of action already accrued in the same manner as those accruing after its passage."

It is clear from these last observations that the learned Judge recognized that there was a great difference between a case where a statute amending the Law of Limitation came into force immediately and the case where a period of time was given between the passing of the Act and the date upon which it came into force during which suits could be brought which would otherwise be barred by the amending Act. This distinction has long been recognized in England and there appears to be no difference between the English Law and Indian Law upon this point.

In the case of *Queen* v. *The Leeds and Bradford Railway Company*(1) a Bench, consisting of Lord Campbell, C. J., Wightman, J., Erle, J. and Crompton, J., had to consider the point which is now

(1) (1852) 21 L. J. (N. S.) M. C. 103.

before us. A statute which did not come into operation until six weeks after the date upon which it was passed provided that where no time was limited for making complaints or laying informations under Acts of Parliament, such complaint should be made and such information should be laid within six calendar months from the time when the matter of such complaint or information arose. The Bench held that this Act had a retrospective operation and invalidated such an order where the complaint was not made within six calendar months from the time when the damage complained of occurred, although the act complained of was committed before the Act came into force. At page 195 Lord Campbell, C.J., observed:

There is no doubt that if the subject-matter of complaint in this case had arisen subsequently to the passing of the 11 and 12 Vict. c. 43, the provision contained in the 11th section would have applied. Then comes the question, whether the Act has a retrospective operation. If the Act had come into operation immediately after the time of its being passed, the hardship would have been so great that we might have inferred an intention on the part of the legislature not to give it a retrospective operation; but when we see that it contains a provision suspending its operation for six weeks, that must be taken as an intimation that the legislature has provided that as the period of time within which proceedings respecting antecedent damages or injuries might be taken before the proper tribunal. Had the time allowed been six months, instead of six weeks, it could hardly have been said that the Act would not have applied to all cases happening before the Act was passed, and we cannot measure the intention of the legislature by the quantum of the time allowed. A certain time was allowed before the Act was to come into operation and that removes all difficulty."

Wightman, J., Erle, J. and Crompton, J. agreed with this view. It may be observed that this

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case was overruled on another point in *Queen* v. *Edwards*(1); but there can be no question that the statement of law relating to the effect of an amending statute remained unaffected. In this case the construction placed upon the statute though fatal to the enforcement of a vested right by shortening the time for enforcing it, did not in terms take away any such right. The Court appears to have thought that the general rule of construction against giving a statute a retrospective effect had only a limited application to cases such as the one before us.

The question of the effect of law amending period of limitation was also considered by their Lordships of the Privy Council in the case of *Soni Ram* v. *Kanhaiya Lal*(2). A suit was brought by the appellant on the 4th of March, 1907, against the respondents for the redemption of a mortgage, dated the 2nd of January, 1842, made between the respective predecessors in title of the parties and in which no date for redemption was specified. Acknowledgements of the mortgagor's right had been made by the widow and daughter of a former mortgagee, a predecessor in title of the respondents, which, the appellant contended, extended the period of limitation. Their Lordships held that the Law of Limitation applicable to the case was not Act XIV of 1859, the law in force at the date of the acknowledgements, but Act XV of 1877, which was in force at the time of the institution of the suit. This case is not precisely in point; but it is important because it recognizes that amendments of statutes dealing with limitation may well have a retrospective effect, though giving the statute such an effect would affect accrued rights.

The point before us was considered by a Special Bench of the Calcutta High Court in the case of *Gopeshwar Pal* v. *Jiban Chandra Chandra*(3). The

(1) (1884) 53 L. J. (N. S.) M. C. 149.
(2) (1913) I. L. R. 35 All. 227, P. C.
(3) (1914) I. L. R. 41 Cal. 1125, S. B.

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Special Bench held that where the application of the provisions of an amending Act makes it impossible to exercise a vested right of suit, the Act should be construed as not being applicable to such cases. It was, however, recognized that where a period of time elapsed between the passing of the Act and the date upon which it came into force different considerations would arise. At page 1141 it is stated :—

"Here the plaintiff at the time when the amending Act was passed had a vested right of suit, and we see nothing in the Act as amended that demands the construction that the plaintiff was thereby deprived of a right of suit vested in him at the date of the passing of the Amending Act. It is not (in our opinion) even a fair reading of section 184 and the third Schedule of the Bengal Tenancy Act, as amended, to hold that it was intended to impose an impossible condition under pain of the forfeiture of a vested right, and we can only construe the amendment as not applying to cases where its provisions cannot be obeyed. The law as amended may regulate the procedure in suits in which the plaintiff could comply with its provisions, but cannot (in our opinion) govern suits where such compliance was from the first impossible. The effect is to regulate not to confiscate. There are thus two positions; where in accordance with its provisions a suit could be brought after the passing of the amendment, it may be that the amendment would apply, but where it could not, then the amendment would have no application."

In the present case a suit such as the present could well have been brought after the Amending Act was passed. In fact, landlords were given eight months in which to bring suits which would otherwise be barred by shortening the period of limitation.

On behalf of the respondents reliance is placed upon the case of *Maharaj Kumar Chote Lal Nandkishore Nath Shah Deo* v. *Tula Singh*(1) in which it

(1) (1926) 8 Pat. L. T. 397.

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was held that section 139A of the Chota Nagpur Tenancy Act does not bar the institution of a suit by a tenant against his landlord for possession in a civil court where the cause of action has arisen before the introduction of the said section by the amending Act of 1920 and the result of applying the new provisions would be to deprive the plaintiff of his right of action altogether. This case is no authority for the respondents. In the course of the judgment there is nothing to suggest that the learned Judges considered the effect of a period of time being given between the passing of an amending Act and the date upon which it was to come into force. The Bench which decided this case, emphasised the rule that an Act should not be given a retrospective effect unless its terms are clear. Accrued rights must be protected unless it was clearly the intention of the legislature that such rights should be interfered with. There can be no doubt that such is a correct statement of the law; but where it is clear that the legislature intended to take away accrued rights, then such an effect must be given to the statute. In my view where, in an Act amending and shortening a period of limitation, a period of time is given between the passing of the Act and the date upon which it is intended that it should come into force, such an Act must be given a retrospective effect. The legislature have given all persons affected by the amending Act a period of time to bring their suits. If suits are not brought within such period, then the amending statute must be held to bar them. Such is the view held in English courts and such is the effect of authorities in courts in India.

For the reasons which I have given, I hold that the plaintiffs' claim in the case for rent due for 1339 and 1340 F. was barred by limitation. I would, therefore, allow this appeal in part and modify the decree of the Court below which must be a decree for rent due in 1341 and 1342 F. only. The damages must be calculated upon the rent due for those two years only. In all other respects the decree will

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remain unaffected. Each party will bear its own costs of this appeal and of the proceedings in both the Courts below.

AGARWALA, J.—I agree. The law of limitation being a branch of the adjectival law, the statute of limitation applicable to a particular suit or legal remedy is that which is in force at the date when the suit is instituted or the remedy is sought and not the statute which was in force at the time of the transaction or vesting of the cause of action on which the suit or remedy is based. If authority is required for that proposition, it will be found in the decision of the Privy Council in *Soni Ram* v. *Kanhaiya Lal*(1). That was a suit instituted in 1907 for redemption of a mortgage. The plaintiff sought to meet the defence of limitation by setting up certain acknowledgements and relied on the fact that they had been given when the Limitation Act of 1859 was in force. The defendants, on the other hand, contended that the suit was governed by the Limitation Act of 1877. Their Lordships of the Privy Council affirmed the view of the High Court of Allahabad that the law of limitation applicable to a suit or proceeding is the law in force at the date of institution of the suit or proceeding, unless there is a distinct provision to the contrary. A difficulty suggests itself when, as in the present case, the period of limitation is shortened after the cause of action has arisen and before a suit on that cause has become barred under the unamended law. Such a case, which involved the construction of the statute with which we are concerned in the present appeal, came before the late Chief Justice sitting singly in *Badri Narayan Singh* v. *Ganga Singh*(2) in which his Lordship held that the longer period of limitation applied, that is to say, that the amendment with which we are concerned, is not retrospective. A different view was taken by

(1) (1913) I. L. R. 35 All. 227, P. C.
(2) (1937) 18 Pat. L. T. 731.

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Rowland, J., in *Rameshwar Prasad Singh* v. *Manger Kahar*(1) where the distinction was referred to between a case where an amending Act comes into force on the day on which it is passed and a case where there is an interval of time between the date on which the Act is passed and the date on which it comes into operation. In the case which came before the late Chief Justice the opposite party was not represented and his Lordship appears not to have noticed that the amending Act did not come into operation immediately.

In *Gopeshwar Pal* v. *Jiban Chandra Chandra*(2) a Special Bench, considering an amendment of the period of limitation provided in the Bengal Tenancy Act, which came into force as soon as it was enacted, observed, at page 1141 :—

"The law as amended may regulate the procedure in suits in which the plaintiff could comply with its provisions, but cannot (in our opinion) govern suits where such compliance was from the first impossible. The effect is to regulate not to confiscate. There are thus two positions: where in accordance with its provisions a suit could be brought after the passing of the amendment, it may be that the amendment would apply, but where it could not, then the amendment would have no application."

That appears to be in consonance with the law as stated in England by Lord Campbell, C. J., in *Queen* v. *The Leeds and Bradford Railway Company*(3). The facts of that case were that two Justices acting under 8 *and* 9 *Vict. c.* 18 had awarded a sum of money to one Edmondson as compensation for damage done to his land by the construction of the defendants' railway. The damage in respect of which the compensation had been awarded was done in 1846 and 1847. The complaint was made in 1850. In the

(1) (1936) 18 Pat. L. T. 193.
(2) (1914) I. L. R. 41 Cal. 1125, S. B.
(3) (1852) 21 L. J. (N. S.) M. C. 193.

meanwhile the statute 11 and 12 *Vict. c.* 43 had been enacted, section 11 of which provides that where no time is limited for making complaints or laying informations under Acts of Parliament, such complaint shall be made and such information laid within six months from the time when the matter of such complaint or information arose. This statute did not come into operation until six weeks after it had been passed, that is to say, until the 2nd of October, 1848. The question, therefore, arose whether the six months' period of limitation prescribed by the latter Act operated to bar the claim made by Edmondson on the basis of the former Act. Lord Campbell, C.J. held that the Act was retrospective, in language which has been quoted in the judgment of my Lord the Chief Justice.

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AGARWALA, J.

Appeal allowed in part.

S. A. K.

FULL BENCH.

Before Wort, Dhavle and Manohar Lall, JJ.

SADANAND JHA

v.

AMAN KHAN.*

1938.

November, 4, 8, 9, 10, 30.

Bihar Money-Lenders Act, 1938 (*Bihar Act III of* 1938), *section* 11, *whether void—Government of India Act,* 1935 (25 *and* 26 *Geo. V, Ch.* 42), *sections* 100 *and* 107.

Per Curiam :—The Provincial Legislature in enacting section 11 of the Bihar Money-Lenders Act, 1938, has also legislated with regard to the subject "contracts" of the Concurrent List, and, therefore this section, being repugnant to an "existing Indian law", is void under section 107(*1*) of the Government of India Act, 1935.

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*Appeal from Appellate Decree no. 81 of 1937, from a decision of P. C. Chaudhuri, Esq., I.C.S., District Judge of Darbhanga, dated the 30th of June, 1936, modifying a decision of Babu Bijoy Krishna Sarkar, Munsif of Darbhanga, dated the 31st January, 1935.

1938.

SADANAND JHA v. AMAN KHAN.

Attorney-General for Ontario v. *Reciprocal Insurers*(1), *Gallaghar* v. *Lynn*(2) *Hodge* v. *Queen*(3), *Citizens Insurance Company of Canada* v. *Parsons*(4), *Attorney-General of Manitoba* v. *License Holders Association*(5), *Attorney-General for Ontario* v. *Attorney-General for the Dominion of Canada*(6), *Attorney-General for Ontario* v. *Attorney-General for the Dominion of Canada*(7), *Paquet* v. *Corporation of Pilots of Quebec*(8), *Marriage Legislation in Canada, In re*(9), *Attorney-General for Canada* v. *Attorney-General for British Columbia*(10), *Grand Trunk Railway of Canada* v. *Attorney-General of Canada*(11), *Deen Doyal Poramanick* v. *Kylas Chunder Pal Chowdhry*(12), *Ramconnoy Audicarry* v. *Johur Lall Dutt*(13), *Kunja Lal Banerji* v. *Narsamba Debi*(14), *Mia Khan* v. *Bibi Bibijan* (15), *Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu* (16), *Queen* v. *Burah*(17), *Nobin Chunder Bannerjee* v. *Romesh Chunder Ghose*(18), *Forbes* v. *Attorney-General for Manitoba*(19), *Attorney-General for Canada* v. *Attorney-General for Ontario*(20), *Attorney-General* v. *Great Eastern Railway Company*(21), *Great West Saddlery Company, Limited* v. *The King*(22), *Bank of Toronto* v. *Lambe*(23), *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Company, Limited*(24), *Commissioner of Income-tax, Bengal* v. *Shaw, Wallace and*

(1) (1924) A. C. 328.
(2) (1937) A. C. 863.
(3) (1883) 9 A. C. 117.
(4) (1881) 7 A. C. 96.
(5) (1902) A. C. 73.
(6) (1896) A. C. 348.
(7) (1894) A. C. 189.
(8) (1920) A. C. 1029.
(9) (1912) A. C. 880.
(10) (1930) A. C. 111.
(11) (1907) A. C. 65.
(12) (1875) I. L. R. 1 Cal. 92.
(13) (1880) I. L. R. 5 Cal. 867.
(14) (1915) I. L. R. 42 Cal. 826.
(15) (1870) 5 Beng. L. R. 500; 14 W. R. 308.
(16) (1903) I. L. R. 26 Mad. 662.
(17) (1878) L. R. 5 Ind. App. 178.
(18) (1887) I. L. R. 14 Cal. 781.
(19) (1937) A. C. 260.
(20) (1937) A. C. 326.
(21) (1880) 5 A. C. 473.
(22) (1921) 2 A. C. 91.
(23) (1887) 12 A. C. 575.
(24) (1930) A. C. 357.

Company(1), *Hansraj* v. *Bejoylal Seal*(2), Kumara Upendra *Krishna Deo Bahadur* v. *Nabin Krishna Bose*(3) and *Ramlall Mookerjee* v. *Harranchunder Dutt*(4), reviewed.

Per WORT, J.—Section 100 of the Government of India Act, 1935, makes it clear that the Federal Legislature is given exclusive power to legislate with regard to subjects enumerated in List I of the Seventh Schedule, and those powers are untramelled by the powers given to the Provincial Legislature in respect to the subjects enumerated in the Provincial List and the Concurrent List. The power given to the Provincial Legislature in the concurrent field is cut down by the exclusive power granted to the Federal Legislature, and, finally, the exclusive power given to the Provincial Legislature to legislate in its own field under List II is conditioned by the exclusive power granted to the Federal Legislature with regard to List I and the concurrent power under List III.

The expression "subject to the provisions of this section" in section 107(*1*) of the Government of India Act, 1935, refers to those provisions in sub-section (*2*) under which on certain conditions a Provincial law, although repugnant to an "existing Indian law", may yet have effect in the province in which it was enacted; it has no reference to the validity or otherwise of the Federal or Provincial legislation.

The principle *generalibus specialia derogant may be* applied in testing the question under the first part of section 107(*1*) whether the Federal Legislature is competent to enact legislation with regard to a subject, as, for instance, the power to legislate in the field of contract may be limited by the application of the principle by excluding from that subject the special subject 'money-lending'. But it cannot be applied for the purpose of deciding whether the "existing Indian Law" relates to a subject in the Concurrent List.

Section 11 of the Money-Lenders Act, 1938, deprives the court of the discretion given to it under section 3 of the Usurious Loans Act, 1918, in cases in which the circumstances proved admit of the exercise of a discretion, and is opposed to the express provision of the law laid down in the

(1) (1932) I. L. R. 59 Cal. 1343; L. R. 59 I. A. 206.
(2) (1929) I. L. R. 57 Cal. 1176; L. R. 57 Ind. App. 110.
(3) (1869) 3 Beng. L. R. (O. S.) 113.
(4) (1869) 12 W. R. (O. S.) 9.

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Usury Laws Repeal Act, 1855, in cases to which the Usurious Loans Act does not apply; that being so, section 11 is repugnant to an "existing Indian Law" and is, to the extent of the repugnancy, void.

Per DHAVLE, J.—Section 2 of the Usury Laws Rpeal Act, 1855, is the part of the "existing Indian Law" as defined in section 311 (2) of the Government of India Act, 1935, and relates to the law of "Contract". Section 11 of the Bihar Money-Lenders Act, 1938, is repugnant to it and, therefore, section 2 of the Usury Laws Repeal Act prevails over section 11 of the Money-Lenders Act which must, to the extent of the repugnancy, be treated as void.

Conflicts might arise not only when the two kinds of Legislatures operate in the concurrent field, but also when one Legislature operates in its exclusive field and another in its exclusive or in the concurrent field; and these all seem to have been provided against by the double method of imposing a limitation on the powers of Provincial Legislatures by making them "subject to" the powers of the Federal Legislature, while conferring powers on the latter "notwithstanding" the powers of the former in the Provincial no less than in the concurrent field; which legislation is to prevail in case of actual conflict in any fields is laid down in the first sub-section of section 107 of the Government of India Act, 1935.

The exclusive power given to the Provincial Legislature over "money-lenders and money-lending" cannot be enlarged so as to include an incidental invasion of the dominant law in the concurrent field, even if such invasion could be regarded as necessarily incidental to the effective exercise of the powers by such legislature.

Per MANOHAR LALL, J.—It will be worse than useless, if not dangerous, to apply the principles which have been enunciated by the Privy Council to govern the construction of the Canadian Act, as governing the construction of the Bihar Money-Lenders Act, 1938, which is framed entirely on different lines and based upon wholly different schemes of policy. The two Acts are not in *pari materia*.

It is not permissible to apply the doctrine of "the general and special" as laid down in the Canadian cases to the consideration of the Indian Act.

Section 11 of the Money-Lenders Act, 1938, comes into conflict with, and is repugnant to, the provisions of section 2 of the Usury Laws Repeal Act, 1855, section 3 of the Usurious Loans Act of 1918 and section 37 of the Contract Act, 1872.

Appeal by the defendant.

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

The appeal was first heard by Wort, A. C. J. and Manohar Lall, J., who referred it to a Full Bench by the following Order of Reference:

WORT, A. C. J. AND MANOHAR LALL, J.—This appeal raises a very important question, being whether certain provisions in the Bihar Money-Lenders Act are *ultra vires* of the Provincial Legislature. There is an observation by Fazl Ali, J., in a case so far unreported of which some notes are printed in 19 Patna Law Times 111 n at page 114 n, in which the learned Judge is reported to have stated " We are not prepared to agree with Dr. Mitter that the Money-Lenders Act is *ultra vires* ". The matter, in the circumstances, will be referred to a Full Bench for decision.

On this reference

P. R. Das (with him *A. C. Roy*), for the appellant:—The Indian Legislature has plenary powers of legislation. So far as List II is concerned, the Bihar Legislature has, therefore, absolute powers as those of the Parliament—*Queen* v. *Burah*(1). Both the clauses of section 107 of the Government of India Act, 1935, refer to repugnancy in relation to List III. The Act contemplates that there can be no repugnancy between the Federal legislation and the Provincial legislation, so far as List II is concerned. The Parliament was providing for a case of repugnancy where it thought there could be a repugnancy.

I concede that where the Provincial Legislature exceeds the limit or usurps the power which it does not possess, the enactment would be *ultra vires;* but " Money-Lenders and Money-Lending " finds place in List II and the Act enacted by the Bihar Legislature is, therefore, *intra vires*. Section 107 deals with the

(1) (1878) L. R. 5 Ind. App. 178, 193.

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question of repugnancy but there is no question of repugnancy here as the law offended against and the offending law do not find place in the Concurrent List. In legislating in that field the Provincial Legislature cannot but interfere with contractual relations of the creditor and the debtor. The Parliament must be deemed to have given this power to the Provincial Legislature. If the two Legislatures are legislating in two different fields there can be no repugnancy.

[MANOHAR LALL, J.—There may be some subjects which may be in List I as well as in List II.]

Yes. If the Provincial Legislature has legislated in regard to "Bills of Exchange" in the garb of legislation on "Money-Lending" then my point fails.

[MANOHAR LALL, J.—It is enough if the effect of the legislation comes to that.]

My point will have no substance if it is shown that the Provincial Legislature was in fact legislating in regard to List I or List III.

[DHAVLE, J.—Your point is that the Parliament could not have given such a useless power to the Legislature when it could not legislate without affecting the existing Indian Law.]

Yes. The question of repugnancy which the Parliament had in mind relates to List III only.

[MANOHAR LALL, J.—To any of the matters in List III?]

Yes.

[MANOHAR LALL, J.—There may be a subject falling in List III, but it may also be included in List II. If the Provincial Legislature legislates in regard to this subject, the question of repugnancy might still arise.]

The word " Contracts " in List III would mean law of Contract excluding the law as to " Money-Lending ". The well-known principle of interpretation, namely *generalia specialibus derogant*, should be applied to the present case. It was adopted by the Privy Council when dealing with the British North America Act, 1867, under similar circumstances. The generality of the wording of any item of List III should be restricted by the special words in List II.

[MANOHAR LALL, J.—Then your argument is that at present there is no existing law with regard to " money-lending ", if the " contract " in List III is not taken also to include " money-lending ". If that be so, then we could not decide the appeal if the Money-Lenders Act had not been there.]

Reliance was placed on *Citizens Insurance Company of Canada* v. *Parsons*(1), *Marriage Legislation in Canada, In re*(2), *Bank of Toronto v. Lambe*(3), *Paquet* v. *Corporation of Pilots, Quebec*(4); *Gallaghar* v. *Lynn* (5) and Lefroy's Constitutional Law of Canada, page 82.

It is impossible to think of water-tight compartments in legislation. If you agree that the Money-Lenders Act is only a species of the Contract Act, the same rule should apply. " Civil Procedure ", in the Concurrent List should be read as excluding matters relating to money-lending.

In cases of overlapping we have to see what is the pith and substance of the Act. If the Provincial Legislature is really legislating within the ambit of its powers, then the fact that in so legislating it has incidentally and inevitably trenched upon an existing Indian law must be ignored.

(1) (1881) 7 A. C. 96.
(2) (1912) A. C. 880.
(3) (1887) 12 A. C. 575.
(4) (1920) A. C. 1029.
(5) (1937) A. C. 863.

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In *Gallaghar* v. *Lynn*(1) which was a case under the Government of Ireland Act of 1920, the point arose whether a certain legislation about "milk" was not an enactment relating to "trade"—a subject expressly prohibited from legislation by the particular (North Ireland) legislature. It was held that the Milk Act was "not a law in respect of trade" (but in respect of peace, order and good Government of Ireland), although it incidentally affected the trade.

My next point is that in fact there is no repugnancy. There is no specific provision in the Contract Act which compels the Court to decree interest at the contract rate. Section 37 is the only section with which section 11 of the Money-Lenders Act can be said to conflict. The words "any other law" in the proviso excuse the performance of a promise by a party. The Money-Lenders Act will be taken to be "any other law".

[MANOHAR LALL, J.—Does it not mean any law of competent legislature of concurrent jurisdiction?]

I submit not. There are no words of limitation.

Then I come to the Usurious Loans Act of 1918 and the Usury Laws Repeal Act of 1855. I submit section 11 of the Money-Lenders Act which embodies the rule of *damdupat* is only a rule of limitation of suits, and does not touch the question of the rate of interest. Reliance was placed on *Mia Khan* v. *Bibi Bibijan*(2).

[MANOHAR LALL, J.—But the decision is in the nature of obiter dictum as the learned Judge himself says.]

But this dictum has been followed in later cases —*Ramconnoy Audicarry* v. *Johur Lall*(3); *Nobin*

(1) (1937) A. C. 863.
(2) (1870) 14 W. R. 308.
(3) (1880) I. L. R. 5 Cal. 867.

Chunder Bannerjee v. *Romesh Chunder Ghose*(1). These authorities have been followed in numerous cases. This is the law in Bombay also.

Section 11 also does not conflict with any provision of the Civil Procedure Code which is a procedural law and cannot possibly relate to the matter covered by section 11.

L. K. Jha, for the respondent.—Mr. Das has argued that the question of repugnancy arises only with respect to a matter contained in the Concurrent List. I submit this is not so. There is an obvious overlapping in List II and List III. Such is the case with "money-lending". It is a matter of contract. The argument that there are general provisions in Lists I and III and special provisions in List II is not correct. They may be all general or all special. My point is that the Provincial Legislature can legislate with regard to "money-lending" or any subject contained in List II, provided it does not touch any subject of List III. I submit that the argument that the Provincial Legislature can legislate and incidentally trench upon the subjects of List III is not correct. The Act shows clearly that the Parliament did contemplate cases of overlapping. Therefore, if in legislating with respect to any subject given in List II, the Legislature enacts any law which falls within List III, it will be void to the extent of repugnancy with an existing Indian law. The rule of "general and special" applied in the Canadian cases does not apply to the Indian constitution. We cannot call the Contract Act "general" and the Money-Lenders Act "special" There is no provision in the Canadian constitution corresponding to section 107 of the Government of India Act. Under this Act, which has its own peculiarities, the two Legislatures have got to legislate within the ambit of the powers given under the different Lists which are

(1) (1887) I. L. R. 14 Cal. 781.

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exhaustive. There is no general power to legislate for " peace, order and good government ".

[MANOHAR LALL, J.—Adopting the rule of " general and special " can we not read Item no. 10 of List III as " Contracts, but not including money-lending contracts " ?]

I submit not. The Act excludes contracts relating to agricultural lands, but money-lending contract has not been so excluded from List III. [Explains and distinguishes *Paquet* v. *Corporation of Pilots of Quebec*(1) and *Citizens Assurance Company of Canada* v. *Parsons*(2).

So far as existing Indian law is concerned the general law of contract includes money-lending contracts and, therefore, if the Provincial Legislature trenches upon enactments relating to " contracts " the provisions of section 107(*1*) will come into operation.

[DHAVLE, J.—Item no. 14 of List III might help you.]

Yes. Wherever the Parliament wanted to engraft an exception, it has expressly done so. (Refers to sections 91 and 92 of the British North America Act of 1867.) Dominion Parliament has got general powers with regard to general subjects under section 91, and special powers with regard to special subjects under section 92. When there is a conflict between the List of section 91 and that of section 92, the former will always prevail. The scheme of the American Act is that the List of Dominion Parliament will control the special list. In other words, the particulars of section 91 would always prevail over the particulars of section 92. [Reliance was placed on *Tenant* v. *The Union Bank of Canada*(3), *Attorney-General for Ontario* v.

(1) (1920) A. C. 1029.
(2) (1881) 7 A. C. 96.
(3) (1894) A. C. 31.

Attorney-General for the Dominion of Canada(1) and *Attorney-General for Canada* v. *Attorney-General for British Columbia*(2).

[WORT, J.—In *Attorney-General for Canada* v. *Attorney-General for British Columbia*(2) their Lordships seem to point out that there may be a Dominion legislation with regard to a certain subject and a Provincial legislation with regard to that subject; but so long as they do not legislate on the same matter the enactments cannot be said to overlap and both will prevail; but if they legislate on the same matter then the Dominion law will prevail.]

Then we have to see if there is an 'occupied field' in the present case. If there is, then the Provincial legislation cannot encroach upon it. The doctrine of 'occupied field' applies where there is a conflict between the Dominion legislation and Provincial legislation within an area common to both. [Relies on *Forbes* v. *Attorney-General for Manitoba*(3).]

Your Lordships have to see whether the contractual part of the Money-Lenders Act is contained in List III. If it is, then we have to see whether there is an existing Indian law on the subject. If the field is already occupied, then the Provincial enactment would be void.

[WORT, J.—The doctrine of "occupied field" can only be applied if the Money-Lenders Act comes under List III.]

Yes. "Contracts" as a whole is in the Concurrent List. This includes Contract Act, Usurious Loans Act, 1918, Usury Laws Repeal Act, 1855. The enumeration in the List is not by reference to Acts but by reference to subjects generally.

(1) (1896) A. C. 348.
(2) (1930) A. C. 111.
(3) (1937) A. C. 260.

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[DHAVLE, J.—The law of Contract is in List I and also in List III. So the law of contract in List III may be said to be the law of contract excluding the law of contract in List I, and similarly with regard to money-lending contracts included in List II.]

The maxim "*generalibus specialia derogant*" does not apply to Indian constitution. Where the Parliament has intended an inclusion or exclusion, it has expressed it. Privy Council decisions with regard to foreign Acts should not be used to construe an Indian Act—*Hansraj* v. *Bejoy Lal Seal*(1).

My next point is that section II of the Money-Lenders Act is repugnant to the provisions of the Code of Civil Procedure (Order XXXIV), Contract Act (section 37), Usurious Loans Act of 1918 (section 3) and Usury Laws Repeal Act, 1855 (section 2).

Coming to the Code, my submission is that section 11 conflicts with rules 2, 4, and 11 of Order XXXIV, which provide that decree has to be passed at the contract rate. They leave no option to the Court but to pass a decree at the rate agreed upon.

[MANOHAR LALL, J.—But the Code is a procedural law.]

It is partly procedural. The court cannot cut down the rate of interest agreed upon in the mortgage bond. [Reliance was placed on *Maharaja of Bharatpur* v. *Ram Kanno Dei*(2), *Jagannath Prasad Singh Chowdhury* v. *Surajmal Jalal*(3), *Rameshwar Koer* v. *Syed Nawab Mehdi Hossein Khan*(4) and *Kusum Kumari* v. *Debi Prasad Dhandhania*(5)] Up to the date of the mortgage decree the matter remains in the

(1) (1929) L. R. 57 Ind. App. 110.
(2) (1900) L. R. 28 Ind. App. 35.
(3) (1926) L. R. 54 Ind. App. 1.
(4) (1898) L. R. 25 Ind. App. 179.
(5) (1935) L. R. 63 Ind. App. 114.

domain of contract and the court is bound to award interest at the contract rate unless the contract is otherwise vitiated.

[MANOHAR LALL, J.—Look to the last paragraph of *Kusum Kumari* v. *Debi Prasad*(1), " Their Lordships also think...recoverable by law...". This cannot refer to the Code which does not lay down the law.]

The amount recoverable by law would be the rate agreed upon, unless the contract is otherwise vitiated. As regards the Usurious Loans Act and the Usury Laws Repeal Act my submission is that the rule of *damdupat* is not a rule of limitation of suits—*Madhwa Sidhanta* v. *Venkataramanjulu*(2). The rule cannot prevail when there is a contract. [Explains and distinguishes *Ramconnoy Audicarry* v. *Johur Lall*(3) and *Nobin Chunder Bannerjee* v. *Romesh Chunder Ghose*(4).] In section 37 of the Contract Act the words " any other law " do not refer to an enactment the legality of which is questioned. The section contemplates an Act then in force.

Lastly I rely on *Vishwanath Narayan Singh* v. *Sri Mahant Harihar Gir*(5).

[WORT. J.—But we are not concerned with sections 16 and 17 of the Money-Lenders Act.]

But this will support my argument that section 11 being repugnant to the Code of Civil Procedure is void.

P. R. Das, in reply.—Parliament seems to recognise that subjects for legislation cannot be put into water-tight compartments and that some of the subjects in the Provincial list may unavoidably or

(1) (1935) I. L. R. 15 Pat. 210; L. R. 63 Ind. App. 114.
(2) (1903) I. L. R. 26 Mad. 662, 669.
(3) (1880) I. L. R. 5 Cal. 867.
(4) (1887) I. L. R. 14 Cal. 781.
(5) (1938) I. L. R. 17 Pat. 714.

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incidentally run into the subjects of the other list. Parliament knew about the distinction drawn in the Canadian cases.

[WORT, J.—Will you clear the point as to why the Privy Council was applying one doctrine in deciding one set of cases and another doctrine of "general and special" at a different time in similar circumstances?]

The Privy Council has been applying the same doctrine but using different expressions; they all mean the same thing.

When giving exclusive jurisdiction to the Federal legislature in regard to List I, the Parliament was making it clear that the power so given was paramount. That is what is meant by "Notwithstanding anything in the two last succeeding sub-sections....." in sub-section (*1*) of section 100. It was providing against an argument founded on an incidental encroachment on the field of Provincial legislature. Legislation has many aspects. You have to see whether the dominant and real aspect comes within List I, II or III—*Per* Lord Haldane in *Citizens Insurance Company of Canada* v. *Parsons*(1). Compare the words of sub-section (*1*) of section 100 with the similar words used in section 91 of the Canadian Act. The words "subject to....." in sub-section (*3*) of section 100 mean that the Provincial legislature was given power to legislate with regard to the subjects of List II notwithstanding that the legislation may run into the Federal subjects.

[MANOHAR LALL, J.—Sub-section (*2*) indicates that Parliament was contemplating that List III was List II *plus* something else. That is to say, the Parliament said that although the Provincial Legislature has been given exclusive powers in regard to

(1) (1881) 7 A. C. 96.

List II, the Federal legislature can also occupy the same field but the Federal power would be paramount.]

That interpretation would have been correct if the negative words in sub-section (*3*) were not there.

[WORT, J.—Does it not mean that when you go to List II, you have to cut out everything of that kind from List I?]

[DHAVLE, J.—Take the item "Negotiable Instrument" from List I, "Contract" from List III and "Money-lending" from List II and perhaps you may be able to solve the difficulty.]

Section 100 means in effect that in making law within your fields you can incidentally encroach upon the Concurrent field or the exclusive field of another legislature.

[DHAVLE, J.—Which would prevail in the event of conflict between List I and List II—"Negotiable Instrument" or "Money-lending"? What would be the position under section 100?]

The latter Act will not be an Act regarding "Negotiable Instrument". The law as to "Negotiable Instrument" will not be void as the Parliament in sub-section (*3*) has said "Notwithstanding .....". The crucial point would be—in which List the dominant aspect of the particular legislation puts it. "Contract" in List III includes various matters. "Money-lending" comes specifically within List II. If this List II had not been there, then it would have come within List III. But as the Privy Council says, both the Lists must be read together, and the dominant aspect of the legislation must be looked into. Their Lordships apply the maxim "*generalibus specialia derogant*" or the doctrine of finding out the "dominant aspect". I draw your Lordships' attention to the Acts of Parliament as regards "Money-Lending"—(1900) 63 and 64 Vict. Ch. 51 and (1927) 17 and 18 Geo. V. Ch. 21

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—for showing that the Money-Lenders Act comes strictly within the item " Money-lending ". These statutes clearly show that reliefs given in the Indian Act come within the scope of " Money-lending ". The dominant aspect of the Money-Lenders Act will also appear on a comparison with the aforesaid enactments on " Money-lending ".

[MANOHAR LALL, J.—The provision of sub-section (*3*) of section 100 is subject to sub-section (*2*) which speaks of the Concurrent List. Does it not mean that the one which occupies the field first will prevail?.]

The meaning of " subject to " is exactly the same as " notwithstanding.....". That is providing against a possible argument based on *incidental* encroachment. The encroachment will hold good. [Reliance was placed on *Paquet* v. *Corporation of Pilots of Quebec*(1).] Generality of section 91 of the Canadian Act has to be restricted by the specific words of section 92. Applying this test, if you find that the dominant aspect of the Act is " Money-lending ", then it is exclusively a Provincial subject and the generality of List III to this extent will be cut down. The generality of the subject " Marriage and Divorce " is cut down by the specific provision regarding " solemnization of marriage " in section 92 of the Canadian Act—*Marriage Legislation in Canada, In re*(2). Likewise the power to legislate with regard to " Money-lending " operates by way of exception to the powers conferred on the Federal Legislature as regards " Contracts " generally. Reliance was placed on *Insurance Company of Canada* v. *Parsons*(3). I submit that if within the respective legislative lists the dominant aspect of the two pieces of legislation put them, the field is clear and both will prevail. In the present case it cannot be said that the field is not clear.

(1) (1920) A. C. 1029.
(2) (1912) A. C. 880.
(3) (1881) 7 A. C. 96, 108.

[*Attorney-General for Canada* v. *Attorney-General for British Columbia*(1) explained and distinguished.]

On the second point I submit that section 11 is not repugnant to any existing Indian law. As regards Code of Civil Procedure, the case of *Kusum Kumari* v. *Debi Prosad Dhandhania*(2) itself negatives the argument of the respondent. It is a matter of contract as their Lordships put it. As regards Contract Act the argument that the words "any other law" implies good law and not impugned law has no substance whatsoever. As to the case of *Madhwa Sidhanta* v. *Venkataramanjulu*(3), I submit that it has been considered in *Kunja Lal* v. *Narsamba Debi*(4), which makes it clear that *Madhwa Sidhanta* v. *Venkataramanjulu*(3) does not decide anything and, secondly, it proceeds upon a plain ignorance of the view that mortgage actions are to be decreed according to section 37 of the Contract Act. The provisions of the Transfer of Property Act dealing with mortgage are to be taken as part of the law of Contract. Then section 11 of the Money-Lenders Act which is a rule of *damdupat* does not conflict with the Usury Laws Repeal Act—*Nobin Chunder Bannerjee* v. *Romesh Chunder Ghose*(5).

[WORT, J.—Section 11 completely takes away the discretion of the Court.]

I rely on the Calcutta and Bombay cases and there is no decision to the contrary. They all have held that the rule of *damdupat* is a rule of limitation of suits and not one relating to the rate of interest.

Cur. adv. vult.

S. A. K.

(1) (1930) A. C. 111.
(2) (1935) L. R. 63 Ind. App. 114.
(3) (1903) I. L. R. 26 Mad. 662.
(4) (1915) I. L. R. 42 Cal. 826.
(5) (1887) I. L. R. 14 Cal. 781.

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WORT, J.—This appeal which has been referred to a Full Bench arises out of an action on a mortgage. The only point raised in the Courts below was with regard to the question of interest. The loan was for Rs. 400 and in the plaint a sum of Rs. 1,980 was claimed, credit having been given for Rs. 281. The trial Judge disallowed compound interest but allowed simple interest at the rate provided by the mortgage bond being Rs. 1-4-0 per mensem. The District Judge on appeal reversed the trial Court's judgment and allowed compound interest at the rate claimed.

The appeal raises the question of the validity of section 11 of the Bihar Money-Lenders Act: Bihar Act III of 1938 which is expressly retrospective. It is contended by the appellant that the learned Judge in the Court below had jurisdiction to make a decree in favour of the plaintiff for a sum of interest no greater than the amount of the loan advanced by reason of the provisions of the section to which I have referred. The section provides:

"Notwithstanding anything to the contrary in any other law or in anything having the force of law or in any contract, no Court shall, in any suit brought by a money-lender (in this Act the money-lender is defined as a person who advances a loan) in respect of a loan advanced before or after the commencement of this Act, pass a decree for an amount of interest for the period preceding the institution of the suit which, together with any amount already realised as interest through the Court or otherwise, is greater than the amount of the loan advanced or, if the loan is based on a document, the amount of the loan mentioned in the document on which the suit is based."

On behalf of the respondents, Mr. Jha contends that the Federal Legislature being paramount with regard to subjects, of which Contract (no. 27) is one, enumerated in List III of the Seventh Schedule of the Government of India Act (*25 and 26 Geo. V., Ch. 42*) and money-lending being a branch of the Law of Contract the section in question is void as being repugnant to the "existing Indian law".

The arguments proceeded in the first place on the footing that the legislation was ultra vires of the Provincial Legislature. Although that in one aspect

may be a correct designation of the problem before us, it would appear that the question is more limited, as there can be no doubt that Parliament having conferred on the Provincial Legislature the power to legislate with regard to " Trade and Commerce within the Province, Markets and Fairs, Money-lending and Money-lenders " (Item no. 27), the legislation in question is within the competence of the Legislature. The question is the narrower one, whether the provisions of the Act with which we are concerned is repugnant to " existing Indian law " as I have already stated.

The case depends upon the proper construction to be placed upon Part V of the Government of India Act, 1935, and the three Lists given in the Seventh Schedule of the Act. More particularly are we concerned with sections 100 and 107 and two items in two Lists. Section 99 of Part V of the Government of India Act distributes generally legislative powers to the Federal Legislature " for the whole or any part of British India or for any Federated State ", and to the Provincial Legislature for the Province. We are not concerned with the subject-matter of the second sub-section of section 99. Section 100 deals with the distribution of the legislative powers in detail. Sub-section (*1*) of that section provides that

> " Notwithstanding anything in the two last succeeding sub-sections the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I."

The next succeeding sub-section confers powers on the Federal Legislature and the Provincial Legislatures with regard to the Concurrent Legislative List, List III, and the third sub-section confers power on the Provincial Legislature to make laws for the Province, excluding the right of the Federal Legislature to legislate in respect of the matters enumerated in the Provincial Legislative List, List I. To be more specific, the second sub-section relating to the Concurrent Legislative List confers the power referred to

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"notwithstanding anything in the next succeeding sub-section" (that is, the third sub-section giving the Province power with respect to the Provincial Legislative List) and confers power on the Provincial Legislature with respect to the same List which power is "subject to the first sub-section" granting exclusive power in respect of the Federal Legislative List to the Federal Legislature. And again, the power conferred upon the Provincial Legislature in respect of the Provincial Legislative List by the third sub-section is subject to the power conferred in the two preceding sub-sections (Federal and Concurrent Legislative Lists).

It was contended by Mr. P. R. Das, on behalf of the appellant in his able argument, that the section properly construed plainly meant that the legislative powers were distributed to the Federal Legislature and the Provincial Legislature and those powers were mutually exclusive; but whilst admitting that the subjects of legislation, as contained in the Lists, could not be put into water-tight compartments, he contended that the Provincial Legislature when legislating on a subject contained in the Provincial List or with regard to a sujbect the dominant character of which or the "pith and substance" of which [as to the application of these tests, *see Attorney-General for Ontario* v. *Reciprocal Insurance* (1); *see* also *Gullaghar* v. *Lynn*(2)] properly brought the legislation in question within a subject assigned to the Provincial Legislature, such legislation could not be considered beyond the powers of the Provincial Legislature and, therefore, could not be questioned. That may be true, but on a plain reading of the section it seems to me to be abundantly clear that Parliament intended in this section that the Federal Legislature should be paramount with regard to all matters enumerated in the three Lists and it is that situation with which we have to deal. I am of the opinion that the argument

(1) (1924) A. C. 328, 337.
(2) (1937) A. C. 863, 870.

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does not correctly state the nature of the problem before us. It appears from this section that the Federal Legislature was given exclusive power to legislate with regard to those subjects enumerated in List I of the Seventh Schedule and those powers are untramelled by the powers given to the Provincial Legislature in respect to the subjects enumerated in the Provincial List and the Concurrent List. Again upon the Federal Legislature is conferred the power to legislate with regard to certain subjects enumerated in the Concurrent List notwithstanding any power conferred upon the Provincial Legislature to legislate with regard to that list or with regard to the subjects enumerated in List II. But the same concurrent power given to the Provincial Legislature is cut down by the exclusive power granted to the Federal Legislature, and finally the exclusive power given to the Provincial Legislature to legislate in its own field under List II is conditioned by the exclusive power granted to the Federal Legislature with regard to List I and the concurrent power under List III.

In arriving at a conclusion with regard to the matter in hand I would bear in mind the principle, which has been reiterated so often by the Judicial Committee of the Privy Council in constitutional cases, that we are not entitled to stray beyond the limits of the matter under discussion, nor to lay down any general rules of construction of the Act. Expressed in the language of their Lordships of the Privy Council in *Hodge* v. *The Queen*(1) " in all these questions of ultra vires it is the wisest course not to widen the discussion by consideration not necessarily involved in the decision of the point in controversy " : *see* also *Citizens Assurance Co., Canada* v. *Parsons*(2), *Attorney-General of Manitoba* v. *Manitoba License Holders Association*(3). In this connection I should like to add that

(1) (1883) 9 A. C. 117, 128.
(2) (1881) 7 A. C. 96, 107.
(3) (1902) A. C. 73, 77.

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although a large number of their Lordships' decisions on constitutional problems arising under the British North America Act of 1867 have been freely quoted, they offer little or no assistance to us in the question before us, and indeed it would be dangerous to apply those decisions to this case having regard to the fact that the Act under consideration in this case and the British North America Act differ so materially in structure, although the interpretation of the two Acts may give rise to similar constitutional problems. There have been, however, principles enunciated which may be of general application and to the extent to which those principles may be described as principles or canons of construction may be useful in determining the matter before us.

If the matter under consideration fell to be determined under section 100 and the respective Legislative Lists only, the problem which we have to solve would bear a striking resemblance to those arising in many of the Canadian cases. But it will be seen that the case depends not only on that section but upon the proper construction to be placed upon section 107 of the Government of India Act in conjunction with the Legislative Lists in the Seventh Schedule—a section the prototype of which is not found in the British North America Act, unless it be the proviso to section 91 which was dealt with by the Judicial Committee in the case of *Attorney-General, Ontario* v. *Attorney-General for the Dominion of Canada*(1). But it will be seen that the scheme of the two Acts is different: whereas under the proviso referred to, subjects enumerated in section 91 of the British North America Act, 1867,

> " shall not be deemed to come within the class of matters of a local and private nature comprised in the enumeration of the classes of subjects by the Act assigned to the Provincial Legislature ",

under the section of the Act now under consideration Federal Legislation shall prevail in all subjects

(1) (1896) A. C. 348, 359.

which the legislation of the Federal Legislature is competent to enact. Had we been considering the power of the Federal Legislature on the one hand to legislate with regard to a particular subject in the presence of actual legislation by the Province on a subject which was alleged to be within the power of the Federal Legislature, whether as regards a subject specifically enumerated in the Federal or Concurrent List or as incidental thereto, questions such as arose in *Hodge* v. *The Queen*(1) and *Attorney-General Ontario* v. *Attorney-General for the Dominion of Canada*(2), wolud have arisen in this case.

We are not concerned with sections 101 to 106. Shortly stated they give powers with regard to legislation in exceptional circumstances, not present in this case. We come therefore to section 107. It is unnecessary to consider sub-section (*2*) or sub-section (*3*) of that section as they relate to matters which are clearly not relevant to this case. The first sub-section provides:

> "If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void."

It will be seen that the last part of the sub-section makes the Federal legislation or the "existing Indian law" paramount; but the words "subject to the provisions of this section" occur. These last words give rise to some difficulty in the argument. But it seems to be quite clear that the expression necessarily refers to those provisions in sub-section (*2*) under which on certain conditions a Provincial law, although repugnant to an "existing Indian law", may yet have effect in the Province in which it was enacted:

(1) (1883) 9 A. C. 117.
(2) (1894) A. C. 189.

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but the words can have no reference to the validity or otherwise of the Federal or Provincial Legislation, as, apart from references to that question, which are not relevant to the point before us, in the first part of the sub-section and the last sub-section, no mention is made in the section to that matter. Broadly stated, it would appear that, whilst section 100 distributes legislative powers to the respective Legislatures, sub-section (*1*) of section 107 provides a test with respect to the validity of legislation when conflict between the Federal and the Provincial Legislation arises—a possibility which is contemplated and is not unlikely having regard to the fact that concurrent legislative powers are conferred on the two Legislatures. It is said in this case that there is this conflict, as the Provincial Legislature, in enacting section 11 of the Bihar Money-Lenders Act (although that legislation is intra vires coming as it does expressly under head 27, ' Money-lending and Money-lenders '), has trenched upon the Concurrent List, in that section 11, prohibiting a money-lender from recovering more than a certain amount of interest and in that sense having made a contract for the parties, has legislated in respect of a subject enumerated in the Concurrent Legislative List, Item 10, and therefore has brought itself within the mischief of the first sub-section of section 107 of the Government of India Act.

The appellant has sought to avoid this position by relying upon a number of Canadian decisions for the application of the maxim *generalibus specialia derogant* [*see* the case of *Paquet* v. *Corporation of Pilots of Quebec*(1)]contending that the general term in the Concurrent List " Contract " is to be cut down by the specific words in the Provincial List " Money-lending and Money-lenders ", or, as expressed by their Lordships of the Judicial Committee in the case referred to, " that the generality of the wording of... has to be interpreted as restricted by the specific

(1) (1920) A. C. 1029.

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language of.....in accordance with the well-established principle that subjects in one aspect may come under one list and in another aspect, that is made dominant, be brought under the other " : *see* also *In re Marriage Legislation in Canada*(1). The argument amounts to this also that, when considering the validity of the legislation under consideration, in its relation to " existing Indian law " with regard to a subject enumerated in the Concurrent List, it must be held that the general subject " Contract " having been cut down by the special subject " Money-lending ", the " existing Indian law " although dealing with interest does not deal with a subject in the Concurrent Legislative List. But this principle cannot be held to apply, and it seems to me for several reasons, the main one of which is stated in the earlier part of my observations. Had we been considering on the one hand the power of the Federal Legislature *eo nomine* to legislate in the absence of actual legislation by that Legislature, and on the other hand legislation by the Provincial Legislature on a subject specifically enumerated in the Provincial List and in another aspect coming within a subject enumerated in the Federal List or the Concurrent List of which the subject-matter of the Provincial Legislature was said to be a branch or part, then it might have been held that the power conferred on the Provincial Legislature to legislate with regard to money-lending and money-lenders was an exception to the power of the Federal Legislature to legislate under the Concurrent Legislative List with regard to the wider and more general subject " Contract ". Undoubtedly money-lending, as I have said, is a branch of " Contract "; the subject ' money-lending and money-lenders' may be considered the species and ' contract ' the genus. The principle relied upon by the appellant is a principle of construction; it cannot affect matters of definition. It will be noticed that the first part of sub-section (*1*) of section 107 refers to two different cases: first, " if any provision of a

(1) (1912) A. C. 880.

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Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is *competent to enact* "; secondly, " or to any provision of an existing Indian law with respect to one of the *matters enumerated in the Concurrent* Legislative List ". The principle *generalibus specialia derogant* may be applied in testing the question under the first part whether the Federal Legislature is competent to enact legislation with regard to a subject, e.g., the power to legislate in the field of Contract may be limited by the application of the principle by excluding from that subject the special subject ' money-lending '. But it cannot be applied for the purpose of deciding whether the " existing Indian law " relates to a subject in the Concurrent List. Either the subject-matter of the " existing Indian law " comes within a subject enumerated in the Concurrent Legislative List or it does not, e.g., money-lending or interest recoverable in a money-lending contract is a part of the subject " Contract ".

At this stage we were invited to consider a detailed comparison of the various subjects of legislation enumerated in the Lists with a view to support and to test the arguments advanced. As an instance, Item 28, List I, was compared with one of the items under consideration in this case, ' Contract ', no. 10, List III. The comparison was also used by Mr. Jha for contending that where Parliament intended a limit to be placed upon the Legislature as regards any particular subject it is so provided, for instance, Item no. 45, List I: no. 7, List III. This does not altogether support Mr. Jha's case but I purposely refrain from any discussion of this argument as it clearly tends to widen the matter under discussion—a course condemned by the Judicial Committee of the Privy Council and, not being the point to be determined in this case, must necessarily be barren of results. If and when the many problems suggested by these comparisons arise, I have no doubt they will be solved by the competent authority. But here the

position is clear. We are considering, it is argued, Provincial Legislation in its relation to an "occupied field", occupied by the "existing Indian law" in respect to "Contract" in its wider and general aspects. It might be said that the Provincial legislation in respect to "Contract" in the particular aspect "Money-lending" was valid, as the power to legislate with regard to that particular matter had been specifically conferred upon that Legislature. What has been described as the "doctrine of the occupied field" has been expressed by Lord Tomlin in the Case of *Attorney-General for Canada* v. *Attorney-General for British Columbia*(1) in the fourth rule there laid down and may be applied to the case before us *mutatis mutandis*: "There can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear; but if the field is not clear and the two legislations meet, the Dominion legislation must prevail". *See Grand Trunk Ry. of Canada* v. *Attorney-General of Canada*(2) and *Attorney-General, Ontario* v. *Attorney-General, Canada*(3). This doctrine may be applied to the case before us, as I have stated, as the dominant power of the Central Legislature is a feature common to the Canadian and Indian constitutions, expressly so in the case of the Indian by section 107 of the Government of India Act.

Here it is necessary to pause to examine what is meant by "existing Indian law" under the Government of India Act. Under section 311 (*2*) "existing Indian law" means

"any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of Part III of this Act by any legislature, authority or person in any territories for the time being comprised in British India, being a legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation".

(1) (1930) A. C. 111.
(2) (1907) A. C. 65.
(3) (1894) A. C. 189.

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So we are met with this position that the laws (in this particular case, it is argued, provisions of the Civil Procedure Code, Contract Act, Usury Laws Repeal Act, 1855, and Usurious Loans Act, 1918) to which section 11 is alleged to be repugnant have the same status as a law passed by the Federal Legislature under section 100. The validity of the "existing Indian law" cannot be called in question, and the problem therefore with which we are met is to consider whether the Provincial Legislature had power to legislate with regard to this particular matter (that is admitted) and whether the "existing Indian law" properly defined comes within the subject "Contract" in the Concurrent Legislative List; in other words, whether this particular field of legislation is already occupied: and, if that is answered in the affirmative, whether section 11 of the Bihar Money-Lenders Act is repugnant thereto. It will be seen that the field of investigation is narrowed. We are therefore not met with the problems which existed in so many of the cases before the Privy Council under the British North America Act: the question does not arise whether, for instance, legislation of the Provincial Legislature was on a subject incidental to or ancillary to a specified subject with regard to which powers have been conferred, nor does the question strictly arise whether the legislation complained of comes within the powers of the Provincial Legislature.

Section 11 of the Bihar Money-Lenders Act prohibits the making of a decree for interest, whatever the contract between the parties may be, for a sum beyond a certain amount. The Court complying with the provision of this section therefore would impose upon the parties a new contract and I do not think there can be any doubt therefore that the Provincial Legislature in passing this legislation is dealing with the subject "Contract" under the special head "Money-lending and Money-lenders"; that is not disputed. It is argued that the Legislature

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by a law passed by an authority indicated in the definition to which reference has been made, has also legislated with regard to the subject " Contract " coming within the Concurrent Legislative List. In the first place it is said that the Legislature has legislated under Order XXXIV, rules 2 and 11, of the Code of Civil Procedure. Rule 2 provides:

" In a suit for foreclosure if the plaintiff succeeds the Court shall pass a preliminary decree ordering that an account be taken of what was due to the plaintiff at the date of such a decree."

Rule 11 provides:

" In any decree passed in a suit for foreclosure, sale or redemption where interest is legally recoverable the Court may order payment of interest to the mortgagee."

Sub-clause (*a*) (*iii*) of that rule provides:

" On the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee..... at the rate agreed between the parties or, failing such rate, at the same rate as is payable on the principal.....".

It is contended here that the Legislature provides that the Court is bound to make a decree at the contract rate. Section 37 of the Contract Act is also relied upon. That section provides:

" The parties to a contract must either perform, or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law ".

Dealing first with section 37 of the Contract Act I am clearly of the opinion that there is no obligation laid down by the Legislature in that section to make a decree according to the terms of the contract and on no other terms. The section 37 itself provides for a possible dispensation to the parties to the contract:—" unless such performance is dispensed with or excused under the provisions of this Act or of any other law ". In those cases in which the facts come within the provisions of the Usurious Loans Act, 1918, the strict performance is excused. As regards Order XXXIV the respondents also rely upon the case of *Jagannath Prosad Singh Chowdhury* v.

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Surajmal Jalal(1) in which Lord Phillimore in delivering the judgment of the Privy Council said: "till the period of redemption has expired the matter remains in contract and interest has to be paid at the rate and with the rests specified in the contract of mortgage". Reliance was also placed upon the case of *Kusum Kumari* v. *Debi Prosad Dhandhania*(2) for the contention that as the law stood before the passing of section 11, Bihar Money-Lenders Act, the contract made by the parties bound them as provided by Order XXXIV. The short answer to that argument is that in the cases quoted the one question which was being considered was interest recoverable for the period before and after the decree. And again from an examination of the latter case it will be seen to be an authority directly opposed to the argument advanced. It is contended by Mr. P. R. Das that this Order creates no rights, lays down no principle of substantive law but is merely a branch of the adjective law, and for that reason no assistance can be gained from it by the respondent. Again it may be remembered that Order XXXIV found place at one time in the Transfer of Property Act an additional reason for the correctness of the view advanced by the appellant. In other words, it was transferred from an Act dealing with substantive law and made a rule under an Act dealing with adjective law or law of procedure.

But a much more serious question arises with regard to the other Act mentioned: the Usurious Loans Act, 1918. In this connection it was first argued that the section under consideration was repugnant to the Usury Laws Repeal Act, 1855, which repealed the Usury laws then in existence and provided that

"in any suit in which interest is recoverable the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by

(1) (1926) I. L. R. 54 Cal. 161; L. R. 54 I. A. 1.
(2) (1935) I. L. R. 15 Pat. 210; L. R. 63 I. A. 114.

the parties: and if no rate is agreed upon at such a rate as the Court shall deem reasonable ".

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There are other provisions with which we have in this case no concern. Then came the Usurious Loans Act of 1918 by which to some extent the Usury laws existing before the passing of the Act of 1855 were reinstated in another form. The Usurious Loans Act, 1918, provides that in circumstances mentioned in section 3 the Court has a discretion to make a decree other than at the rate of interest agreed upon between the parties: in other words, to reopen the transaction the subject of the litigation and to that extent to make a new contract between the parties. The position, therefore, is this: in a case in which the conditions mentioned in section 3 of the Usurious Loans Act, 1918, do not exist, the Court is bound to make a decree at the rate " agreed upon between the parties " (Act XXVIII of 1855). If the case before us had been limited to a consideration of the repugnancy of section 11 of the Bihar Money-Lenders Act to the Act of 1855, much could have been said for the appellant's argument that Parliament could not have intended that a conflict should exist, and that it could not be assumed on any construction of the relevant provisions that what Parliament gave to Provincial Legislature by conferring powers to legislate in respect to money-lending was expressly taken away by conferring power on the Federal Legislature to legislate as to Contract, or by inference made invalid by placing a general subject 'Contract' in the Concurrent List. But the " existing Indian law " does include legislation on this specific subject in the sense that a law exists with regard to the recovery of interest in the Usurious Loans Act, 1918.

Now, by section 11 of the Bihar Money-Lenders Act the Court is deprived of the discretion placed in its hands by the Usurious Loans Act, 1918, and at the same time, as regards those cases to which by their circumstances the Act of 1918 does not apply in terms, the Court is prohibited from obeying the

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mandatory provisions of the Act of 1855 " adjudge or decree an amount of interest according to that agreed upon by the parties ". The answer to that put forward in the argument of Mr. P. R. Das is a principle laid down by a number of Indian authorities to which I shall now refer. It is contended on the analogy of these authorities that section 11 of the Act under consideration amounts to nothing more than a rule of limitation of suits and is therefore in conflict neither with the Usury Laws Repeal Act of 1855 nor with the Usurious Loans Act of 1918. It will be observed that if this argument is to be accepted it must be held that the two Acts referred to the Acts of 1855 and 1918 are Acts giving substantive rights.

The first case relied on is *Deen Doyal Poramanic* v. *Kylas Chunder Pal Chowdhury*(1) deciding that the *damdupat* rule was not applicable to the mufassal and the Judges deciding that case said during the course of the judgment that " in the Presidency town here no doubt it has been held that the rule of Hindu law in question has not been abrogated by Act XXVIII of 1855 ". In *Ramconny Audicarry* v. *Johur Lall Dutt*(2) Mr. Justice Wilson sitting alone observed, on the authority of certain Bombay decisions but without considering the authorities in detail, that he doubted whether the rule of Hindu law in question (i.e., *damdupat* rule) has properly anything to do with the legality or illegality of any contract: " I think it is rather a rule of limitation ". Mr. Justice Chaudhuri sitting on the original side of the Court in *Kunja Lal Banerji* v. *Narsamba Debi*(3) held (referring, however, to a Madras decision to which detailed reference will be made later) that the *damdupat* rule applied in cases of mortgage, observing that the Madras Court had overlooked section 4 of the Transfer of Property Act. On the

(1) (1875) I. L. R. 1 Cal. 92.
(2) (1880) I. L. R. 5 Cal. 867.
(3) (1915) I. L. R. 42 Cal. 826.

other hand in *Mia Khan* v. *Bibi Bibijan*(1) the Court held that Act XXVIII of 1855 repealed the Mohammadan laws against interest as between co-religionists but remarking that so far as Courts of Justice were concerned the rule had been treated as obsolete. In Madras in the case of *Madhwa Sidhanta Onahini Nidhi* v. *Venkatanamanjulu Naidu*(2) it was held that under sections 86 and 88 of the Transfer of Property Act the mortgagee was entitled to interest at the contract rate, and whether the rule of *damdupat* be treated as a special rule (being applicable to Hindus only) and the Transfer of Property Act as a general statutory provision or *vice versa*, the rule of *damdupat* general, and Transfer of Property Act sections 86 and 88 as special, the same result obtained, viz., the latter was to be taken as having abrogated the former. This latter case is against Mr. Das's contention. However, he relies upon the earlier quoted cases by way of analogy. He contends that section 11 of the Bihar Money-Lenders Act lays down nothing more than a rule of limitation and in no way affects or is repugnant to the statutory provisions to which reference has been made. However, whatever section 11 of the Bihar Money-Lenders Act may be described as—whether as a mere rule of limitation, or as a provision of substantive law—it most certainly deprives the Court, as I have already stated, of the discretion given to the Court under section 3 of the Usurious Loans Act of 1918 in cases in which the facts proved allow the exercise of a discretion, and is most certainly opposed to the express provision of the law laid down in the Usury Laws Repeal Act in those cases to which Usurious Loans Act does not apply.

Nor can the validity of the section be upheld because in the particular circumstances of some cases the discretion given to the Courts by the Usurious Loans Act may be exercised and yet the Court

(1) (1870) 5 Beng. L. R. 500; 14 W. R. 308.
(2) (1903) I. L. R. 26 Mad. 662.

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may obey the express provisions of section 11, i.e., in those cases in which the amount of the interest awarded does not exceed the limits provided by that section. Those cases would be rare, as it is notorious especially in cases of the kind with which we are dealing, that owing to the fact that no interest is paid to the creditor for the whole or part of the period of limitation the amount of interest far exceeds the principal, even in those cases in which the Court exercises its discretion under the Usurious Loans Act. An Act cannot at the same time be valid and invalid: valid in those cases in which by the circumstances of the case, and not by reason of the provisions of the Act itself, the Court keeps within the confines laid down, invalid in those cases, even allowing for the Court's discretionary powers, in which the limitations of section 11 are exceeded. In my judgment the section under consideration is repugnant to the earlier existing Indian law and, to the extent of the repugnancy which is indicated above, is void.

The result therefore is that the appeal fails and must be dismissed with costs.

A certificate is granted under section 205 of the Government of India Act.

DHAVLE, J.—This is an appeal by the third defendant in a suit brought to enforce a mortgage bond executed years ago by his father and elder brother, defendants 1 and 2. The rate of interest provided in the bond was Re. 1-4-0 per cent per mensem with yearly rests. The trial court held that the rate was excessive and decreed the claim with only simple interest at Re. 1-4-0 per cent per mensem. On an appeal by the plaintiff the District Judge held that the compound interest stipulated in the bond was not excessive, and therefore, decreed the suit in full. Defendant no. 3 filed the Second Appeal to this Court in October, 1936. In July, 1938, the Bihar Money-

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Lenders Act, no. III of 1938, became law. Section 11 of this Act provides:—

"Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract, no Court shall, in any suit brought by a money-lender in respect of a loan advanced before or after the commencement of this Act, pass a decree for an amount of interest for the period preceding the institution of the suit which, together with any amount already realised as interest through Court or otherwise, is greater than the amount of the loan advanced, or, if the loan is based on a document, the amount of loan mentioned in the document on which the suit is based."

Bihar Act V of 1938 which became law in September 1938, provided *inter alia* that section 11 of Act III—

"shall apply, and shall be deemed always to have applied, to suits brought by money-lenders in respect of loans advanced before the commencement of the said Act (Act III of 1938) and to appeals arising out of such suits, whether such suits or appeals were instituted before or after"

section 11 came into force.

The Division Bench, before which this appeal came in the first instance, has referred to a Full Bench the question whether section 11 of Bihar Act III of 1938 is *ultra vires* of the Provincial Legislature.

It was the appellant that sought to take advantage of what may be called the rule of *damdupat* embodied in section 11, and the respondent that sought to meet this by urging that the section was *ultra vires*. This contention is based on section 107 (1) of the Government of India Act, 1935, read with item no. 10. "Contracts", in List no. III, the Concurrent Legislative List in the Seventh Schedule of the Act, and section 2 of the Usury Laws Repeal Act, 1855, which provides that—

"in any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties."

This last is part of the "existing Indian law" as defined in section 311, sub-section (2), of the Government of India Act, and relates to the law of contracts.

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It is urged for the respondent that section 11 of Bihar Act III of 1938 is repugnant to it, and that, therefore, under section 107, sub-section (*1*), of the Government of India Act, section 2 of the Usury Laws Repeal Act ought to prevail over section 11 of the Bihar Money-Lenders Act which must to the extent of the repugnancy be treated as void.

On the other hand, it has been urged for the appellant that as the Bihar Act relates to "Money-lending and Money-lenders", a matter specifically included in item 27 of the Provincial Legislative List, List no. II in the Seventh Schedule of the Government of India Act, the Provincial Legislature has, under sub-section 3 of section 100 of the latter Act, exclusive power to legislate with respect to the matter, and that these powers of legislation are plenary, "as large and of the same nature, as those of Parliament itself"—*Queen* v. *Burah*(1). The relief of the debtor is not, it is pointed out, an unusual feature of Money-Lenders Acts, and it is contended that as the Bihar Legislature is empowered to legislate "with respect to" this matter, the Act "is not invalidated if incidentally it affects matters which are outside the authorised field"—*Gallagher* v. *Lynn*(2). Section 107 (*1*) places existing Indian law with respect to the matters enumerated in the Concurrent Legislative List on the same footing as Federal law in respect of repugnancies with Provincial legislation, but it is contended that the section is confined to repugnancies with the former occurring in Provincial Laws enacted with respect only to the matters enumerated in the Concurrent Legislative List. The Bihar Money-Lenders Act comes under the Provincial Legislative List, and it is therefore urged that section 107 (*1*) has no application, and further that there is in fact no repugnancy between section 11 of the Money-Lenders Act and section 2 of the Usury

(1) (1878) L. R. 5 I. A. 178.

(2) (1937) A. C. 863.

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Laws Repeal Act, 1855, "which deals exclusively with the rate of interest which may be allowed"—*Nobin Chunder Bannerjee* v. *Romesh Chunder Ghose*(1).

I have already quoted the terms of the two sections. In so far as section 11 of the Bihar Act forbids the passing of a decree for "an amount of interest" (prior to the suit) in excess of the amount of the loan advanced, there is plainly an apparent conflict with the requirement of section 2 of the Act of 1855 that "the amount (of interest) shall be decreed by the Court at the rate agreed upon by the parties". In legislating on the subject of money-lending and money-lenders the Bihar Legislature is no doubt dealing with a matter within the competence of the Provincial Legislature, and of the Provincial Legislature alone. Indeed, sub-section (*3*) of section 100 of the Government of India Act provides not only that the Provincial Legislature has power to make laws for a Province with respect to any of the matters enumerated in the Provincial Legislative List, but also that the Federal Legislature has no power to do so—an express exclusion of the latter on which much stress has been laid by the appellant. But there is a distinction between exclusive powers and unrestricted powers; and the power conferred upon the Provincial Legislature with respect to List II is by the very terms of the sub-section "subject to the two preceding sub-sections". Now, the first sub-section of section 100 gives the Federal Legislature exclusive power to make laws with respect to any of the matters enumerated in List I, the Federal Legislative List, and this power is expressed to be "notwithstanding anything in the two next succeeding sub-sections". Sub-section (*2*) gives power to the Federal Legislature, again "notwithstanding anything in the next succeeding sub-section", to make laws with respect to any of the matters enumerated

(1) (1887) I. L. R. 14 Cal. 781.

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in List III, the Concurrent Legislative List. The same sub-section also provides that "subject to the preceding sub-section" the Provincial Legislature has power to make laws with respect to the same matters. The distribution of legislative powers with respect to the three Lists between the two kinds of Legislature—the Federal Legislature and the Provincial Legislatures—thus proceeds on lines not to be found in the North British America Act, 1867, on which a number of decisions ranging from *Citizens Insurance Company of Canada* v. *Parsons*(1) to *Forbes* v. *Attorney-General for Manitoba*(2), have been cited before us. The powers conferred on the Federal and the Provincial Legislatures can up to a certain point be expressed in the same terms—"concurrent" as regards List III, and "exclusive" as regards Lists I and II respectively; and yet there is a vital difference between them, for the Federal Legislature is given exclusive and concurrent powers over Lists I and III respectively "notwithstanding" the powers of the Provincial Legislatures over Lists III and II, while these latter powers are "subject to" the former. The distinction may perhaps be more clearly brought out in another way as follows: The Federal Legislature has—

(*1*) exclusive power over List I, notwithstanding the concurrent power of Provincial Legislatures over List III and their exclusive power over List II;

(*2*) concurrent power over List III, notwithstanding the exclusive power of Provincial Legislatures over List II, and

(*3*) no power over List II which is confined to Provincial Legislatures, subject, however, to the powers of the Federal Legislature over Lists I and III;

(1) (1881) 7 A. C. 96.
(2) (1937) A. C. 260.

while the Provincial Legislatures have—

(*1*) no power at all over List I;

(*2*) concurrent power over List III, subject however, to the exclusive power of the Federal Legislature over List I; and

(*3*) exclusive power over List II, subject to the powers of the Federal Legislature over Lists I and III.

If we turn to the items included in these three Lists, it becomes plain that Parliament intended to make an exhaustive enumeration of the powers confided to the two kinds of Legislature. This appears even more clearly from section 104 which deals with "residual powers of legislation" and enacts that the Governor-General, acting in his discretion, may empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the three Lists. Apart from this (and from such special provisions as we find, for instance, in section 102 which will be referred to later) either Legislature has power to legislate with respect to the Concurrent Legislative List with its thirty-six items, including (be it noted) such general subjects as (*1*) Criminal Law, (*2*) Criminal Procedure, (*4*) Civil Procedure including the Law of Limitation, (*5*) Evidence, (*8*) Transfer of Property other than agricultural land, (*10*) Contracts, including special forms of Contracts but not including Contracts relating to agricultural land, and (*14*) Actionable wrongs (save in so far as included in List I or List II), while the Federal Legislature has for its own exclusive field List I with its fifty-nine items of All-India or Federal concern, and the Provincial Legislatures their List II with its fifty-four items. In a very detailed scheme of this kind it was only to be expected that an absolutely sharp and definite distinction could not be attained and that some of the subjects assigned, say, to the Federal Legislature may unavoidably run into

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the Concurrent Legislative List (with its very general subjects) or the Provincial Legislative List. It could not have been the intention that conflicts should exist; and it seems, therefore, to have been provided on one hand that the Federal Legislature is to exercise its powers over List I, *notwithstanding* the concurrent powers given to the Provincial Legislatures over List III and the exclusive powers given to them over List II, and on the other, that these concurrent powers of the Provincial Legislatures over List III and their exclusive powers over List II are to be *subject to* the powers of the Federal Legislature over Lists I and III.

The usual practice of the courts in constitutional matters is to refrain from expressing an opinion on points which do not arise—*see Attorney-General for Canada* v. *Attorney-General for Ontario*(1). But it is desirable, as in *Parsons'* case(2) (already referred to), to take one or two illustrations in order to understand the inter-relations of the Federal and the Provincial Legislatures with reference to the three Lists and apply them to the particular question before us, namely, whether section 107 (*1*) renders section 11 of the Bihar Money-Lenders Act void on the ground of its repugnancy to section 2 of the Usury Laws Repeal Act. Thus, item no. 54 in List I, " Taxes on income other than agricultural income ", might on the face of it easily run into or clash in part with item no. 16 in List III, " Legal, medical and other professions " and item 46 in List II, " Taxes on professions, trades, callings, and employments; " and *vice versa*. There are also items 26 (Carriage of passengers and goods by sea or by air) and 28 (Cheques, bills of exchange, promissory notes, and other like instruments) in List I which might easily run into item no. 10 (Contracts) or 31 (Electricity) in List III and item 27 (Trade and commerce within the Province) and 29 (.....distribution of goods) in List II. Conflicts might thus arise

(1) (1937) A. C. 326.
(2) (1881) 7 A. C. 96.

not only when the two kinds of Legislature operate in the Concurrent field, but also when one Legislature operates in its exclusive field and another in its exclusive or in the Concurrent field; and these would all seem to have been provided against by the double method of imposing a limitation on the powers of Provincial Legislatures by making them "subject to" the powers of the Federal Legislature, while conferring powers on the latter "notwithstanding" the powers of the former in the Provincial no less than in the Concurrent field. Which legislation is to prevail in case of actual conflict in any fields seems to be laid down in the first sub-section of section 107 of the Act, while the second sub-section of this section provides a special method by which a Provincial Legislature may effectively legislate on a matter in the Concurrent field notwithstanding provisions to the contrary in a Federal or the existing Indian law in that field. If this be the right view, it would follow that so far as section 11 of the Money-Lenders Act is really repugnant to section 2 of the Usury Laws Repeal Act, the latter must prevail.

Against this view Mr. P. R. Das has argued that the Government of India Act does not contemplate any conflict between Federal and Provincial legislation except in the Concurrent field, for which alone (he has argued) specific provision is made in section 107. In this connection learned Counsel has in the first place referred to section 102 of the Act, which in sub-section (*1*) empowers the Federal Legislature, on a "Proclamation of Emergency", to make laws for a Province with respect to any of the matters enumerated in the Provincial Legislative List, and in sub-section (*2*), provides that such Federal laws (which by the succeeding sub-sections are to have effect for a limited time) shall prevail over any provisions of the Provincial laws that may be repugnant to it. The conflict dealt with in this section is, however, a conflict arising only when two Legislatures—the Federal and the Provincial—operate in one and the same, viz., the

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Provincial field, the former being empowered to do so in times of grave emergency. This does not, in my opinion, furnish any indication that Parliament did not think of, and therefore, made no provision regarding, conflicts that may arise in ordinary times when the Federal and the Provincial Legislatures exercise exclusive powers over lists I and II, respectively, and also exercise concurrent powers over list III. All such conflicts *prima facie* come within sub-section (*1*) of section 107, which runs—

"107(*1*). If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void."

The expression "subject to the provisions of this section" takes us to the next sub-section which is as follows:—

"107(*2*) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter:

Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved, has received the assent of the Governor-General or His Majesty, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion."

It has been urged for the appellant that the words following "an existing Indian law" in sub-section (*1*), namely, "with respect to one of the matters enumerated in the Concurrent Legislative List", should also be read with the expressions "any provision of a Provincial law" and "any provision of a Federal Law" occurring earlier in this sub-section;

and the reason given is that the expression "subject to the provisions of this section" in the same sub-section, has, so it is argued, the effect of making the repugnancies dealt with in the first sub-section identical with those dealt with in the second sub-section. The construction contended for is opposed to the plain grammar of the sub-section, and there is nothing in the scheme of legislation laid down in the Act to indicate that Parliament intended it. As we have already seen, the enumeration of items in the three Lists itself makes it far from improbable that conflicts of legislative provisions would arise in other fields no less than in the Concurrent field; and there is no reason to suppose that Parliament intended to leave the former to the operation of section 100 alone with its qualifications of "notwithstanding" and "subject to". Further, if Parliament had intended to provide in sub-section (*1*) of section 107 for conflicts in the Concurrent field alone, it could easily have done so by adopting the language of sub-section (*2*) which is unmistakably confined to action in the Concurrent field. Nor can I agree that the expression "subject to the provisions of this section" in sub-section (*1*) has the effect of confining the conflicts dealt with in this sub-section to conflicts in the Concurrent field. That expression no doubt refers to sub-section (*2*) which is confined to legislation in the Concurrent field. But is the provision of this exceptional procedure for the Concurrent field any reason for supposing that Parliament either was not aware of, or decided to ignore, possible conflicts between Provincial Legislation in the Exclusive field and Federal or the existing Indian law in the Concurrent field? As we have seen already from section 100, the powers of the Provincial Legislatures are subject to the powers of the Federal Legislature. Section 107 may be regarded as a supplement to that provision. In the first sub-section it deals with the effect of repugnancies between Provincial and Federal Legislation without any reference to the fields to which the

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conflicting enactments may relate; and it also deals with repugnancies between Provincial Legislation (whenever passed) and the existing Indian law which has not been referred to in section 100 and is here, in the Concurrent field only, put on the same footing as Federal law irrespective of whether this relates to its exclusive or the Concurrent fields. The sub-section provides in effect that in either case the Provincial law shall, to the extent of the repugnancy (and no more), be void. To this general rule the second sub-section provides an exception limited to Provincial, Federal, and existing Indian legislation, all in the Concurrent field. That the exception is limited, in my opinion, affords no reason for restricting the scope of the general rule.

We have in the present case to consider a conflict of a provision in a Provincial law on a matter enumerated in the Provincial Legislative List with a provision of the existing Indian law with respect to a matter enumerated in the Concurrent Legislative List; and as I have already remarked, the existing Indian law is placed on the same footing in this respect as Federal legislation in the first sub-section of section 107. The limitation placed in section 100 on the powers of a Provincial Legislature over the Provincial Legislative List by making them " subject to " the powers of the Federal Legislature over the Concurrent Legislative List makes it impossible to accept the appellant's contention that the exclusive power of the Provincial Legislature with respect to Money-Lenders and Money-Lending is plenary; and indeed in the very passage from *Queen* v. *Burah* (1) which was cited for the appellant, Lord Selborne clearly spoke of the powers of the Indian Legislature being " as large, and of the same nature, as those of Parliament itself ", (only) when the former is acting within the limits which circumscribe these powers. The same limitation (with the corresponding power

(1) (1878) L. R. 5 I. A. 178.

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of the Federal Legislature in the Concurrent field "notwithstanding" the exclusive power of the Provincial Legislature "with respect to" List II) goes far to show that it is not open to this latter legislature, when operating in its exclusive field, to affect matters governed by Federal legislation, even incidentally. The addtional facts that the Provincial Legislature is itself empowered to operate in the Concurrent field, but that this power (no less than the exclusive power over List II) is qualified by the provisions of section 107, seem to me to leave no doubt that Provincial legislation in the exclusive Provincial field is not permitted to trench upon Federal Legislation, even if such invasion could be regarded as necessarily incidental to the effective exercise of its powers by the Provincial Legislature. The proper test to apply to the case before us is, in my opinion, not so much whether the Provincial Act is "with respect to" a matter in List II or in List III, as whether any provision in it is repugnant to the provision of an existing Indian law with respect to a matter enumerated in List III; for section 107 in substance imposes a limitation upon what Provincial legislation may validly effect even in the two fields open to it. To powers so limited, the principle of *Gallagher* v. *Lynn*(1) a case under such a very different Act as the Government of Ireland Act, 1920, cannot apply. For, as Lord Selborne, L. C., said about the application of the doctrine of *ultra vires* in *Attorney-General* v. *Great Eastern Railway Company*(2) "whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*"—an observation which need not be confined to the interpretation of Railway Act; and the express limitation of the powers of the Provincial Legislature by making them subject *inter alia* to

(1) (1937) A. C. 863.
(2) (1880) 5 A. C. 473.

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Federal law in its appropriate field (read with section 107 as regards existing Indian law in the Concurrent field) amounts to an equally clear prohibition of even an incidental invasion of the superior law in that field by the Provincial Legislature.

Mr. Das has also urged that in giving relief to the debtor under section 11 the Provincial Legislature cannot be said to have travelled beyond the field of money-lenders and money-lending,—especially as the rule of *damdupat* is not unknown in this country—and that the generality of the term Contracts in item 10 of the Concurrent List should be interpreted as restricted by the specific language of item 27 in the Provincial List in accordance with what Lord Haldane in *Paquet* v. *Corporation of Pilots, Quebec*(1) called the well-established principle that subjects which in one aspect may come under a section describing the powers of a Provincial Legislature may, in another aspect that is made dominant, be brought within another section which gives the powers of the Federal Legislature (and *vice versa*). But the principle so set out refers to sections 92 and 91 of the British North America Act, 1867, and its scope appears more clearly from Lord Haldane's observations in *Great West Saddlery Company, Ltd.* v. *The King*(2) :—

"The rule of construction is that general language in the heads of section 92 yields to particular expressions in section 91, where the latter are unambiguous. The rule may also apply in favour of the Province in construing merely general words in the enumerated heads in section 91.....Whether an exception is to be read in either case depends on the application of the principle that language which is merely general is, as a rule, to be harmonized with expressions that are at once precise and particular by treating the latter as operating by way of

(1) (1920) A. C. 1029.
(2) (1921) 2 A. C. 91.

exception. The two sections must be read together, and the whole of the scheme for distribution of legislative powers set forth in their language must be taken into account in determining what is merely general and what is particular in applying the rule of construction. For neither the Parliament of Canada nor the Provincial legislature have authority under the Act to nullify, by implication any more than expressly, statutes which they could not enact.....

It is obvious that the question of construction may sometimes prove difficult. The only principle that can be laid down for such cases is that legislation the validity of which has to be tested, must be scrutinized in its entirety in order to determine its true character. "

The scheme of the British North America Act is, however, materially different from that of the Government of India Act. Section 92 of the former Act enumerates 16 classes of subjects assigned exclusively to the Legislatures of the Provinces, and section 91 empowers the Parliament of Canada to make Laws for the Peace, Order and good Government of Canada in relation to all matters not coming within those classes, and further, for greater certainty, etc. specifically enumerates 29 classes of subjects as within the exclusive authority of the Parliament of Canada " notwithstanding anything in this Act ". There is another section (section 95) giving concurrent powers of legislation respecting two subjects only—Agriculture and Immigration—and providing that a Provincial law relative to these subjects shall have effect as long and as far only as it is not repugnant to any Act of the Parliament of Canada. But among the subjects specified in section 92 is a very comprehensive subject " property and civil rights in the Provinces ", as against particular subjects enumerated in section 91 like the regulation of trade and commerce, the raising of money by any mode or system of taxation, navigation and shipping, seacoast and inland fisheries,

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banking and incorporation of banks, bankruptcy and insolvency, marriage and divorce, and the criminal law. Particular subjects are also specified in section 92, such as direct taxation, shop, saloon and other licenses, the incorporation of companies, and the solemnization of marriage. The Act exhausts the whole range of legislative power, and it was found that whatever was not given to the Provincial Legislatures rested with the Parliament—*Bank of Toronto* v. *Lambe*(1); but this certainly cannot be said of the Government of India Act in view of the provisions of section 104. It would have been practically impossible for the Dominion Parliament to legislate upon several of the classes of subjects enumerated in section 91 without affecting the property and civil rights of individuals in the Provinces, a subject specified in section 92, and the general language of this last subject was interpreted, as restricted by that of the former. The rules were, therefore, established that " the legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in section 91, is of paramount authority, even though it trenches upon matters assigned to the Provincial Legislatures by section 92 ", and that " it is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the Provincial Legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in section 91 "—*Attorney-General for Canada* v. *Attorney-General for British Columbia*(2). Exceptions were similarly read in favour of the Provinces as regards particular subjects like the solemnization of marriage and direct taxation, as against the subjects of marriage and divorce and the raising of money by any mode or system of taxation enumerated in section 91, the reason being that the

(1) (1887) 12 A. C. 575.
(2) (1930) A. C. 111.

Legislature could not have intended that powers exclusively assigned to the Provincial Legislature should be absorbed in those given to the Dominion Parliament; the principle was applied that the generality of the wording of section 91 in such matters must be interpreted as restricted by the specific language of items found in section 92. But can this principle be applied to the subject of money-lending and money-lenders in our List II as against contracts in List III? The Government of India Act places a large number of *general* subjects in the Concurrent List and provides a means by which Provincial Legislation may prevail in this field, but otherwise leaves Federal Legislation dominant in this as in field I and makes Provincial Legislation "subject to" that legislation (together with the existing Indian Law in the Concurrent field); and as to conflicts or repugnancies, it makes special provision by section 107, which may be compared and contrasted with the Canadian principle of the "occupied field". Mr. Das's contention that the item of Contracts in the Concurrent List should be read as restricted by the item of money-lending and money-lenders in the Provincial List is further rendered unacceptable by the fact that the former is defined with manifest deliberation as "Contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts relating to agricultural land", while contracts relating to agricultural land, thus excepted, apparently come within "transfer, alienation and devolution of agricultural land" in item no. 21 in the Provincial List. Provincial Legislation, which under section 100 is confined to Lists II and III, will, in case of conflicts with competent Federal law or the existing Indian law relating to matters within List III, have the validity of its provisions judged under the Government of India Act by reference to the terms of section 107, to which no real parallel can be found in the North British America Act; and our Act makes it clear that any provision of a Provincial law which is repugnant to any provision of the other

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law must, to the extent of the repugnancy, be treated as void, except so far as the Provincial Legislature may have put itself in a position to apply sub-section (*2*) of the section and obtained the necessary assent. From this point of view it is not for the Courts to consider whether or not the Bihar Legislature could pass any really effective legislation on the subject of money-lending and money-lenders without trenching upon the existing Indian law with respect to contracts. The former subject is by no means wholly included in the latter, and unlike the Provincial Legislatures in the Dominion of Canada, the Bihar Legislature has power to get over the existing Indian law with respect to contracts by a resort to section 107(*2*). The exclusive power given to the Provincial Legislature over money-lenders and money-lending cannot, therefore, be enlarged in the way contended for on behalf of the appellant so as to include an incidental invasion of the dominant law in the Concurrent field. I would hold accordingly that it cannot be validly exercised so as to override any provision of any existing Indian law, and that in case of repugnancy section 107(*1*) must take effect.

I now come to the contention of the appellant that there is in fact no repugnancy between section 11 of the Bihar Act and section 2 of the Usury Laws Repeal Act. This contention is rested, as I have already indicated, on the ruling in *Nobin Chunder Bannerjee* v. *Romesh Chunder Ghose*(1). The relation of the Hindu Law rule of *damdupat* and the Usury Laws Repeal Act has been the subject of a certain difference of opinion even in Calcutta, to say nothing of the contrary view that has prevailed in Madras—*see Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu*(2). The questions that arose on the point were whether the Usury Laws Repeal Act only repealed previous legislation or also superseded the

(1) (1887) I. L. R. 14 Cal. 781.
(2) (1903) I. L. R. 26 Mad. 662.

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Hindu rule of *damdupat*, and whether this rule was a rule regulating the rate of interest or only a rule of limitation. The learned Judges in *Nobin Chunder Bannerjee's* case(1) answered both these questions in favour of the rule (referred to as the law) of *damdupat* which was in force on the Original Side of that High Court in accordance with *21 Geo. III c. 70 s. 17*. Those questions do not arise before us, for we have now to deal with the specific provision of the Bihar Act which, on the face of it, precludes the passing of a decree required by section 2 of the Usury Laws Repeal Act. Learned Counsel for the appellant has not suggested how it is possible for a Court in this Province to comply with section 11 of the Bihar Act without infringing section 2 of the other Act. I am not, therefore, prepared, on the authority of the ruling in *Nobin Chunder's* case,(1) to hold that the apparent conflict between the two provisions is not an actual repugnancy.

It has been contended for the respondent that section 11 of the Bihar Act also offends against the existing Indian law relating to two other items in the Concurrent List—no. 4, Civil Procedure; and no. 8, Transfer of Property. But the conflict, such as it is, is a conflict not as regards procedure but as regards the right to recover interest accrued at the agreed rate. The transaction was a mortgage, and if repugnancy is established in the domain of Contract (the main contention on behalf of the respondent), it seems unnecessary to consider whether there is a repugnancy in the domain of Civil Procedure as well, or in the other item which was referred to by the learned advocate for the respondent and on which the case of *Madhwa Sidhanta* v. *Venkatanamanjulu*(2) already cited, is relevant along with the criticism of Chaudhuri, J. in *Kunja Lal Banerji* v. *Narsamba Debi*(3).

(1) (1887) I. L. R. 14 Cal. 781.
(2) (1903) I. L. R. 26 Mad. 662.
(3) (1915) I. L. R. 42 Cal. 826.

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The result is that in my opinion section 11 of the Bihar Money-Lenders Act has not been competently enacted so as to supersede section 2 of the Usury Laws Repeal Act and must be treated as void. This conclusion is not affected by the facts that in circumstances which do not exist in this case, section 3 of the Usurious Loans Act, Act X of 1918, gives certain powers to the Court notwithstanding section 2 of the Usury Laws Repeal Act, 1855, and that section 22 of the Bihar Money-Lenders Act saves those powers except as otherwise provided in section 12. The case was (therefore) in fact argued before us on section 2 of the Usury Laws Repeal Act.

I would accordingly uphold the decree of the lower appellate court and dismiss this appeal with costs.

MANOHAR LALL, J.—The question before the Full Bench is whether section 11 of the Bihar Money-Lender's Act, 1938 (hereinafter to be referred to as the 'Act'), is *intra vires* of the Provincial Legislature as constituted under the Government of India Act, 1935, and if so whether it can be applied in deciding the rights of the respondent, a mortgagee, to recover interest in full as stipulated in his mortgage bond. The question is of very far reaching importance to the litigants of this province. It is a matter of satisfaction that we have had able assistance from Mr. P. R. Das who appeared for the appellant and from Mr. L. K. Jha who appeared for the respondent.

The facts which are necessary to be stated are these. The appellant executed a mortgage bond for Rs. 400 on the 24th of Chait, 1328, in favour of the respondent, the due date of payment whereof was in 1329. The interest stipulated on the principal sum was Rs. 1-4-0 per cent per mensem with yearly rest. The trial court decreed the suit for the principal sum but disallowed the compound rate of

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interest and awarded only simple rate of interest at the stipulated rate. In appeal the learned District Judge held that the stipulated rate was not excessive, that the transaction between the parties was fair and that there was necessity for the loan. He, therefore, set aside the decree of the learned Munsif and granted to the plaintiff a decree at the compound rate of interest as claimed in the plaint. The defendant has appealed to this Court.

The appellant contends that by operation of section 11 of the Act (which admittedly has retrospective effect by reason of the Amending Act of 1938) no decree can be passed for any amount of interest which is greater than the amount of loan advanced as stated in the mortgage bond, in other words, that the plaintiff is entitled to a decree for Rs. 800 only. The respondent on the other hand contends that the Provincial Legislature has no power to make this provision in the Act as it conflicts with the existing Indian laws on the subject, namely, Interest Act XXXII of 1839, the Usury Laws Repeal Act of 1855, Usurious Loans Act of 1918, Indian Contract Act of 1872 (section 37), Code of Civil Procedure, 1908, Order XXXIV (the provision relating to mortgage decrees).

It is necessary in the first instance to consider what is the pith and substance of the Act. The Act is stated to be an Act "to regulate money-lending transactions and to grant relief to debtors in the province of Bihar". The Act received the assent of His Excellency the Governor of this province on the 6th of July, 1938. It is admitted that the Act has not received the assent of His Excellency the Governor-General or of His Majesty. The Act contains a detailed scheme as to the registration of money-lenders and the manner in which they are required to keep accounts (sections 4 to 7). Chapter 3 provides that in certain cases a money-lender shall not be entitled to institute a suit at all and limits

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the powers of the Courts to pass a decree for interest except at certain rates or up to a fixed amount and also provides that an agreement by a debtor to pay compound interest to the creditor shall, in respect of a loan advanced after the commencement of this Act, be void. There are other provisions under this chapter which give the Courts power to re-open certain transactions. In other sections of the same chapter provisions are made with the ostensible object of helping the debtors even in the execution stage. Chapter IV deals with penalties and procedure. The provision of section 22 is important. It specifically refers to the Usurious Loans Act of 1918 and provides that

> "save as otherwise provided in section 12 nothing in this Act shall effect the powers of a court under the Usurious Loans Act".

A consideration of the various provisions makes it clear that the Act attempts to deal completely and exhaustively with interest, the rate recoverable and the amount which can be decreed by the Courts in certain instances (irrespective of the contracts between the parties) and the registration of money-lenders. The Act also contains stringent provisions that if a money-lender fails to obey the mandatory provisions of the Act his suit is liable to be dismissed.

Such in substance being the dominant character of the Act it will be useful at this stage to examine the scheme of the Government of India Act which confers powers on the different legislatures. A perusal of the various clauses of section 100 and section 107 leads to the conclusion that the scheme of the Government of India Act, 1935, appears to give exclusive jurisdiction to the Federal Legislature over the subjects enumerated in list I. There is a concurrent field called list III wherein both the Federal and the Provincial Legislature can legislate but subject nevertheless to the exclusive powers of the Federal Legislature regarding the subjects of list I. The Provincial Legislature again has been given

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exclusive powers to legislate over the matter of list II but nevertheless subject to the exclusive powers of the Federal Legislature as just pointed out. Any conflict between the Provincial Law and the Federal Law or the existing Indian Law is avoided by the clear provisions of section 107. From this I conclude that the framers of the Government of India Act must have foreseen that the sharp and definite distinction which they intended to carefully make between the powers of the two Legislatures might not have been attained or possibly could not be attained and that some of the classes of the subjects assigned exclusively to the Provincial Legislatures may have run into and were embraced by some of the enumerated classes of subjects in lists I and III. There fore, an endeavour was made to provide for cases of apparent conflict and it is with this object that section 100 and section 107 have been so carefully worded. This can be illustrated by taking a few examples from the lists—item no. 13 in list I relates to Benares Hindu University and Aligarh Muslim University. Item no. 17 in list II is education and would appear to cover item no. 13 of list I. But by virtue of section 100 the powers of the Provincial Legislature under item 17 of list II are subject to the exclusive powers of the Federal Legislature under item 13, that is, the Provincial Legislature has no jurisdiction to legislate with regard to these two Universities. The same remaks apply to item no. 52 of list I and item no. 14 of list II as well as to item no. 51 of list I and item no. 30 of list II. It is unnecessary to multiply further instances. A more apposite illustration is provided by item 28 of list I, item 27 of list II and item 10 of list III (the very matter under consideration). It cannot be denied that item no. 28 of list I is a part of money-lending (item 27 of list II) if the words are taken in the general sense and also a part of item no. 10, list III. But by the operation of section 100 the Provincial Legislature whether acting under list II or list III,

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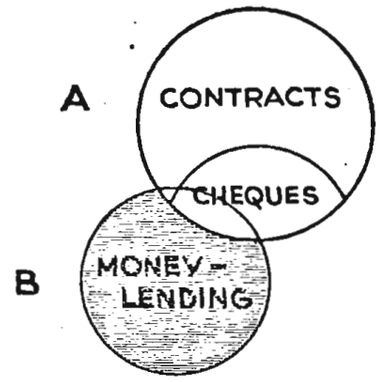
have no power to touch cheques and bills of exchange, for example. This may be graphically illustrated by a diagram.



Circle *A* covers the whole field of contracts and, therefore necessarily covers cheques which is the lower sector of that circle. Circle *B* deals with money-lending and must cover necessarily, if the words are to be taken in the largest and literate sense, both contracts and cheques; in other words, this circle must cut the Circle *A* including the sector of cheques. The scheme of the Indian Act, now, comes to our aid to solve this difficulty of overlapping or repugnancy. If the words of section 100 are kept in view the powers under the heading of money-lending will cover only that portion of Circle *B* which is not covered by the cheques' sector. The Provincial Legislature, having concurrent powers with Federal Legislature can legislate with regard to that portion of Circle *B* which falls within Circle *A* (outside the sector) provided always that if there is any existing Indian Law on this matter the latter will prevail by virtue of the express provision in section 107. It should be stated here that any remarks that are being made by me in the course of this judgment with respect

to the other provisions of the Act and of the Government of India Act must be clearly understood to be only incidental and must not be taken as deciding finally the questions that may arise hereafter.

A large number of Canadian cases which have come up for decision before their Lordships of the Judicial Committee beginning from *Attorney-General* v. *Great Eastern Railway Company*(1) right up to *Forbes* v. *Attorney-General*(2) were freely cited before us on behalf of both the parties. These cases concerned the decision of the questions which were raised before their Lordships of the Privy Council from time to time as to whether a certain provision of an Act passed by the Provincial Legislature of Canada or by the Dominion Parliament was or was not *intra vires* of the powers given to them under the Act—the question in each case being generally whether the provisions of section 91 of the Canadian Act in a particular matter controlled or dominated the provision under section 92 on the same matter or on a cognate matter or *vice versa*. As instances, see the case of solemnisation of marriage [*In re Marriage Legislation in Canada*(3)], the Railway case [*Grand Trunk Railway Company of Canada* v. *Attorney-General of Canada*(4)], the Timber case [*Attorney-General for British Columbia* v. *McDonald Murphy Lumber Company Limited*(5)]. But in my opinion the cases which were referred to in argument are of no material assistance in deciding the matter in controversy before us. They are no doubt very useful and valuable guides to the application of the doctrine of the 'general and special' or the 'overlapping and the occupied field' rules (if applicable in the present case) but the scheme of the Indian Act to my mind is entirely different from the Canadian Act. The latter gives only exclusive powers to the Provincial

(1) (1880) 5 A. C. 473.
(2) (1937) A. C. 260.
(3) (1912) A. C. 880.
(4) (1907) A. C. 65.
(5) (1930) A. C. 357.

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Legislature with respect to the subjects enumerated specifically in section 92 but while bestowing full power on the Dominion Parliament with respect to the matters enumerated in section 91 also leaves the residual power in the Dominion Parliament under the heading "Peace, order and good government of Canada". In the Indian Act the scheme is wholly different.

The doctrine of the "occupied field" which is found stated in many cases of the Privy Council and which is item no. 4 in the synopsis by Lord Tomlin in *Attorney-General for Canada* v. *Attorney-General for British Columbia*(1) has been inserted for us in section 107 of the Indian Act. It may also be useful to note that where it was found impossible to legislate on any of the matters enumerated in section 91 or section 92, of the Canadian Act, without incidentally trenching upon the jurisdiction of the other legislature, the legislation under consideration was held by the Judicial Committee to be good. But that reasoning has no application to the consideration of the Act passed by the Indian Legislature created under the Indian Act because here the powers are given to both exclusively as well as concurrently. I can find no such parallel in the Canadian Law of 1867 except to a limited extent under section 95. The scheme of the Indian Act is entirely different. The residual power is given to the Governor-General under section 104, the Federal Legislature and the Provincial Legislature have been given exclusive powers in certain fields, concurrent powers in another field (the exercise of jurisdiction by the Provincial Legislature being wholly excluded from list I). In my opinion the key to the solution of the problem before us is very clearly indicated in section 100 and section 107. It will, therefore, be worse than useless, if not dangerous, to apply the principles, which have been enunciated by the Privy Council to govern the construction of the

(1) (1930) A. C. 111, 118.

Canadian Act, as governing the construction of the present Act under consideration which is framed entirely on different lines and based upon wholly different schemes of policy. The two Acts are not in pari materia. The Judicial Committee have condemned in strong language this method of construction which the appellant wished us to follow from the analogy of another Act.

In dealing with the construction of certain sections in the Indian Income-tax Act (XI of 1922), the High Court in India had relied upon a large number of English cases which depended upon the construction of the English Income-tax Statute. Sir George Lowndes, in delivering the judgment of their Lordships of the Judicial Committee in *The Commissioner of Income-tax, Bengal* v. *Shaw, Wallace and Company*(1), made the following observations at page 212 " Again their Lordships would discard altogether the case law which has been so painfully evolved in the construction of the English Income-tax statutes—both the cases upon which the High Court relied and the flood of other decisions which has been let loose in this Board. The Indian Act is not in pari materia; it is less elaborate in many ways, subject to fewer refinements, and in arrangement and language it differs greatly from the provisions with which the Courts in this country have had to deal. Under such conditions their Lordships think that little can be gained by attempting to reason from one to the other.....". *See* also the observation in *Hansraj* v. *Bejoylal Seal*(2).

I, therefore, decline to be led away by the argument from analogy based upon the reasonings adopted by their Lordships in deciding cases on the Canadian Law.

The real question to decide then, as I indicated in the course of the argument several times, is whether

(1) I. L. R. 59 Cal. 1343; L. R. 59 I. A. 206.
(2) (1929) I. L. R. 57 Cal. 1176; L. R. 57 I. A. 110, 114.

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the provision under consideration in the Act is on a matter coming under list II and whether it conflicts with the provision of any existing Indian Law with respect to a matter enumerated in list III; in other words, whether the provision, that the courts are precluded from passing a decree for interest beyond the amount of principal, is within the law-making powers given to the Provincial Legislature and if so whether it conflicts with any existing Indian Law with respect to any matter in list III.

It is obvious, and this was not seriously contested before us, that on a plain reading the subject of section 11 does fall within the general words of item 27 in list II 'money-lending and money-lenders' as well as in item 10 of list III, 'contracts'. It, therefore, follows that the Provincial Legislature have complete powers to pass this enactment. But admittedly they have not followed the procedure laid down by section 107, sub-section (*2*). No sanction of His Excellency the Governor-General has been obtained nor the assent of His Majesty has been signified to this section. The provisions of section 107(*1*) now come into play and section 11 will be of no validity in this Province if it conflicts with any existing Indian Law on the subject.

Is there then any existing Indian Law on this matter? The term 'existing Indian Law' has been defined by section 311 of the Government of India Act. It was admitted, and indeed it is manifest, that there does exist an Indian Law with respect to the matter in question. If the present section had not been enacted we would have been able to dispose of the appeal by deciding the extent to which the respondent would have been entitled to obtain a decree for the amount of interest. But the provisions of section 11 leave us no discretion. Apparently, therefore, there is a serious conflict between the provisions of section 11 and the provisions of one or more existing Indian Laws with respect to this matter which, I have already held,

is enumerated in the concurrent legislative list. The Usury Laws Repeal Act of 1855 by section 2 definitely directs that

> "in any suit in which interest is recoverable the amount shall be decreed by the Court at the rate agreed upon by the parties."

Section 11 of the Act comes into direct conflict with this provision. The Usurious Loans Act of 1918, which is specially mentioned in section 22 of the Act, was enacted to give additional powers to Courts in certain cases of usurious loans. The powers given by the Act of 1918 are mentioned in section 3 of that Act, namely, it gives powers to the Court "notwithstanding anything in the Usury Laws Repeal Act of 1855" to re-open the transactions between the debtor and creditor where the Court thinks that the interest is excessive and the transaction between the parties is substantially unfair. It is to be noticed that this section gives the Court wide powers within which it may exercise its discretion but does not cut down the discretion. Section 11 of the Act leaves the Court no discretion whatsoever and, therefore, it comes into conflict with the Usurious Loans Act of 1918. Similarly the Indian Contract Act of 1872 by section 37 provides that the parties to a contract

> "must perform, or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law".

Before the passing of the Act under consideration there was no other law beyond that contained in section 16 of the Contract Act or the provisions contained in the two Acts of 1855 and 1918, which I have just referred to, which would excuse the performance of a contract if valid to pay the amount of interest calculated at the rate agreed upon by the parties. Therefore, section 11 of the Act comes into conflict with this provision of section 37 of the Contract Act also. When section 107, sub-clause (*1*), is applied to this state of affairs it is clear to my

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mind that these existing Indian Laws, just referred to, shall prevail and the enactment of the Provincial Legislature shall, to the extent of repugnancy, be void; in other words, section 11 cannot operate at all to override the provisions to be found in these Acts of 1855, 1872 and 1918.

But it was argued by learned Counsel for the appellants that it is impossible to conceive of any Act which can be framed regarding money-lending and money-lenders which would not contain a provision like section 11, if the Legislature wanted to make such a provision. He referred, as an illustration, to the two English Acts 63 *and* 64 *Vict. ch.* 51 and 17 *and* 18 *Geo. V. ch.* 21. The answer to this argument is that the Provincial Legislature have not been deprived of the power to make this provision. They can always do so by following the procedure laid down by section 107, sub-clause (*2*), namely, by obtaining the assent of His Excellency the Governor-General or of His Majesty.

Mr. Das argued that if lists III and II, are read together and the doctrine of 'the general and special' as laid down in the Canadian case is applied, the subject of section 11 must be deemed to be excluded from item 10 of list III and must be interpreted to fall wholly within the ambit of item 27 of list II. As I have already stated, it is not permissible to apply the principles which the Privy Council laid down in considering the Canadian Act to the consideration of the Indian Act. The two lists must be read as they stand and if the subject of section 11 falls within item 10 on a plain reading thereof, effect must be given to that reading. The Provincial Legislature is not debarred from passing this enactment but if it is to prevail against any existing Indian Law they have only to follow the procedure indicated by section 107, sub-clause (*2*). I, therefore, overrule this contention.

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Learned Counsel for the appellant finally contended that the provision in section 11 to restrict the amount of interest recoverable is not a provision which conflicts with any existing Indian Law on the subject because, so he argued, this provision is merely a provision regarding the limitation of suits. He relied upon the observations of the learned Judges of the Calcutta High Court in a number of cases beginning with *Ramlall Mookerjee* v. *Harranchunder Dutt*(1) and *Mia Khan* v. *Bibi Bibijan*(2). In these cases it was held that the rule of *damdupat* was a rule of limitation of suits and, therefore, was applicable when the parties to a litigation were Hindus residing within the presidency in the town of Calcutta. In my opinion this argument has no weight because, apart from the fact that Sir Barnes Peacock did not approve of this argument in *Kumara Upendra Krishna Deb Bahadur* v. *Nabin Krishna Bose*(3) and the observations of Mr. Justice Phear in *Mia Khan* v. *Bibi Bibijan*(2) are expressly obiter; it seems to me that the Calcutta decisions could be justified by the very words of section 37 of the Contract Act. The rule of *damdupat* prevails as a rule of law within the presidency town if the parties are Hindus. In other words, the performance of the contract to pay interest when the principal is reached is excused under the provision of the rule of *damdupat* which is "any other law"—the rule of *damdupat* does not prevail in this Province.

The learned Advocate for the respondent also contended that the provision under consideration comes into conflict with the provision to be found in Order XXXIV, rule 11, of the Code of Civil Procedure. Civil Procedure, he argued, is expressly mentioned in item no. 4 in list III. But I do not agree with this argument. Rule 11 of Order XXXIV is part of an adjective law and points out only the mode in

(1) (1869) 12 W. R. (O. S.) 9.
(2) (1870) 5 Beng. L. R. 500; 14 W. R. 308.
(3) (1869) 3 Beng. L. R. (O. S.) 118.

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which interest is to be calculated after the Court has decided the rate of interest that should be decreed in the particular case before it. The Court decides the rate of interest recoverable not by virtue of its powers under the Code of Civil Procedure but by virtue of the provisions of those existing Indian laws which have been referred to by me above.

With the wisdom of this Act this Court is in no sense concerned. A Court of law has nothing to do with a Provincial or a Federal Act lawfully passed except to give it effect according to its tenor. With the wisdom or expediency or policy of an Act lawfully passed no Court has a word to say. All, therefore, that I can consider and have considered in the arguments under review is whether it is proved that this provision in the Act is within the authority of the Provincial Legislature and if so whether it conflicts with any existing Indian Law.

Having given this case my most anxious consideration, I come clearly to the conclusion that the provisions of section 11 of the Act though *intra vires* of the Bihar Legislature cannot be applied in favour of the appellant in this appeal. I would, therefore, dismiss this appeal with costs.

S. A. K. *Appeal dismissed.*

REVISIONAL CRIMINAL.

Before Khaja Mohamad Noor and Varma, JJ.

1938.

August, 12.

HARNANDAN LAL

v.

RAMPALAK MAHTO.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 133 *and* 139-*A*—*Penal Code*, 1860 (*Act XLV of* 1860), *section* 12—"*public*", *meaning of*—*right of cultivators to irrigate, whether is a* '*public*' *right.*

* Criminal Revision no. 413 of 1938, from an order of Maulavi S. Ahmad, Magistrate, First Class, Patna, dated the 28th March, 1938.

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The word "public" is not defined in the Code of Criminal Procedure, but for the purpose of the Code the definition given in the Penal Code is to be adopted.

Section 12 of the Penal Code says that "public" includes any class of the public or any community. This definition is inclusive and does not define the word "public". It only says that class of public or community is included within the term "public".

A class or community residing in a particular locality may come within the term "public". The number of persons claiming the right and the nature of right itself will no doubt be the criteria on which conclusions may be arrived. The best criterion will be to see whether the right is vested in such a large number of persons as to make them unascertainable and to make them a community or class.

Where some cultivators claimed the right to use a certain channel to bring water from a reservior for irrigating their fields and contended that this was a public right within section 133 of the Code of Criminal Procedure, *held*, this was a private right and not a public one.

Per Verma, J.—A public right does not depend on the number of individuals who enjoy it. It is, generally speaking, that which must be enjoyed by members of the general unascertained mass of the public.

Queen-Empress v. *Jasodanand*(1), *Emperor* v. *Bharosa Pathak*(2), *Munna Tiwari* v. *Chandrabali*(3) and *Emperor* v. *Raghunandan Prasad*(4), considered.

Budha v. *Mohan Lal*(5), distinguished.

Application in revision.

The case was heard in the first instance by Varma, J. who referred it to the Division Bench by the following order:

"Let this case be placed before the Division Bench for hearing as I understand there is no decision of the Patna High Court on this point."

(1) (1898) I. L. R. 20 All. 501.
(2) (1912) I. L. R. 34 All. 345.
(3) (1928) I. L. R. 50 All. 871.
(4) (1931) I. L. R. 53 All. 706.
(5) (1912) 16 Ind. Cas. 162.

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On this reference

Brahmdeva Narain, for the petitioner.

W. H. Akbari and *R. J. Bahadur*, for the opposite party.

KHAJA MOHAMAD NOOR, J.—This is an application in revision against an order of a first class magistrate staying under section 139-A of the Code of Criminal Procedure a proceeding under section 133 of the Code after taking evidence contemplated by the former section.

It appears that the petitioner filed before the Subdivisional Magistrate of Patna a complaint alleging that the opposite party had obstructed a public water channel. The opposite party appeared before the Magistrate and one of them (opposite party no. 1) at any rate denied the obstruction and further contended that the right claimed by the petitioner was not a public right. The case was made over to the learned Magistrate whose order is in revision before us. He took some evidence. One witness was examined on behalf of the opposite party, and thereupon the learned Magistrate stayed the proceeding or, in other words, dropped it holding that the right claimed by the petitioner was not a public right.

There was an unsuccessful application before the learned Sessions Judge and then the matter has come up before this Court in revision.

It is contended on behalf of the petitioner that the right involved was a public right and therefore the proceeding ought not to have been dropped. It is not disputed that the right claimed by the petitioner in the channel in dispute is a right to bring through it water from a certain reservoir for the irrigation of the fields of the cultivators including himself. According to the only evidence on the record, the village Poonawan where the channel is situated, contains 200 houses of which 60 are cultivators and some

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of these 60 use the channel for bringing water from the reservoir for the irrigation of their lands.

The question for consideration is whether this right of cultivators of using the channel for the purpose of irrigation can be said to be a public right within the meaning of section 133 of the Code of Criminal Procedure or, in other words, about 60 cultivators can be said to be public. As the learned Sessions Judge has pointed out, the word " public " is not defined in the Code of Criminal Procedure; but for the purposes of the Code the definition given in the Penal Code is to be adopted. Section 12 of the Indian Penal Code says that " public " includes any class of the public or any community. This definition is inclusive and does not define the word " public ". It only says that class of public or community is included within the term " public ".

It must be conceded that the learned Magistrate has gone a bit too far when he says that—

> " it (public) evidently means the class or community throughout the world."

A class or community residing in a particular locality may come within the term " public ". The question is whether the cultivators who use the channel form a class or community. That obviously is not necessary. The learned Sessions Judge has relied upon *Munnu Tiwari* v. *Chandrabali*(1) where Dalal, J. held the right to be of a private nature and not a public right. In *Emperor* v. *Bharosa Pathak*(2), where a certain act was likely to cause damage to the inhabitants of two villages, Tudball, J. held that the right of passage was a public right. The question has to be decided on the facts of the case. There may be a case where there cannot be any doubt that the right claimed is a public right. On the other hand, there may be a case in which there cannot be any doubt that the right claimed is a private one. There may, however, be a

(1) (1928) I. L. R. 50 All. 871.
(2) (1912) I. L. R. 34 All. 845.

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case in which it may be arguable whether the right claimed is or is not a public right. The number of persons claiming the right and the nature of right itself will no doubt be the criteria on which conclusions may be arrived. The best criterion will be to see whether the right is vested in such a large number of persons as to make them unascertainable and to make them a community or class. Judging from this point of view, I have no hesitation in holding that though, as I have said, the learned Magistrate has gone far, he was perfectly right in holding that the right claimed was a private right vested only in a selected number of persons who claim to irrigate their fields from this channel; and his order, in my opinion, was perfectly correct.

The learned Advocate for the petitioner has further contended that the learned Magistrate was not justified in entering into the question of the nature of right at that stage. His inquiry ought to have been confined in ascertaining whether reliable evidence exists in support of the denial of the existence of the public right and he ought not to have gone into the question whether the right is or is not a public right. In my opinion, this case goes much beyond what is contemplated in law. The law requires that the mere existence of reliable evidence in support of the denial of the public right is sufficient to stop the hands of the Magistrate from proceeding further with the case. But in this case not only reliable evidence exists in support of the denial but, as the fact shows, the public right does not exist at all.

The application is rejected.

VARMA, J.—I agree.

The application is directed, as has been pointed out, against the order of the Magistrate dropping the proceedings under section 133 of the Code of Criminal Procedure. The argument advanced by the petitioner before us is that on the materials before the Magistrate he was not justified in holding that the right claimed by the applicant in the case was not a public right.

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VARMA, J.

In a proceeding under section 133 what section 139-A requires is that a magistrate should be satisfied that there is reliable evidence in support of the denial of the public right; the moment he finds that, he has to stop his hands and leave the matter for the civil court to decide. As to what is reliable evidence, it will depend upon the circumstances of each case. But a good test seems to be this, that if the evidence adduced stands unrebutted, the public nature of the right will be demolished.

Mr. Brahmadeva Narain for the petitioners has drawn our attention to various cases from which he has tried to show that from the facts of this case the Court ought to have come to a finding that the right claimed by the applicant before the Magistrate was in the nature of a public right. A public right does not depend upon the number of individuals who enjoy it. It is, generally speaking, that which must be enjoyed by members of the general unascertained mass of the public [*vide* Desai's Dictionary of Legal Terms and the decision in *Queen-Empress* v. *Jasoda Nand*(1)]. The decisions which have been referred to by the Sessions Judge are *Emperor* v. *Bharosa Pathak*(2), *Munna Tiwari* v. *Chandrabali*(3) and *Emperor* v. *Raghunandan Prasad*(4). I venture to suggest that the decision in *Munna Tiwari's* case(3) is very much in point. The decision in *Budha* v. *Mohan Lal*(5) referred to by the Advocate for the petitioners does not help him and seems to be based chiefly on whether section 133 of the Code of Criminal Procedure was applicable to prevent a breach of the peace on the facts of that case.

I would, therefore, discharge the rule.

Rule discharged.

J. K.

(1) (1898) I. L. R. 20 All. 501.
(2) (1912) I. L. R. 34 All. 345.
(3) (1928) I. L. R. 50 All. 871.
(4) (1931) I. L. R. 53 All. 706.
(5) (1912) 16 Ind. Cas. 162.

APPELLATE CRIMINAL.

1938.

August, 15, 16, 29.

Before Khaja Mohamad Noor and Rowland, JJ.

KING-EMPEROR

v.

SADASIBO MANJHI.*

Sessions Trial—procedure—commitment, whether can be quashed—all charges to be disposed of—Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 215 *and* 240—*confession of a co-accused, when admissible—nature of corroboration required—rule of prudence—Evidence Act,* 1872 (*Act I of* 1872), *section* 30.

A Sessions Judge must pass orders disposing of every charge framed, he cannot quash a commitment though he has power to take action under section 240 of the Code of Criminal Procedure, 1898.

Once a charge has been framed it should not be dropped until the conclusion of the trial unless, on the face of it, it is wholly inappropriate or the trial is open to attack on the ground of misjoinder or multifariousness of charges.

Kunja Subudhi v. *King-Emperor*(1), followed.

Section 30 of the Evidence Act, 1872, requires that the confession to be used against a co-accused must incriminate its maker. The law does not require that the confession should claim for its maker the leading part in the crime.

The confession of a co-accused uncorroborated by other evidence is not alone sufficient to support a conviction, and can carry no weight unless it is substantially corroborated by good evidence from other sources.

It is not a rule that corroboration by circumstantial evidence is not sufficient unless the circumstances constituting corroboration would, if believed to exist, themselves support

* Death Reference no. 4 of 1938 (Orissa), with Criminal Appeal no. 21 of 1938. Reference made by letter no. S. C./28-Cl., dated the 30th June, 1938, from P. S. Vishwanath Ayyar, Esq., I.C.S., Agency Sessions Judge, Koraput.

(1) (1928) I. L. R. 8 Pat. 289.

a conviction. The criterion is whether the matters before the court taken as a whole carry conviction.

Barnabas Christian v. *King-Emperor*(1), relied on.

Devendra Bhattacharya v. *King-Emperor*(2), *Sheonarain Singh* v. *King-Emperor*(3), *King-Emperor* v. *Mangru Kisan*(4), *Empress* v. *Ashotosh Chuckerbutty*(5), *Emperor* v. *Lalit Mohan Chuckerbutty*(6), *Emperor* v. *Kheri*(7) and *Emperor* v. *Gangappa Kardeppa*(8), reviewed.

Per Khaja Mohamad Noor, J.—The confession of a co-accused cannot be placed on the same footing as that of an accomplice. Section 30 of the Act gives it a position inferior to the evidence of an accomplice. The law does not require, apart from the confession of a co-accused, independent evidence by itself sufficient for conviction. This will be making section 30 of the Evidence Act practically useless.

The broad proposition that a conviction can legally be had on an uncorroborated confession of a co-accused is too wide. There must be some evidence, which when weighed after considering the confession of the accused, should bring the charge home to the accused.

Reference under section 374 of the Code of Criminal Procedure, 1898.

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

Azizullah, for the appellant.

Public Prosecutor for Orissa, for the Crown.

ROWLAND, J.—The Agency Sessions Judge of Koraput has made this reference for confirmation of the sentences of death passed on Sadasibo Manjhi and on Jalla Dhonorjoya Domb under section 302 of the Indian Penal Code for the murder of Sunamani

(1) (1934) 15 Pat. L. T. 711.
(2) (1927) 8 Pat. L. T. 566.
(3) (1928) I. L. R. 8 Pat. 262.
(4) (1937) I. L. R. 16 Pat. 612.
(5) (1878) I. L. R. 4 Cal. 483, F. B.
(6) (1911) I. L. R. 38 Cal. 559, S. B.
(7) (1907) I. L. R. 29 All. 434.
(8) (1913) I. L. R. 38 Bom. 156.

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Dondasena a widow aged about 60, resident in village Jodapalli, a hamlet of Dungiaputthi. The murder is said to have taken place on the night of the 8th November, 1937, in the course of a dacoity committed by the two prisoners above named and Orjuno Challan, Akutia Gudia and Gusang Soma at the house of Sunamani Bewa.

It was the prosecution case that this old woman was of substantial means and that in the dacoity considerable sums in cash as well as numerous gold ornaments including properties of the lady herself and articles deposited with her by way of pledge or pawn were stolen by the dacoits and that some of the stolen properties were recovered from the possession of the five persons I have named and also from Chanda Loichan and Kepai Ghasi who are said to have received such articles from the dacoits knowing them to be stolen property.

On these facts the Stationary Sub-Magistrate of Jaypur committed for trial at the Court of Session these seven persons namely, Sadasibo Manjhi (accused no. 1), Orjuno Challan (accused no. 2), Akutia Gudia (accused no. 3). Jalla Dhanurjoy Domb (accused no. 4), Gusang Soma (accused no. 5), Chanda Loichan (accused no. 6) and Kepai Ghasi (accused no. 7). Against the first five he framed charges under sections 449, 396 and 302 of the Indian Penal Code. Against the sixth and seventh the charge framed was under section 414. The fourth accused was also charged under section 75 of the Indian Penal Code as being liable to enhanced punishment by reason of previous conviction. When the case came before the Sessions Judge he framed a new charge under sections 302 and 34 of the Indian Penal Code and proceeded to try accused nos. 1 to 5 on this charge. He excluded from the trial the charge against accused nos. 6 and 7 reserving their case for a separate trial. As regards the charges under sections 449 and 396 against accused nos. 1 to 5 he appears neither to have

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cancelled these charges nor to have taken up the trial of them. The Sessions Judge ought to have recorded some order in respect of these charges and should not have left them in the air. He has given no reason for not trying them; and he was not competent (under section 215) to quash the commitment, though he could (under section 240) stay the trial of some charges or allow them to be withdrawn on conviction being had on the murder charge: in that case the consequences set forth in section 240 would follow in the event of the conviction being set aside. If this intention was to withdraw the charges I would consider it, in the words of Fazl Ali, J. in *Kunja Subudhi* v. *King-Emperor*(1), " premature " to do so " before there was time to judge what value could be properly attached to the confession and which part of it was liable to be rejected and which part of it had been sufficiently corroborated ". " The rule of caution " (it was there said) " is that it is better to have too many charges than too few and once a charge has been framed it should not be dropped until the conclusion of the trial unless, on the face of it, it is wholly inappropriate or the trial is open to attack on the ground of misjoinder or multifariousness of charges ".

The facts and the history of the investigation are stated in the judgment of the Sessions Judge and it is unnecessary to repeat them at length. The deceased was last seen alive in her own village Jodapalli on the 8th November and her body was found about a hundred yards from her house at a stream called Kusumjodi the next morning. Death was due to strangulation with dislocation of vertebræ of the neck. There were cut marks on her left ear from which a gold ornament appeared to have been torn. No fruitful clue was obtained till about the beginning of December when the police got some information which led them to make searches. Properties were recovered from the possession of each of the five accused. I shall deal later with the recoveries and evidence of identification

(1) (1928) I. L. R. 8 Pat. 289.

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of some of the properties. Four of the accused, that is to say, all except accused no. 1 made confessions before a Magistrate and substantially the convictions rested on the confessions coupled with recovery of stolen and suspicious properties. In addition there is some evidence of movements and suspicious acts of the accused persons. The first accused and the second, who is his brother-in-law, are residents of Jayantagiri, about twenty miles from the home of the deceased. Accused no. 3 is of the same village. Accused no. 4 is of village Mewa, twelve miles from Jayantagiri and accused no. 5 is of Sindhiput, six miles from Mewa. According to the confessions it was accused no. 1 who organised and led the gang. He sent accused no. 3 to call accused no. 4 and accused nos. 1 and 4 planned to murder Sunamani and take her money and ornaments. It was accused no. 4 who called accused no. 5 and brought him in. The description of the murder is given in the several confessions in substantial agreement, the principal difference being that according to accused nos. 2, 3 and 5 these persons were posted outside to keep guard against any interruption while accused nos. 1 and 4 entered the house, overpowered and killed the woman; whereas accused no. 4 says that while he and accused no. 1 took the principal parts in gagging the woman's mouth and twisting her neck, the other three accused (nos. 2, 3 and 5) also assisted in overpowering her by catching her legs and hands. According to the confessions each of the confessing accused got Rs. 60 cash and some ornaments. All the confessions were retracted before the Committing Magistrate and at the trial and the accused persons who made them have said that they gave those statements under pressure brought by the police. There is no evidence of any such pressure having been brought. The Magistrate recording the confession questioned the accused with commendable care and I have no doubt that the confessions were entirely voluntary. One of the accused, namely, Gusang, no. 5, told the Magistrate that there

had been some attempt at tutoring him to change his story so as not to implicate accused no. 1, but he did not yield to the suggestion.

It has been argued that the confessions are self-exculpatory, that is to say, they did not implicate the makers in the same way as the other persons mentioned in them and therefore should not be considered as against the other accused, particularly accused no. 1. No doubt section 30 of the Indian Evidence Act requires that the confession should be one affecting its maker and this has been always, since as far back as in *Empress of India* v. *Ganraj*(1), understood to mean that the confession must incriminate its maker or it is of no value against a co-accused, but each of the confessions in the present case fully implicates its maker in the guilt of dacoity with murder and of participation by assistance at the actual murder, so that principle does not avail the defence here; the law does not go so far as to require that the confession should claim for its maker the leading part in the crime. Then it is said that a conviction cannot be based on confessions unless there is other circumstantial evidence sufficient to support the conviction independently of the confessions. There is an obiter dictum to this effect in *Periyaswami Moopan* v. *Emperor*(2) where Reilly, J. observed that " the confession cannot take the place of evidence against the co-accused, nor can it be added to supplement evidence otherwise insufficient ". Now undoubtedly the rule is that the confession of a co-accused uncorroborated by any other evidence is not alone sufficient to support conviction. There is some difference of opinion as to whether this is a rule of law, that is to say, a conviction based on confession of co-accused alone would be bad in law, or whether it is a rule of practice which has all the reverence of law. The former view is taken by the Judges composing a Full Bench of the Calcutta

(1) (1879) I. L. R. 2 All. 444.
(2) (1930) I. L. R. 54 Mad. 75.

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High Court which decided the leading case of *Empress* v. *Ashootosh Chuckerbutty*(1) and followed by Jenkins, C.J. in *Emperor* v. *Lalit Mohan Chuckerbutty*(2). The latter view was taken in the Allahabad High Court in *Emperor* v. *Kehri*(3) and in Bombay High Court in *Emperor* v. *Gangappa Kardeppa*(4) where Macleod, J. said that " confession in section 30 cannot be restricted to an unretracted confession, as once a confession is proved it may be taken into consideration ". " Nor do I think ", he said, " that words can be read into the section when there is nothing in the section to fetter the discretion of the Court, or that there is anything in the section itself which prevents a Court from convicting after taking the confession into consideration. But I do think that the High Courts in India have, as they are entitled to do, laid down rules of practice which deserve all the reverence of law so that they ought to be observed by judges when exercising their discretion under section 30 ". In this High Court the Calcutta view was accepted in *Devendra Bhattacharya* v. *King-Emperor*(5) but not in *Sheonarain Singh* v. *King-Emperor*(6) or in *King-Emperor* v. *Mangru Kisan*(7) The question which of those views should prevail is in the present case academic, for on the one hand the whole of the facts are open to us as a court of fact and, on the other hand, none of the accused is sought to be convicted on an uncorroborated confession. The question may require consideration in a case in which it directly arises. But the point with which we are concerned here is whether the above rule is to be extended to the length of laying down that when a conviction is sought to be based on the confession of a co-accused together with corroborative evidence

(1) (1878) I. L. R. 4 Cal. 483, F. B.
(2) (1911) I. L. R. 38 Cal. 559, S. B.
(3) (1907) I. L. R. 29 All. 434.
(4) (1913) I. L. R. 38 Bom. 156.
(5) (1927) 8 Pat. L. T. 566.
(6) (1928) I. L. R. 8 Pat. 262.
(7) (1937) I. L. R. 16 Pat. 612.

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there is a rule that such corroborative evidence cannot be used unless it is sufficient, if believed, itself to support a conviction. This was the opinion of Jackson, J. in *Ashootosh's* case(1) above referred to. He said, " an accused person other than he who has confessed cannot lawfully be convicted upon such confession alone nor in my opinion ought he to be convicted on the ground of such confession corroborated by circumstantial evidence, unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction ". This extension of the doctrine was not accepted by the majority of the Full Bench Garth, C.J. said " How far any corroborative evidence would be sufficient, coupled with the confession, to convict a prisoner, must depend on the circumstances of each particular case ". In *Devendra Bhattacharya's case*(2), Scroope, J. quotes both *Ashootosh's* case(1) and *Lolit Mohan's* case(3) as laying down that corroboration by circumstantial evidence is not sufficient unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction. With great respect, the majority of the Judges who decided *Ashootosh's* case(1) laid down no such proposition, and it was advanced as a rule of prudence, and not of law, even by the minority as is clear from the words I have quoted from the judgment of Jackson, J. with whom McDonell, J. concurred, and I find nothing in the judgment of Jenkins, C.J. in the later case to support this extension of the doctrine. Jenkins, C.J. said, " the Court can only treat a confession as lending assurance to other evidence against a co-accused. Thus to illustrate my meaning, in the view I take, a conviction on the confession of a co-accused alone would be bad in law ". I do not think the learned Chief Justice meant to lay down any doctrine as to the amount of corroboration required. The remarks of

(1) (1878) I. L. R. 4 Cal. 483, F. B.
(2) (1927) 8 Pat. L. T. 566.
(3) (1911) I. L. R. 38 Cal. 559, S. B.

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Scroope, J. seem to me to be obiter dicta and the supposed rule to be not well-founded. Its implication is that the Court must assess the effect of the corroborative evidence independently as a condition precedent to considering the confession and applying its mind to determine the cumulative effect of the confession and corroborative evidence taken together. This is a mental gymnastic which I find it difficult to believe that the law requires a court to practise. The definition of proof in section 3 of the Evidence Act makes the real test to be whether after considering the matters before it the Court believes a fact to exist or considers its existence so probable that a prudent man ought to act upon the supposition that it exists. The criterion is whether the matters before the Court taken as a whole carry conviction. I can find no warrant in the statute for requiring a court to speculate as to what its findings would be if the materials had been something different, as a preliminary to making up its mind what it thinks of the case on the materials as they stand. Not that I wish in any way to minimise the importance which experience teaches should be attached to independent corroboration of a confession not only in its general outlines but also as against each individual accused affected by it. I would accept as a rule, at least of prudence if not of law, the statement in *Barnabas Christian* v. *King-Emperor*(1) that against a co-accused a confession "can carry no weight unless it is substantially corroborated by good evidence from other sources". The judgment of the learned Sessions Judge does not show separately the extent to which the case against each individual accused is corroborated by the finds of property; and this aspect of the case needs further examination.

Accused no. 1 was arrested on the 3rd December, 1937, and on the 4th he took the investigating officer to a sugar-cane field near his house where he produced material objects IX to XV. These are (IX) a bag

(1) (1934) 15 Pat. L. T. 711.

containing (X) Rs. 6-8-6 in cash, (XI) a necklace, (XII and XIII), ear ornaments, (XIV) a nose-ring and (XV) a cloth. His sister produced cash Rs. 20 material object LIII. Of these articles material object (XI) necklace has been identified by Arjuno Bhumia (p. w. 9), by Somara Bhumia (p. w. 11), by Subarno Dandasenani (p. w. 13), by Rajendra Dandasenani (p. w. 14) and Solomon Sothomon (p. w. 20). Material object XIII has been identified by Subarno Dandasenani (p. w. 13) to be an article which has been pledged with Sunamani. Narasingo Addu (p. w. 36) identifies the article as having been pledged by him. Somara Bhumia (p. w. 37) corroborates the identification by Narasingo. Material object XII is identified by Onam Patro (p. w. 29) as having been pledged by him with Sunamani and this identification is corroborated by Subarno (p. w. 13), and Bhima Gauda (p w. 31). With regard to these articles there appears to be a discrepancy between this evidence and that of Rajendra (p. w. 14) who says that material object XII belonged to the deceased. Material object XIV has been identified by Solomon (p. w. 20) as belonging to the deceased but the deceased's near relatives Subarno (p. w. 13) and Rajendra (p. w. 14) and a servant Arjuno Bhumia (p. w. 9) do not identify it and the identification by Solomon (p. w. 20) may be regarded as doubtful. The statement of the accused was that he did not produce any property, that the material objects were foisted by somebody in his sugarcane field and the police themselves discovered them; he did not point anything out. The money which he gave to his sister (material object LIII) has not of course been identified. The evidence as to money is directed only to show that after the dacoity he was in funds. He says that this money was the sale-proceeds of a wild boar which he reared. There is further evidence that he paid off some debts, namely Rs. 15 to Sabisetti Jagarnadham (p. w. 39) and Rs. 14 to Sandaradas Kurtivas (p. w. 40) on the 24th November, 1937. He

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says in his statement that he discharged the loans with money raised by the sale of *rabi* crop. The fact that he was in funds at about that time can have little, if any, evidentiary value attached to it. The evidence is that he is a man of some position and property being a village headman.

In argument it was sought to discredit the identifications of property on the ground that test identifications were not held. Personally I see no magic about test identification. The evidence on which the court has to act is the identification by witnesses at the trial and the question is, are the witnesses to be believed or not? I have no doubt as to the identification of material objects XI, XII and XIII as articles stolen in the dacoity, and I am of opinion that as against this accused there was sufficient corroboration that the case is true and that he is guilty of the offence.

Accused no. 2 was arrested on the 3rd December and on the 4th he took the investigating officer to Londapahali Dongiri hill where in two places he took out certain articles. These are (XVI) a small earthen pot, (XVII) a gold ear-ing, (XVIII) a pot with (XIX) a tin sheet over it containing (XX) Rs. 60 in a bag. Material object (XXI) is a sum of Rs. 3-2-0 in copper in a bag (XXII), while material object XXIII is a small bag containing coins Rs. 1-3-6. Against this accused there is also his own confession which speaks of his being given by accused no. 1 and accused no. 4 a gold ear-ring and Rs. 60 cash. The finding of Rs. 60 in a bag may be considered corroborative to some extent of this confession. None of the objects have been definitely identified as part of the stolen property, but in view of his own confession and those of the other accused I consider the case against him to be sufficiently established and I would confirm his conviction.

Accused no. 3 was arrested in Jayantagiri on the 4th December and on that day he produced at his house

material objects XXIV to XXVIII. Of these M. O. XXIV is a gold Nagulu, M. O. XXV is a gold nose-ring, M. O. XXVI is a nose-ring, M. O. XXVII is cash Rs. 48 and M. O. XXVIII is a torn cloth. Of these M. O. XXIV is identified by Onam Patro (p. w. 29). M. O. XXV is identified by Subarno Dandasenani (p. w. 13). M. O. XXVIII a torn cloth is identified by Subarno (p. w. 13) and by Rajendra Dandasenani (p. w. 14) and it appears to be a readily identifiable article. The cash Rs. 48 is to some extent corroborative of the statement in the confession that each accused was given Rs. 60. In the light of the confessions including his own I consider the case against this accused as sufficiently corroborated and I would affirm his conviction.

Accused no. 4 was arrested on 5th December at Mewa. On that day he took the investigating officer to Chompa Mundia Jholla stream where he produced from a place of concealment material objects XXXIX to XLIV. M. O. XXXIX is a gold Nagulu, XL is gold Sorisa mali, XLI a gold nanu, XLII half of a kantha, M. O. XLII half of a purnelu and XLIV a red bordered cloth. Material object XXXIX is identified by Onam Patro (p. w. 29), Mukundo Paiko (p. w. 30) and Bhima Gauda (p. w. 31) as having been pledged by Onam with the deceased. But the same article is also identified by Arjuno Bhumia (p. w. 9) as having been the property of the deceased. M. O. XL Sorisa mali is identified by Arjuno Bhumia (p. w. 9) and Rajendra (p. w. 14). Subarno (p. w. 13) deposes that this article was in Sunamani's possession but she is unable to say whether it was her property or pledged. M. O. XLI is identified by Manikyo Dandasenani (p. w. 35) as having been pledged with the deceased and this is corroborated by Subarno (p. w. 13). Manikyo Dandasenani (p. w. 35) further says that this was a part of a jewel of which material object no. VI was another part. M. O. VI was recovered from persons into whose hands it is said to have passed through the receiver accused nos. 6 and 7,

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but of the intermediate transactions evidence is not on this record. M. O. XLII is said to be a part of a jewel consisting of three parts. The other parts are material objects I and XXXIV. The identifying witnesses are Arjuno Bhumia (p. w. 9), Somara Bhumia (p. w. 11), Subarno (p. w. 13) and Rajendra (p. w. 14). Material object XXXIV was recovered from the possession of accused no. 5 and M. O. I was found lying on the ground near the body of the deceased. The identification of this article seems to be particularly conclusive. M. O. XLIII has been identified by Somara (p. w. 11), Subarno (p. w. 13) and Rajendra (p. w. 14) and I see no reason to doubt the correctness of this identification. M. O. XLIV red bordered cloth is identified by Arjuno Bhumia (p. w. 9), Somara Bhumia (p. w. 11) and Rajendra (p. w. 14). It is an easily identifiable article and its identification need not be doubted. The investigating officer also searched the house of this accused and recovered M. Os. XLV and XLVI. A pair of bullocks were also produced. M. O. XLV, an aluminium vessel, has been identified by Arjuno (p. w. 9) and Somara (p. w. 11). I do not doubt the correctness of this identification. M. O. LI was found in the possession of Tillo Budda (p. w. 25) who deposes that it was pledged with him for Rs. 6 by accused no. 4. It has been identified by Ananda Naiko (p. w. 38) as having been pledged by him with Sunamani and the identification is corroborated by Subarno (p. w. 13). Taking together the confessions including his own and the recovery of all these articles there is no room for doubt that the case against accused no. 4 is amply established.

Accused no. 5 was arrested on the 4th December and he produced at his house material objects XXIX to XXXVIII. M. O. XXIX is a small pot containing M. O. XXX cash Rs. 29. M. O. XXXI is a piece of gourd containing M. O. XXXII a gold earring. M. O. XXXIII is a Sorisa mali of 162 beads and M. O. XXXIV half of a Kantha. M. O. XXXV

is an aluminium vessel. Of these articles M. O. XXXII has been identified by Arjuno (p. w. 9), but there seems to be some ambiguity. The record of his statement is that M. Os. XXXII, XXXVI and XXXVIII, clothes, were worn by Sunamani. Perhaps a wrong number has been given or the Sessions Judge was mistaken in thinking that this witness refers to M. O. XXXII as clothes. The other identifying witness of this object is Subarno (p. w. 13) who says that it was pledged with Sunamani but the real owner does not appear to have been traced. The identification of this article must remain unproved, but the next M. O. XXXIII Sorisa mali is very amply identified. Arjuno (p. w. 9), Somara (p. w. 11) and Subarno (p. w. 13) have identified it as an article deposited with Sunamani as pledge. Budhu Gollaru (p. w. 32) claims it as the owner who pledged it and his evidence is supported by Narasingho Addu (p. w. 36). It is a very easily identifiable article being a necklace of 162 beads and the identification of it seems to me to be very clear and cogent. M. O. XXXIV is a part of a jewel of which other parts were M. O. XLII and M. O. I. It is identified by Arjuno (p. w. 9), Subarno (p. w. 13) and Rajendra (p. w. 14) and I would accept its identification as correct. M. O. XXXV, an aluminium vessel is identified by Sumara (p. w. 11). The investigating officer also searched the house of this accused and recovered M. O. XXXVI a white printed sari, XXXVII, a white sari green bordered and XXXVIII two pieces green imitation silk. Of these M. O. XXXVI is identified by Arjuno (p. w. 9) and Subarno (p. w. 13), M. O. XXXVII by Somara (p. w. 11) and Subarno (p. w. 13) and M. O. XXXVIII by Arjuno (p. w. 9), Subarno (p. w. 13) and Rajendra (p. w. 14). I think the identification of all these articles which seem to have been easily recognisable should be accepted.

The explanations of the accused as regards the finding of articles have been in each case on the same

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lines, that is to say, none of them have claimed to be the owner of any of these properties but all have said that the articles were in some way foisted by the police. Of this there is no evidence and the testimony of the witnesses who speak of the recovery of the articles in the manner alleged by the prosecution has not in any way been shaken.

The Sessions Judge has referred to some other corroborative evidence as regards movements of accused. The arrests having taken place about a month after the crime this evidence from witnesses whose recollection as to dates and times may not have been precise does not seem to me to add very much to the case, but some significance must be attached to the evidence of Kocho Sona (p. w. 22) and Korra Podalam Bariki (p. w. 19) as to association of the accused. The former of these witnesses speaks of two visits by accused no. 3 to the house of accused no. 4 in Mewa about the month of October and this evidence of association of these accused before the crime may be regarded as corroborative of the statement in the confessions that accused no. 3 was sent by accused no. 1 to call accused no. 4. P. W. 19's evidence refers to a visit by accused no. 4 to Sindiput where accused no. 5 lives ; the witness says that accused no. 4 took accused no. 5 with him and said that they were going to attend Shandy or bazar. The result of this examination of the evidence is that the case is established fully against all the accused and I would affirm all the convictions. According to the confessions of accused no. 3 and accused no. 5, the murder of deceased as well as robbery was in contemplation from the outset, and I believe this to be true. At any rate there is no room for doubt that the robbery and murder were done in one transaction. The sentence of death imposed on accused no. 1 and accused no. 4 is fully merited by them and I would accept the reference and confirm it and dismiss the appeals of all the accused.

We have been handicapped in our study of the evidence of this case by the illegible writing of the

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Sessions Judge. Parts of the record could not be correctly transcribed into the brief and there were words which we referring to the original could not read. I hope that the Sessions Judge will endeavour in future to prepare a legible record.

KHAJA MOHAMAD NOOR, J.—I agree that the reference be accepted and the appeal be dismissed.

I would, however, like to make a few remarks of my own on the value of the confession of an accused affecting another accused who is being jointly tried with him for the same offence. The view taken in *King-Emperor* v. *Mangru Kisan*(1) which followed *Sheonarain Singh* v. *King-Emperor*(2) seems to be that though as a matter of law a confession of a co-accused is sufficient for the conviction of an accused, as a rule of prudence one must seek corroboration of the confession before conviction. With all respect to the learned Judges who decided the two cases, this view places the confessions of a co-accused on the same footing as the evidence of an accomplice, but I venture to think it is not. The evidence of an accomplice is as a matter of law sufficient for a conviction. He is a competent witness and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice (section 133 of the Indian Evidence Act). The courts are by law allowed but not compelled to presume him unworthy of credence unless he is corroborated. If in spite of warning a jury believes him without corroboration, the High Court cannot interfere. If the framers of the Indian Evidence Act intended to attach to the confession of an accused against a co-accused the same value as the evidence of an approver, they would have said so. The confession of an accused can only be considered against his co-accused. Even this would not have been permissible but for section 30 of the

(1) (1937) I. L. R. 16 Pat. 612.
(2) (1928) I. L. R. 8 Pat. 262.

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Indian Evidence Act. The Act itself gives it a position inferior to the evidence of an approver.

In practice, however, in a large number of cases it is immaterial whether the rule of seeking corroboration be taken as a rule of practice which has all the reverence of law or whether it be treated as a rule of law. But difficulty is likely to arise in cases tried by jury in which there is nothing against an accused except the confession of his co-accused whether retracted or not. The question may then arise whether the judge ought to direct the jury to return a verdict of not guilty on the ground that there is no evidence against the accused, or in case the judge does not give this direction and the jury on this material alone convicts the accused, whether the conviction can be interfered with by the High Court on the ground that it is based upon no legal evidence whatsoever. Garth, C. J. in the case of *Empress* v. *Ashutosh Chakravarty*(1) observed as follows:—

"A confession by prisoner *A*, which involves the guilt of prisoner *B*, is of itself, unsupported by other testimony, evidence of the weakest possible kind against B. It is simply the statement of a third person, not made upon oath or affirmation, and I am of opinion, that no court ought to convict prisoner *B* upon such evidence. I consider, moreover, that if a prisoner were convicted upon such evidence, whether by a jury or otherwise, and were to appeal to this court, the conviction ought to be set aside; and further, that any sessions judge trying such a case before a jury ought to direct them to acquit the prisoner. How far any corroborative evidence would be sufficient, coupled with the confession, to convict a prisoner, must depend upon the circumstances of each particular case".

It is clear from this observation that the question whether there can be a conviction on the

(1) (1878) I. L. R. 4 Cal. 483, F. B.

confession of a co-accused was treated as one of law and not of prudence.

In the case of *Emperor* v. *Lalit Mohan Chakravarty*(1) Jenkins, C. J. went much further and observed as follows:—

"Reliance has been principally placed on those (confessions) of the accused Soilen Das and Susil Biswas, and these the prosecution would use not only against the person making them, but also against the rest of the accused. The warrant for this is to be found in section 30 of the Evidence Act, which provides that, when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons, is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession. The language of the section is guarded, and the history of this Act leaves me in no doubt that this section was designedly framed in these terms. While admissions, a word which embraces confessions, are by section 21 relevant, and may be proved as against the person making them, all that section 30 provides is, that the court may take them into consideration, as against other persons. This distinction of language is significant, and it appears to me that its true effect is, that the court can only treat a confession as lending assurance to other evidence against a co-accused. Thus to illustrate my meaning, in the view I take, a conviction on the confession of a co-accused alone would be bad in law. This reading of the section appears to me to gain confirmation from the language of section 5".

This view was adopted in this Court in the case of *Devendra Bhattacharya* v. *Emperor*(2) where

(1) (1911) I. L. R. 38 Cal. 559, S. B.
(2) (1927) 8 Pat. L. T. 566.

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Das, J. (Scroope, J. concurring) held that under section 30 of the Evidence Act the court may take into consideration a confession made by an accused person against the co-accused, but the court can only treat a confession as lending assurance to other evidence against co-accused and a conviction based on the confession of a co-accused alone would be bad in law.

I am inclined to agree with the views set forth in the two Calcutta cases and that of Das, J. in the Patna case above referred to. The case of *Devendra Bhattacharya* v. *Emperor*(1) which was an earlier decision was not brought to the notice of the learned Judges who decided the two cases *Sheonarayan Singh* v. *King Emperor*(2) and *King-Emperor* v. *Mangru Kisan*(3). If a question arises as to whether a conviction based upon an uncorroborated confession of a co-accused is bad in law, a question which did not arise in the two cases, the matter may require reconsideration. I am not prepared to go to the length of saying that there must be, apart from the confession of a co-accused, independent evidence by itself sufficient for conviction as has been stated as an obiter dictum in a Madras case. This will be making section 30 of the Indian Evidence Act practically useless. But I think that the broad proposition that a conviction can legally be had on an uncorroborated confession of a co-accused is somewhat too wide. In my opinion, the correct law seems to be that there must be some evidence which when weighed after considering the confession of the co-accused should bring the charge home to the accused. The question, however, is of academic interest in this case, as there is not only ample corroboration to the confession of the four prisoners, accused nos. 2 to 5, but there is independent circumstantial evidence against every accused.

(1) (1927) 8 Pat. L. T. 566.
(2) (1928) I. L. R. 8 Pat. 262.
(3) (1937) I. L. R. 16 Pat. 312.

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So far as the accused nos. 2 to 5 are concerned, they can safely be convicted on their own confessions supported as they are by the discovery of the material objects.

So far as the accused no. 1 is concerned, the material against him is ample. There can be no doubt that the deceased was murdered on the night in question. She was seen alive in the evening. The condition of the dead body with lobes of ears cut off and the condition in which the house was found, leaves no room for doubt that robbery was committed along with murder. Then some properties of deceased which have been sufficiently identified were practically produced by the accused no. 1 and he must be taken to have been in possession of them. One may, therefore, safely presume under section 114 of the Evidence Act (the illustrations are not exhaustive) that the accused no. 1 was either involved in the murder and robbery or, at any rate, he received the stolen property knowing it to be the proceeds of the robbery. Having come so far, the little aid taken from the confessions proves the guilt of the accused no. 1 beyond any doubt.

J. K.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Fazl Ali and Agarwala, JJ.

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August, 31. *September*, 1, 6.

Penal Code, 1860 (*Act XLV of* 1860), *sections* 34 *and* 300—*murder—accused killing paramour of a woman with whom he carried on intrigue—both found sleeping together—*

*Death reference no. 24 of 1938, with Criminal Appeal no. 160 of 1938. Reference made by, and appeal against the decision of, T. Luby, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 28th July 1938.

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grave provocation, whether can be pleaded—nature of provocation contemplated by first exception—direct evidence of acts of the accused sufficient to disclose his intention—question of motive, whether material—section 34, *application of.*

The provocation which is mentioned in the first exception to section 300 of the Penal Code, 1860, is something which is recognized as provocation in law and not merely something which arouses the uncontrollable anger of a particular individual.

A man in love with a woman who has repulsed his suit might be so angry as to lose control of himself at the sight of her engaged in sexual intercourse with another, but if he kills one or both of them, he cannot plead grave provocation in mitigation of his offence. The law that when a husband discovers his wife in the act of adultery and thereupon kills her, he is guilty of manslaughter and not of murder, has no application where the woman concerned is not the wife of the accused but a woman with whom the accused has been carrying on an intrigue sanctioned by the custom of the community.

King v. *Palmer*(1), and *Emperor* v. *Dinabandhu Ooriya*(2), relied on.

Kota Potharaju, In re(3), dissented from.

For the application of section 34 of the Penal Code, 1860, the question of motive is not material where there is direct evidence of the acts of the accused and the acts themselves are sufficient to disclose the intention of the actor.

Satrughan Patar v. *Emperor*(4) and *Maung Gyi* v. *King-Emperor*(5), distinguished.

Reference under section 374 of the Code of Criminal Procedure, 1898.

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

Ganesh Sharma, for the appellant.

(1) (1913) 2 K. B. 29.
(2) (1929) 124 Ind. Cas. 818.
(3) (1931) 35 Law Weekly, 141.
(4) (1919) 50 Ind. Cas. 337.
(5) (1923) I. L. R. 1 Rang. 390.

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Assistant Government Advocate, for the Crown.

AGARWALA, J.—This is a reference under section 374 of the Code of Criminal Procedure, by the Judicial Commissioner of Chota Nagpur, for confirmation of the sentences of death passed on Murgi Munda (aged 25) and Gangu Munda (aged 24), both of village Kurunga, for the murder of Gansa Munda (aged 20) of village Keora, six miles from Kurunga.

On the occasion of the last Sarhul festival, i.e., on the 8th of April, 1938, there was a village dance held on a hill adjacent to village Behonda. In the evening this dance was continued at the Akhara of the village. As appears to be customary in that part of the country, it was attended only by the young people of the village, the elders being engaged in entertaining each other at their homes. Many of the young girls who were present at the dance at the Akhara have been examined as witnesses in this case, and from their evidence it appears that among the youngmen who were present were the two accused and the deceased Gansa Munda. At some time in the evening Gansa Munda left the Akhara, and after an interval of time not specified, two girls—Randai (p. w. 3) and Gangi (p. w. 4)—also left for the purpose of going to their respective homes to have their evening meal. On their way they met Gansa, who proposed to Randai that he should go to her home and smoke. She told him that there was no tobacco left, and eventually she and he went off together to the Jojohansa jungle. For what happened after that we have only the statement of Randai, supported by circumstantial evidence.

Before dealing with this statement and the evidence it is desirable to make a few observations with regard to the parties concerned. The witnesses in this case are Mundas, and they have spoken with extreme candour about a custom which prevails in their community. It appears that it is customary for unmarried girls to cohabit with unmarried men, and

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that the only obligation this entails is that the man is expected to marry any girl who becomes pregnant by him. In village Behonda the scene of these meetings is Jojohansa jungle, which lies a few hundred yards outside the village. Gansa Munda, the deceased, was the brother of the daughter-in-law of Charan Munda (p. w. 1) the Munda of village Behonda. Previously he used to work for the Munda. While he was so employed, he carried on a love intrigue with Randai of the same village. Two years ago Gansa Munda left Behonda and took up his residence at village Keora. From that time Randai transferred her favours to Murgi Munda, the accused; but she has deposed that Gansa Munda was in the habit of visiting the village, and that whenever he did so she used to cohabit with him in the jungle.

I will now revert to Randai's account of what happened on the evening of the 8th of April when she and Gansa went to jungle. She said that by the side of a footpath under a Char tree, Gansa prepared a bed of leaves and twigs and that thereupon they had sexual intercourse. After that they fell asleep in each other's arms. Later in the night she awoke to find Murgi pulling her away from Gansa. He slapped her and kicked her. She noticed that the accused Gangu Munda was at this time engaged in pressing the neck of Gansa Munda with his hands. After pulling Randai away from Gansa, Murgi Munda then picked up a large stone and struck Gansa's head with it three or four times with the result that he died. The two assailants then took the girl some little distance away and under pain of death extracted from her an undertaking that she would disclose to no one what she had seen. The two men then tied Gansa's body with his own cloth to a branch of a tree, which was found lying nearby and carried him to the field of Balga which was partly under water. There they buried the body while the girl sat on the ridge of the field looking on. After this the two men washed their hands and feet in a water

channel and Gangu set off in the direction of Behonda and Murgi towards his house, with the girl. Murgi carried the pole for a part of the way but threw it away at Karipiri-tanr. According to the girl they reached Murgi's house at Kurunga after midnight. When they arrived there, they found that Samu Munda (p. w. 2) was also there. The girl stayed at Murgi Munda's house for the next three or four days, i.e., Saturday, Sunday, Monday and Tuesday morning. On the morning of Saturday Gangu arrived and had a talk with Murgi. While she was there she was warned twice by Murgi not to disclose what she had seen on Friday night. On Tuesday morning a police constable arrived at Murgi's house. Murgi was not there at the time as he was paying a visit to a Lohar. The constable took charge of Randai. Then they went and fetched Murgi and Gangu and after that all three persons were produced before the Sub-Inspector who was at Behonda, where the girl made a statement. The girl then took the Sub-Inspector to the Char tree where he noticed the bed of leaves and twigs and marks of struggle. Five yards from the tree he found blood on the ground and on leaves and stones. The girl pointed out the place in Balga's field where the body of Gansa had been buried, and also the branch to which the body had been tied and which had been discarded at Karipiri tanr. Although decomposition had set in, the girl and the villagers with the Sub-Inspector had no difficulty in identifying the corpse of Gansa Munda. The Sub-Inspector shewed a hair-pin which Randai said was hers.

This, as I have already said, is the only direct evidence we have of what transpired in the Jojohansa jungle on the night that Gansa Munda met his death, and the witness who has given this statement has told her story with a frankness and downrightness, which is extremely impressive even when read in print. The learned Judicial Commissioner who had the advantage of hearing the witness make the statement

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was equally impressed both by her story and by her manner of telling it. Even in the absence, therefore, of any corroboration of it, it would be extremely difficult to discard this statement, more particularly as there is absolutely no motive for her to implicate the two appellants falsely. She admits, and there is other evidence to the same effect, that both the appellant Murgi Munda and the deceased Gansa Munda were her lovers. Although on the night in question it was Gansa Munda whom she accompanied to the jungle, her regular lover (if one may use the term) was at that time—and had been for two years—Murgi Munda. There had been no quarrel or dissension between them. Nor is there any evidence that the appellant Gangu Munda had incurred either the anger or dislike of Randai, or of any other villagers so that there is no apparent motive for her to implicate him either.

Having thus given Randai's account of what happened to her and Gansa while they were in the jungle, it is necessary to refer to what went on in the village on the evening of the 8th of April and on the subsequent days, and for that purpose the most comprehensive evidence is that of the Munda of the village (p.w. 1). He says that on Saturday morning, when it was found that Gansa and Randai were missing, it was assumed that they had eloped. In the afternoon, however, the Munda's son Runka (p.w. 9), who had been in the Jojohansa jungle and had returned from there, told him that he had seen blood marks on a bed of leaves under a Char tree. The Munda thereupon sent his daughter-in-law, Hisi, to inquire whether Gansa was at Kudapiri where her sister lives. He sent his son Binrai and others to Keora to inquire whether Gansa was there. All of these people returned on Sunday morning without having found Gansa. The chaukidar was then sent for and shown the blood marks under the Char tree. They found there a broken necklace of seeds, which had belonged to Gansa, and they also

noticed a hair-pin which was subsequently picked up and given to the Sub-Inspector and shown by him to Randai, who said it was hers. The Munda then summoned the young men and women of the village and asked them what they had seen Gansa and Randai doing on Friday night, and he was informed by them that Gansa and Randai had left the Akhara separately and that afterwards the two appellants, Murgi and Gangu, had inquired where Randai had gone. This information, coupled with what had been found under the Char tree, led the Munda to conclude that either Gansa or Randai or both of them had been murdered. He, therefore, in the company of some of the villagers and the chaukidars set out for Tamar police-station, which is 30 miles from Behonda, taking with him the necklace and the hair-pin. They arrived at the thana on the morning of Monday, the 11th of April. The Assistant Sub-Inspector recorded the first information on the statement of Mangal chaukidar (p.w. 10). While this party was at the thana, another chaukidar, Soma Bhagta (p.w. 14) arrived there. He also had been shown the blood marks under the Char tree on Sunday and had discovered a trail of blood which began on the jungle path, not far from the Char tree, and led up to the field of Balga. He had noticed the water in the field was blood-stained, and had gone to the thana to report these facts. His statement was recorded in the form of a Saneha, which is Exhibit 7 in the case. The Sub-Inspector, the chaukidars and villagers left for Behonda the same day and reached the village on Tuesday morning. While passing through the jungle the Sub-Inspector deputed a constable to fetch Murgi and Gangu from Kurunga. The constable is Sukhari Oraon (p.w. 17). He found Gangu at his home and Murgi at the house of a Lohar. Both these men and Randai accompanied him to the Sub-Inspector without protest. The Sub-Inspector took charge of the dhoties which the two men were wearing. These were sent to the

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Chemical Examiner who reported that both of them had blood-stains but as the stains were disintegrated he could not determine their origin. Stains of human blood were found on the dried leaves taken from the bed under the Char tree, on the mala, on the stone and on the earth which the Sub-Inspector scraped from the place of occurrence.

It will be observed that these facts amply corroborate the evidence of Randai in almost all material particulars. But as the appellant Gangu had no apparent motive to take part in this crime it is desirable to examine closely the evidence which implicates him. Of his relationship with Murgi Munda we know only that they come from the same village. The evidence of the girls of the village that he was with Murgi Munda on the evening of the 8th when Murgi Munda enquired from them at the Akhara as to the whereabouts of Randai is not challenged. There can be little doubt that two assailants were present at the commission of the crime. The stone with which Gansa Munda's head was battered has been produced in Court before us. It is a large piece of rock weighing 10½ seers or 21 lbs. A stone of this weight to be used effectively as an implement of assault would have to be firmly grasped with two hands. The assailant could not have wielded it with one hand while the other hand held the victim. Unless, therefore, Gansa Munda was killed without a struggle while he was asleep the inference is that some one held him while Murgi Munda struck him with the stone. This in effect is what Randai's description of the assault amounts to. Then the corpse could hardly have been moved by Murgi Munda alone from the Char tree to the field of Balga and buried there without any assistance. The branch to which Randai says the dead body was tied and carried is itself a heavy piece of wood. Medical examination disclosed that on Murgi Munda's right shoulder there was an abrasion which was about a week old at the time of the medical

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examination, which was on the 14th April. This suggests that the branch on which the body was carried was slung on to the shoulders of the carriers and that it grazed the shoulder of Murgi Munda. The doctor also found on each of the shoulders of Gangu Munda marks of healed up ulcers but he was unable to determine their age or cause. The dhoties worn by both the accused, however, were blood-stained. The learned Judicial Commissioner asked each of the accused how he accounted for these stains. Neither of them offered any explanation. Although, therefore, the Chemical Examiner was not able to certify that the stains were those of human blood owing to disintegration there is no reason to suppose that they were stains of animal blood as, in that case, the accused themselves would have said so. It would indeed be a strange coincidence if the two persons suspected of this murder and who had been seen in each other's company shortly prior to the murder should have on their clothes stains of animal blood which neither of them was able to account for. I, therefore, agree with the learned Judicial Commissioner and the four assessors who assisted him in the trial that both the appellants were concerned in killing Gansa Munda. It has, however, been contended that the offence they committed was not murder. With regard to Murgi Munda it was argued that as he found his lover in the arms of Gansa Munda in the circumstances already narrated, the provocation for him to kill Gansa Munda was so grave as to affect the nature of the offence which he committed. Reliance was placed on the decision of a Division Bench of the Madras High Court in the case of *Kota Potharaju*(1). The facts of that case were that the accused, finding his mistress in the arms of a former lover, stabbed her. The Sessions Judge who tried the accused in that case convicted him of murder although he was of the opinion that had the deceased been the wife of the accused he would not

(1) (1931) 35 Law Weekly, 141.

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have come to this decision. Their Lordships of the Madras High Court observed: "We find it impossible to agree that the fact that Mahalakshmi was the appellant's mistress and not his wife makes any real difference. One cannot apply considerations of social morality to a purely psychological problem. The question is not whether the appellant ought to have exercised, but whether he lost control over himself. When a man sees a woman, be she his wife or his mistress, in the arms of another man, he does not stop to consider whether he has or has not the right to insist on exclusive possession of her person... .....She is a woman, of whose person he desires to be in exclusive possession and that is, for the moment, enough for him". With the greatest respect to the opinion of these learned Judges I disagree. The mere fact that a person's desires are thwarted does not in law justify him killing the person who is thwarting him. The provocation which is mentioned in the 1st exception to section 300, Penal Code, is something which is recognized as provocation in law and not merely something which arouses the uncontrollable anger of a particular individual. A man in love with a woman who has repulsed his suit might be so angry as to lose control of himself at the sight of her engaged in sexual intercourse with another but if he killed one or both of them, he could certainly not plead grave provocation in mitigation of his offence. In the case of a wife the position is entirely different. The law recognizes that a husband is entitled to expect fidelity from her. It is even possible that the provocation might be held to be grave in the case of a man who finds in the arms of another lover a mistress whom he maintains and from whom, therefore, he might reasonably expect faithfulness. But that this is not so even in the case of a girl betrothed to the assailant is clearly indicated in the case of *King* v. *Palmer*(1). In that case the girl to whom the accused was betrothed suddenly informed him that she had been prostituting herself.

(1) (1913) 2 K. B. 29.

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He thereupon seized her and cut her throat with a razor which he had in his pocket. Lord Coleridge, J. who tried the case directed the jury that " no provocation by words, however opprobrious, in a case where a deadly weapon is used, can in law reduce the crime from murder to man-slaughter ". This direction was challenegd in the Court of Criminal Appeal by the accused. In delivering the judgment of the Court Channell, J. observed: " The Judge stated the rule in the old form, that words alone can never constitute sufficient provocation to reduce murder to man-slaughter. It would perhaps have been more accurate in view of modern decisions if he had said that words cannot constitute sufficient provocation except in very special circumstances. But the only special cricumstances which have been held sufficient for that purpose are where the words involved a confession of adultery.....The reason for that exception is that a sudden confession is treated as equivalent to a discovery of the act itself. But here the relation between the parties was not that of husband and wife, nor was it a case of unmarried persons living together as husband and wife. They were simply persons who were in the position of being engaged to be married. Under those circumstances, if the effect of the summing up was to leave the jury under the impression that they could not properly find a verdict of man-slaughter, we think that it was right ". It may be observed in the present case that Murgi Munda was not even betrothed to Randai. Between them existed an intrigue sanctioned by the custom of the community in which they lived but in no way entailing the obligation of marriage unless and until Randai should have become pregnant by Murgi. It may be noticed that the observation in the Madras case referred to above were mere obiter for the Court declined to interfere with the conviction for murder on the ground that before stabbing his wife the accused deliberately fastened the door of the room and searched for the knife with which he then stabbed her. In *Emperor* v. *Dinabandhu Ooriya*(1) a

(1) (1929) 124 Ind. Cas. 818.

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Division Bench of the Calcutta High Court held that the well-established law that when a husband discovers his wife in the act of adultery and thereupon kills her, he is guilty of man-slaughter only and not of murder, has no application where the woman concerned is not the wife of the accused but only a public woman. In my opinion the offence committed by Murgi Munda was murder.

With regard to Gangu Munda it was contended that even if Murgi intentionally murdered Gansa that intention was not shared by Gangu. It is true that Gangu had not even that amount of motive which actuated Murgi; but in a case where there is direct evidence of the acts of the accused the question of motive is not material if the acts themselves are sufficient to disclose the intention of the actor. Reference was made to the case of *Satrughan Patar* v. *Emperor*(1) where a Division Bench of this Court pointed out that "The mere fact that a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under section 34 of the Penal Code....." Their Lordships observed, "It is only when a Court can with some judicial certitude hold that a particular accused must have preconceived or premeditated the result which ensued, or acted in concert with others in order to bring about that result, that section 34 may be applied." It was contended on behalf of the appellant Gangu that there was no evidence of a preconceived or premeditated plan between him and Murgi for the murder of Gansa. But on the other hand it cannot be denied on the evidence that has been accepted that he acted in concert with Murgi in bringing about the result which followed. The learned Advocate for the appellants also cited the case of *Maung Gyi* v. *King Emperor*(2) where it is observed, "The existence of a common intention being the sole test of joint responsibility, it must be proved what the common intention was and

(1) (1919) 50 Ind. Cas. 337.
(2) (1923) I. L. R. 1 Rang. 390.

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it must also be proved that the common act for which the accused is to be made responsible was acted in furtherance of that common intention". The post mortem examination of the corpse in the present case revealed that the left temporal bone was broken in three pieces, the right temporal bone in two pieces, and the parietal bone in six pieces, indicating that more than one blow was struck and, as I have already shewn, the evidence discloses that these blows were struck either while Gansa was asleep or else while he was deprived of the power of defending himself. The Sub-Inspector found marks of struggle near the Char tree and the blood-stains which he noticed were five yards from the tree. The blood-stained stones were also found at this place. This clearly indicates that Gansa was not killed in his sleep while lying under the Char tree. If, therefore, he was awake he would have been in a position to put up some kind of defence against a person who had both his hands engaged in grasping a heavy stone unless his actions were impeded by some other person. The evidence, in my opinion, clearly indicates that his actions were so impeded by Gangu. From these circumstances the only inference is that at the time when Murgi battered the head of Gansa with the stone, the intention of killing him was shared by Gangu. In my opinion, therefore, the offence committed by Gangu is also murder. The circumstances in which the crime was committed do not justify any mitigation of the sentence passed on Murgi Munda and this is confirmed; but with respect to Gangu the absence of motive for him to take part in committing the offence suggests that he was acting under the influence of his companion. I would, therefore, alter the sentence of death passed on him to transportation for life.

FAZL ALI, J.—I entirely agree.

Conviction upheld.

Sentence on appellant No. 2 altered.

S. A. K.

APPELLATE CIVIL.

1938.

October, 28.

Before Harries, C. J. and Varma, J.

FIRM LADURAM SAGARMAL

v.

JAMUNA PRASAD CHAUDHURI.*

Partnership Act, 1932 (*Act IX of* 1932), *section* 69(*2*)—*unregistered firm, suit by—registration after the institution of the suit, whether can cure the initial defect and make the suit maintainable.*

A suit by an unregistered firm is not maintainable by reason of section 69(*2*) of the Partnership Act, 1932. Registration of the firm at a later stage, after the institution of the suit, cannot cure the initial defect so as to make the suit maintainable.

A plaint filed by an unregistered firm is in effect no plaint at all, because section 69 makes claims arising out of a contract unenforceable if the firm is unregistered at the date of the institution of the suit.

If the plaintiff has no cause of action when the suit is instituted, such a suit is bound to fail though a cause of action might come into existence within a very short time after the institution of the suit.

Krishen Lal Ram Lal v. *Abdul Ghafur Khan*(1), *Chhagan Lal* v. *Firm Mangal Sain Raj Narain*(2), *M. S. A. Subramania Mudaliar (Firm)* v. *East Asiatic Company, Limited*(3) and *Firm Ram Prasad Thakur Prasad* v. *Firm Kamta Prasad Sita Ram*(4), followed.

Radha Charan Saha v. *Matilal Saha*(5) and *T. Varadarajulu Naidu* v. *R. Rajamanika Mudaliar*(6), not followed.

*Appeal from appellate decree no. 734 of 1937, from a decision of Babu Ramchandra Misra, Additional Subordinate Judge of Bhagalpur, dated the 22nd July, 1937, affirming a decision of Babu Damodar Prasad, Munsif of Bhagalpur, dated the 14th October, 1936.

(1) (1935) A. I. R. (Lah.) 893.
(2) (1938) A. I. R. (Lah.) 767.
(3) (1936) A. I. R. (Mad.) 991.
(4) (1935) A. I. R. (All.) 898.
(5) (1937) 41 Cal. W. N. 534.
(6) (1937) A. I. R. (Mad.) 767.

Appeal by the plaintiff.

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

S. N. Bose and *K. Dayal*, for the appellant.

B. N. Mitter (with him *Harinandan Singh* and *Yasin Yunus*), for the respondents.

HARRIES, C. J.—This is a plaintiff's second appeal against concurrent decrees of the Courts below dismissing his claim.

The suit out of which this appeal arises was for the recovery of money due on certain bahi-khata accounts. The plaintiff firm carried on business as wholesale cloth dealers, whereas the defendants carried on a retail cloth business. Over a period of time the defendants had made purchases of cloth from the plaintiff firm, and eventually the parties adjusted the accounts. It was the plaintiff's case that a sum of Rs. 1,693 was due from the defendants to the plaintiff firm upon this account.

The defendants raised a number of defences, but it is only necessary for me to deal with one of them. Defendants contended that the suit as instituted was not maintainable as at the date of the institution of the suit the plaintiff firm had not been registered in accordance with the provisions of the Partnership Act. The other defences, namely, limitation and denial of the accuracy of accounts, do not arise in this appeal.

The trial Court dismissed the suit on the ground that it was not maintainable by reason of section 69 of the Partnership Act. The lower appellate Court was of opinion that the suit was not maintainable when instituted but that it became maintainable at a later date when the plaintiff firm was registered. It further held that part of the claim was barred by limitation and that the remainder had been satisfied by payment. It accordingly upheld the decision of the trial Court though upon different grounds.

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FIRM LADURAM SAGARMAL v. JAMUNA PRASAD CHAUDHURI.

HARRIES, C. J.

It has been strenuously argued by Mr. Bose in this appeal that the suit was maintainable and that the lower appellate Court was right in treating the suit as having been instituted on the date when the firm was registered. The suit was instituted on the 21st of November, 1935, and it is common ground that upon that date the firm was an unregistered one. On the 10th of December, 1935, the plaintiff firm applied for registration under the Partnership Act and on the 18th of January, 1936, registration was effected. It has been contended on behalf of the appellant that though the suit was not maintainable when instituted, the court was entitled to treat the suit as properly instituted on the 18th of January, 1936.

On behalf of the respondents it has been contended that as the suit was not maintainable when instituted, nothing that happened afterwards could affect the maintainability of this particular suit.

Reliance has been placed by the Advocate for the appellant upon the case of *Radha Charan Saha* v. *Matilal Saha*(1). In that case a suit was instituted by an unregistered firm on the 25th of May, 1934, and no exception was taken in the written statement on the ground of non-registration of the firm. The suit proceeded to trial and was decreed on contest against the answering defendant and ex parte against the others. The answering defendant appealed, but that appeal was not proceeded with as there was an application to have the ex parte decree set aside by those defendants against whom the ex parte decree was passed. That ex parte decree was set aside and the suit came on for hearing afresh. At that hearing a plea was taken that the suit was not maintainable under section 69(*2*) of the Partnership Act on the ground of non-registration of the firm at the date of the institution of the suit. The firm was as a matter of fact registered on the 20th of June, 1934.

(1) (1937) 41 Cal. W. N. 534.

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The objection was upheld by the courts below and the suit dismissed. On appeal Mitter, J. held that the suit ought not to have been dismissed merely on the ground of non-registration of the firm at the date of the institution of the suit but that it ought to have been deemed to have been instituted on the date when the firm was registered.

This case was followed by Horwill, J. of the Madras High Court in the case of *T. Varadarajulu Naidu* v. *R. Rajamanika Mudaliar*(1). In that case an unregistered firm had instituted a suit and during the course of the proceedings had registered itself in accordance with the Partnership Act. On objection being raised that the firm was not registered at the date of the institution of the suit, the suit was dismissed though registration had taken place before the hearing. Horwill, J. held that it would be most inequitable for the firm to have its suit dismissed and be forced to file another after paying fresh court-fee. Accordingly he allowed the suit to be treated as instituted at the date when the firm was registered.

These two single Judge cases undoubtedly support the argument of the appellant. But Mr. Mitter on behalf of the respondents has cited a large number of authorities of various courts which take the opposite view. In *Krishen Lal Ram Lal* v. *Abdul Ghafur Khan* (2) a Bench of the Lahore High Court held that a suit instituted by an unregistered firm must be dismissed. According to the learned Judges section 69 of the Partnership Act clearly said that no suit falling within its purview should be instituted. It was the institution of the suit that was barred, hence an unregistered firm could not file a suit, nor could it after filing get the suit stayed till it got itself registered. Such a suit would have to be dismissed, though the dismissal of such suit would be no bar to a fresh suit after registration, if such

(1) (1937) A. I. R. (Mad.) 767.
(2) (1935) A. I. R. (Lah.) 893.

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was within time. In this case the Bench certainly took the view that a suit instituted by an unregistered firm was bound to fail and that registration after the filing of the suit could not possibly affect the maintainability of that particular suit. A similar view was expressed by a learned single Judge of the Lahore High Court in the case of *Chhagan Lal* v. *Firm Mangal Sain Raj Narain*(1). In that case it was held that a suit by an unregistered firm was invalid and that registration of the firm after the suit had been instituted did not relate back so as to make the suit valid.

Another case to the same effect is the case of *M. S. A. Subramania Mudaliar (Firm)* v. *East Asiatic Company, Limited*(2). In that case an unregistered firm instituted a suit and, after objection was raised, obtained registration under the Partnership Act. Thereafter it applied for amendment praying that the suit should be treated as having been instituted on the date of the application for amendment. It was held that any subsequent amendment of the petition after getting the firm registered under the Partnership Act could not relate back to the date of the institution of the suit so as to cure the defect which existed at the time of institution, as the plaint was not a plaint at all : hence the order of amendment could not be granted.

In the case of *Firm Ram Prasad Thakur Prasad* v. *Firm Kamta Prasad Sita Ram*(3) Kendall, J. held that before instituting a suit by a partner against a firm, the firm must be duly registered and the Registrar must have recorded the person suing as a partner in the firm. Subsequently registering the firm and amending the plaint did not make a valid institution; merely making an application for registration before suit was not sufficient. Section 69 was mandatory.

(1) (1938) A. I. R. (Lah.) 767.
(2) (1936) A. I. R. (Mad.) 991.
(3) (1935) A. I. R. (All.) 898.

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It is, therefore, clear that the trend of authority is in favour of the respondents' contention in this case, namely, that a suit which is not maintainable by reason of non-compliance with section 69 of the Partnership Act cannot become maintainable at a later stage by reason of registration. In my view, subsequent registration cannot cure the initial defect. A plaint filed by an unregistered firm is in effect no plaint at all, because section 69 makes claims arising out of a contract unenforceable if the firm is unregistered at the date of the institution of the suit. An unregistered firm has no right to sue, and, therefore, a plaint filed by it has no legal effect. If at the time the plaint is filed the claim is bound to fail, I cannot see how subsequent registration can improve the position. The single Judge of the Calcutta High Court held that there was no reason why the court should not treat the plaint as filed on the date of registration. That is possibly a very fair view to take; but I know of no provision of law which permits a court to treat the plaint as filed on a date subsequent to the date upon which it was actually filed. In neither of the cases cited on behalf of the appellant is any authority cited which would enable a court to treat a suit as being instituted months later than the date upon which it was in fact instituted. In my view the crucial date is the date of the institution of the suit. If on that date the suit was bound to fail, nothing that happens subsequently can give the plaintiff a right to sue. The case is very similar to a case where a plaintiff brings a suit prematurely. If it is held that he had no cause of action at the date of the institution of the suit, then it does not avail him in the slightest to show that his cause of action did come into existence a few days after the filing of the suit. If the plaintiff had no cause of action when the suit was filed, then such a suit is bound to fail, though a cause of action might come into existence within a very short time after the institution of the suit. For the same reason, I cannot understand how, an unregistered firm can file a suit and the defect be

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cured by subsequent registration. It appears to me that if the suit as filed was not maintainable, then it must be dismissed.

For the reasons which I have given, I am satisfied that this suit was not maintainable. In my view the lower appellate court rightly dismissed this suit though I am unable to agree with the reasons which it gave for doing so. In my judgment the learned Munsif and not the lower appellate court gave the true grounds for dismissing this claim. I would, therefore, dismiss this appeal with costs.

VARMA, J.—I agree.

Mr. S. N. Bose for the appellants has laid great stress upon the decision in *Radha Charan Saha* v. *Matilal Saha*(1) and I should like to examine the reasons given in that judgment for allowing the suit to be deemed to have been filed after the date of registration. The reasons which I gather from the judgment are these: that the plea of non-registration was not taken till the second hearing began, that the plaint was allowed to remain on the file till the date of registration and that the view which the learned Judge took in holding that the plaint should be deemed to have been filed after the date of registration was in accordance with justice. Looking at all these reasons separately and collectively, I find that they may be very good grounds for creating sympathy in favour of the plaintiff; but they do not supply any legal reasons for getting round the provisions of section 69(*2*) of the Partnership Act which have been declared to be imperative. No reason appears to have been given in that judgment for the proposition that a plaint which is filed on one date may under certain circumstances be deemed to have been filed on a subsequent date. The case which has been referred to in that judgment is the case of *Pran Krishna Saha* v. *Kripa Nath Choudhury*(2). But that was a case

(1) (1937) 41 Cal. W. N. 534.
(2) (1916) 21 Cal. W. N. 209.

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under the Bengal Tenancy Act. The reasons given in that judgment would be applicable to the facts of the present case only by analogy and it is needless to say that arguments by analogy are not always safe. For these reasons, I fail to see any reason in that judgment for extending the provisions of section 69(*2*) of the Partnership Act, which are imperative. I agree with the views expressed in *Krishen Lal Ram Lal* v. *Abdul Ghafur Khan*(1), *Firm Ram Prasad Thakur Prasad* v. *Firm Kamta Prasad Sita Ram*(2), *Chhagan Lal* v. *Firm Mangal Sain Raj Narain*(3) and *M. S. A. Subramania Mudaliar* v. *East Asiatic Company, Limited*(4) and dismiss the suit. The trial court dismissed the suit on this ground but the lower appellate court relying on the decision in *Radha Charan Saha's* case(5) held that although the suit was not maintainable it should be deemed to have been filed on a date subsequent to the date of registration. For the reasons given in the earlier part of this judgment I would uphold the view of the trial court on this point.

The appeal is dismissed with costs.

Appeal dismissed.

S. A. K.

REVISIONAL CRIMINAL.

Before Harries, C.J. and Agarwala, J.

HARAMOHAN PATNAIK

v.

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Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 54(*1*) *and* 83—*magistrate of a native State, whether can*

*Criminal Revision no. 4 of 1938 (Orissa), from an order of Rai Sahib Ganesh Chandra Chandra, Town Magistrate of Cuttack, dated the 24th of September, 1938.

(1) (1935) A. I. R. (Lah.) 893.
(2) (1935) A. I. R. (All.) 898.
(3) (1938) A. I. R. (Lah.) 767.
(4) (1936) A. I. R. (Mad.) 991.
(5) (1937) 41 Cal. W. N. 534.

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issue warrant directing officers in British India to arrest a State subject—Indian (Foreign Jurisdiction) Order in Council, 1902—*notifications, dated, March,* 1912, *and January,* 1937, *effect of—arrest and detention in terms of later notification, whether legal—notifications, whether ultra vires—Extradition Act,* 1903 (*Act XV of* 1903)—*absence of warrant—arrest, whether permissible—section* 54(*1*), *scope of.*

A magistrate of a native State cannot issue a warrant directing the police or officials in British India to arrest a person accused of committing a crime within a native State.

Tahilram Khanchand v. *Emperor*(1), followed.

Section 83 of the Code of Criminal Procedure, 1898, contemplates cases where a magistrate in British India issues a warrant for the arrest of a person in some place in British India outside his jurisdiction. It does not empower the magistrate of a native State, which is outside British India, to issue a warrant for the arrest of a person in British India, even if such native State may have adopted the Code as a part of the law of the State.

Where, however, by a notification, dated the 14th of January, 1937, the Governor-General in Council in exercise of the powers conferred by the Indian Foreign (Jurisdiction) Order in Council, 1902, and all other powers enabling him in that behalf directed that

"all criminal processes issued in a manner similar to that prescribed by the Code of Criminal Procedure, 1898, by a Magistrate having jurisdiction in any State in India shall be acted upon and executed in railway lands lying within such State by all magistrates and Police Officers having jurisdiction in such railway lands under the same conditions and in the same manner as if such processes had been issued by a Magistrate having jurisdiction in such railway lands.....".

Held, (*i*) that under the terms of the notification the arrest by the Government Railway Police of a subject of a native State on the premises of a railway station within the State (which, by an earlier notification, were placed under the jurisdiction of certain magistrates and officers in British India) in pursuance of a warrant issued by the State authorities was legal;

(*ii*) that the notification contemplates that there should be some enquiry as to whether the person arrested is or is not a subject of the State which has issued the warrant;

(1) (1938) A. I. R. (Sind) 46.

(*iii*) that, therefore, the only course which the railway police could follow in executing the warrant issued by the magistrate was to produce the arrested person before a magistrate having jurisdiction over railway lands; such a magistrate could then make the necessary inquiry and order detention of the arrested man until arrangements were made for taking him to the native State.

(*iv*) that the notifications, respectively, dated the 28th of March, 1912, and the 14th of January, 1937, were not ultra vires the Indian (Foreign Jurisdiction) Order in Council, 1902.

Held, further, that in order to justify an arrest under section 54(*1*), paragraph 7, Code of Criminal Procedure, 1898, there must be in existence as a fact, as opposed to any belief which may be entertained by any person, a warrant which has been issued under the Extradition Act, 1903.

Subodh Chandra Roy Chowdhary v. *Emperor*(1) and *Emperor* v. *Kalu*(2), followed.

What is a reasonable complaint or suspicion within section 54(*1*) depends on the circumstances of each case but it must be founded on some definite fact or some tangible proof which is sufficient to establish in the mind of a reasonable police officer the reasonableness or credibility of the charge, information or suspicion.

Subodh Chandra Roy Chowdhary v. *Emperor*(1), followed.

H. Mahapatra and *G. C. Das*, for the petitioner.

Advocate-General for Orissa and *Public Prosecutor for Orissa*, for the Crown.

HARRIES, C.J.—This is an application by one Haramohan Patnaik under section 491(*1*) (*b*) of the Code of Criminal Procedure.

On the 28th of September, 1938, the petitioner presented an application to this Court praying that an order passed by a learned Magistrate of the first class at Cuttack directing that the petitioner be sent

(1) (1924) I. L. R. 52 Cal. 319.
(2) (1933) A. I. R. (Lah.) 159.

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to Dhenkanal State was illegal and that he should be released from custody forthwith. Notice of this application was served upon the local authorities concerned in Cuttack who have appeared to show cause why this Court should not interfere with the orders which have been passed in this case.

The petitioner Haramohan Patnaik is a subject of Dhenkanal State, which is a native state bordering upon the province of Orissa. On the 23rd of September, 1938, the petitioner was arrested on the platform of the Dhenkanal Garh Railway Station by the Government Railway Police, who purported to act under a warrant issued by the District Magistrate of Dhenkanal. After arrest the petitioner was brought to Cuttack and produced before the City Magistrate, Mr. Ganesh Chandra Chandra, on the 24th of September, 1938. On inquiry the petitioner admitted that he was a subject of Dhenkanal State, and the learned Magistrate ordered that he should be detained in custody until the Dhenkanal State authorities made arrangements to convey him to Dhenkanal. The warrant of arrest issued by the District Magistrate of Dhenkanal showed that the petitioner was alleged to have committed, within that State, an offence under section 124A of the Indian Penal Code. It is to be observed that there is no allegation in this case that the petitioner has committed any offence within British India.

On behalf of the petitioner it has been contended that his arrest at the Dhenkanal Garh Railway Station was illegal and as such vitiates all proceedings taken thereafter.

Dhenkanal Garh Railway Station is within the State of Dhenkanal; but it is clear that the Dhenkanal State authorities have no jurisdiction within the limits of Railway land in that State. The position with regard to Railway lands in the State of Dhenkanal is defined by a notification no. 754-IB., dated the 28th of March, 1912, issued by the Governor-General

in Council in exercise of the powers conferred upon him by the Indian (Foreign Jurisdiction) Order in Council, 1902, and of all other powers enabling him in that behalf. The order of the 28th of March, 1912, provides:

"(1) Subject to the modification specified in the fourth column of the schedule thereto annexed all laws for the time being in force in the districts or areas specified in the third column of the said schedule shall be in force in the lands lying within the States specified in the corresponding entry in the second column which are occupied by the portions of the railways specified in the corresponding entry in the first column thereof.

(2) The Local Government and all officers subordinate to it for the time being exercising executive authority within the said districts or areas shall exercise the like authority within the said lands, except in connection with the administration of police which shall be vested in the officers for the time being in charge of Raiway Police under the said Local Government.

(3) All courts having for the time being jurisdiction within the said districts or areas shall have the like jurisdiction within the said lands."

From a reference to the schedule annexed to this Order, it will be seen that the laws in force in the district of Cuttack shall be in force in the Railway lands situate in the State of Dhenkanal and further that the Local Government and officers subordinate to it exercising executive authority in the Cuttack district shall exercise similar authority within the railway lands situate in Dhenkanal State. Further, the police administration within the railway lands situate in Dhenkanal State is vested in the officer for the time being in charge of the Railway Police.

The effect of this Order is to place the Railway lands in Dhenkanal State within the jurisdiction of the local authorities at Cuttack and accordingly it is argued that the District Magistrate of Dhenkanal has no jurisdiction whatsoever over the land upon which the Dhenkanal Garh Railway Station is situate. It is contended, therefore, that any warrant issued by the District Magistrate of Dhenkanal could

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not be directed either to the district authorities exercising jurisdiction over these railway lands or to the Railway Police who were responsible for maintenance of law and order within these Railway lands. The warrant for the arrest of the petitioner was directed to the officer in charge of the Railway Police at Dhenkanal Garh Railway Station, and it directed him to arrest the petitioner who was alleged to have committed within the State an offence under section 124A of the Indian Penal Code.

In my view it is clear that a Magistrate of a native state cannot issue a warrant directing the police or officials in British India to arrest a person accused of committing a crime within a native state. This has been clearly laid down in a recent decision, *Tahilram Khanchand* v. *Emperor*(1). In that case a magistrate of Nasirabad, which is outside British India, issued a warrant under section 83 of the Code of Criminal Procedure for the arrest of a person residing in British India. It was held that such a warrant could not be executed by a Magistrate in British India and that proceedings taken in pursuance of such warrant were illegal and could be quashed by the Court under section 491 of the Code of Criminal Procedure. Section 83 of the Code of Criminal Procedure lays down the procedure to be followed when a warrant is to be executed outside the local limits of the jurisdiction of the court issuing the same; but this section, in my view, can have no application to a case such as the present. Section 83 of the Code of Criminal Procedure contemplates cases where a magistrate in British India issues a warrant for the arrest of a person in some place in British India outside his jurisdiction. It is said that the Code of Criminal Procedure has been adopted by the Dhenkanal State authorities; but even so, that would not give the Dhenkanal State authorities a right to issue a warrant and obtain the arrest of a person in

(1) (1938) A. I. R. (Sind) 46.

the manner indicated by section 83 of the Code of Criminal Procedure. If the Dhenkanal State authorities have adopted the Code of Criminal Procedure, it cannot be said that the same law is applicable to both the State and British India. The effect of the adoption of the Code of Criminal Procedure by the Dhenkanal State authorities is to make the provisions of that Code part of the law of Dhenkanal State. It is still a State wholly outside British India and, therefore, the provisions of section 83 of the Code of Criminal Procedure cannot apply to the State in its relation with British India. In my judgment, therefore, it is clear that the arrest of the petitioner cannot be justified under the provisions of section 83 of the Code of Criminal Procedure.

It was further argued on behalf of the petitioner that, assuming section 83 of the Code of Criminal Procedure applied, the production of the petitioner at Cuttack and the subsequent order for detention passed by the Magistrate were wholly illegal. Cuttack is more than thirty miles from the Dhenkanal Garh Railway Station and accordingly it was contended that section 85 of the Code of Criminal Procedure applied. It was contended on behalf of the petitioner that if the arrest was legal, then by reason of the provisions of section 85 of the Code of Criminal Procedure the petitioner should have been produced before the District Magistrate of Dhenkanal State. In my view, it is unnecessary to consider this aspect of the case, because the arrest cannot be justified under the terms of section 83 of the Code of Criminal Procedure.

By Notification no. 34-I.B., dated the 14th of January, 1937, the Governor-General in Council in exercise of the powers conferred by the Indian (Foreign Jurisdiction) Order in Council, 1902, and of all other powers enabling him in that behalf, directed that

"all criminal processes issued in a manner similar to that prescribed by the Code of Criminal Procedure, 1898, by a Magistrate

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having jurisdiction in any State in India shall be acted upon and executed in railway lands lying within such State by all magistrates and police officers having jurisdiction in such railway lands under the same conditions and in the same manner as if such processes had been issued by a Magistrate having jurisdiction in such railway lands.....

Provided further that nothing hereinbefore contained shall require a magistrate or police officer having jurisdiction in such railway lands to execute any process so issued against any person who is not a subject of the State by the court of which the process has been issued or be construed as authorising him to execute any such process against any subject or servant of His Majesty."

The Advocate-General of Orissa who appeared on behalf of the local authorities has contended that the arrest of the petitioner was perfectly legal by reason of this notification. He did not contend that the arrest and subsequent proceedings could be justified under sections 83 and 85 of the Code of Criminal Procedure. The Advocate-General argued that the effect of this notification of the 14th of January, 1937, is that all magistrates and police officers having jurisdiction in the railway lands in the Dhenkanal State must execute a warrant issued by a magistrate of that State under the same conditions and in the same manner as if such warrant had been issued by a magistrate having jurisdiction over such railway lands. In other words, he contended that the Railway Police at Dhenkanal Garh Railway Station were bound to execute the warrant issued by the District Magistrate of Dhenkanal in precisely the same manner as if it had been issued by the District Magistrate of Cuttack who, by the notification of the 28th of March, 1912. has sole jurisdiction over railway lands in the State. In my judgment, the terms of this notification of the 14th of January, 1937, are clear and in the present case the police at Dhenkanal Garh Railway Station had no alternative but to act upon the warrant issued by the District Magistrate of Dhenkanal and to arrest the petitioner.

After arresting the petitioner, the police produced him on the following day before a magistrate of the first class in Cuttack and the latter, after ascertaining that the petitioner was a subject of

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Dhenkanal State, remanded him in custody in order to enable the Dhenkanal authorities to make arrangements for conveying him to the State. It has been strongly contended on behalf of the petitioner that even if the arrest was justified under the notification of the 14th of January, 1937, the subsequent proceedings were wholly illegal. It was contended that the police had no right whatsoever to take the petitioner to Cuttack and to produce him before a Magistrate. It was urged that the police should have handed the petitioner over then and there to the Dhenkanal State authorities and as they did not do so, he could no longer be detained at Cuttack.

The last proviso to the notification of the 14th of January, 1937, makes it clear that a magistrate or police officer having jurisdiction over railway lands can only execute a warrant issued by a magistrate in a native State against a person who is a subject of that State. Such magistrates or police officers are not to execute such warrants against persons not subjects of the State or to execute any warrant against any subject or servant of His Majesty. Before a person arrested by the railway police upon a warrant issued by a magistrate of a native state is handed over to the State authorities, it must first be ascertained whether the person arrested is or is not a subject of that State. If he is, he must be handed over to the State authorities; but if he is not a subject of the native State, then he cannot be handed over. The notification contemplates that there should be some inquiry as to whether the person arrested is or is not a subject of the State which has issued the warrant. Clearly such an inquiry cannot be left to the railway police, and in my view the only course which the railway police can follow in executing a warrant issued by a magistrate in a native State, is to produce the arrested man before a magistrate having jurisdiction over railway lands. Such a magistrate can then make the necessary inquiry and order detention of the arrested man until arrangements

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are made for taking him to the native State. Any other construction of this notification would leave the arrested man entirely at the mercy of police officers who might frequently be of junior rank. It is to be observed that the notification of the 14th of January, 1937, directs all magistrates and police officers to execute the warrant issued by a magistrate in a native State, and in my view this contemplates that after a person is arrested on railway lands by the police he must be produced before a magistrate having jurisdiction over such railway lands who will then decide whether such arrested person should be detained and handed over to the native State authorities.

It was contended on behalf of the petitioner that this notification of the 14th of January, 1937, was ultra vires, The Indian (Foreign Jurisdiction) Order in Council, 1902. The limits of the Indian (Foreign Jurisdiction) Order in Council, 1902, are defined by clause 2 of that Order. Those limits are the

"territories of India outside British India, and any other territories which may be declared by His Majesty in Council to be territories in which jurisdiction is exercised by or on behalf of His Majesty through the Governor-General of India in Council, or some authority subordinate to him, including the territorial waters of any such territories".

Clause 3 of the Order enables the Governor-General of India in Council on His Majesty's behalf to exercise any power or jurisdiction which His Majesty or the Governor-General of India in Council for the time being has within the limits of the Order and to delegate any such power or jurisdiction to any servant of the British Indian Government in such manner, and to such extent, as the Governor-General in Council from time to time thinks fit.

Clause 4 of the Order provides that

"the Governor-General in Council may make such rules and orders as may seem expedient for carrying the order into effect, and in particular—

(a) for determining the law and procedure to be observed, whether by applying with or without modifications all or any of the provisions of any enactment in force elsewhere, or otherwise;

(*b*) for determining the persons who are to exercise jurisdiction, either generally or in particular classes of cases, and the powers to be exercised by them;

(*c*) for determining the courts, authorities, judges, and magistrates, by whom, and for regulating the manner in which, any jurisdiction, auxiliary or incidental to or consequential on the jurisdiction exercised under this Order, is to be exercised in British India;

(*d*) for regulating the amount, collection, and application of fees."

In my judgment the notification, dated the 28th of March, 1912, by which railway lands within a native State are placed under the jurisdiction of certain magistrates and officers in British India is intra vires the Order of 1902. The Order of 1902 contemplates such provisions as are contained in the notification of the 28th of March, 1912. Further, there is nothing in the notification of the 14th of January, 1937, which can possibly be said to be outside the powers conferred upon the Governor-General in Council by the Indian (Foreign Jurisdiction) Order in Council, 1902. In my judgment, these two notifications cannot possibly be said to be ultra vires and the arrest and subsequent production of the petitioner before the Magistrate at Cuttack are amply justified under the terms of these notifications. Further, the detention of the petitioner by order of the learned Magistrate at Cuttack is legal by reason of the combined effect of these two notifications.

It was also contended by the Advocate-General that the arrest and detention of petitioner could be justified under the provisions of section 54(*1*), 7th paragraph, of the Criminal Procedure Code. This section permits police officers in certain cases to arrest without an order from a magistrate and without a warrant. The seventh paragraph to section 54(*1*) Criminal Procedure Code permits the arrest, without a magistrate's order or a warrant, of a person against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in an act committed outside British India which if committed in British India

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would have been punishable as an offence or for which he is under any law relating to extradition or under the Fugitive Offenders Act, 1881 or otherwise liable to be apprehended or detained in custody in British India. The petitioner's act, it is contended, namely, sedition, is punishable as an offence in British India and the petitioner could be apprehended and detained in custody under the Extradition Laws. Therefore it is said he could be arrested without a warrant. Assuming the warrant issued by the District Magistrate of Dhenkanal to be illegal, that, it is urged, is immaterial because he could be arrested without any warrant at all. In my view the arrest and detention of the petitioner cannot be justified under these provisions. The only information which the Railway police had in this case was the warrant issued by the District Magistrate, Dhenkanal State. Such can hardly be said to be a reasonable complaint or to amount to credible information or to create reasonable suspicion. What is a reasonable complaint or suspicion depends on the circumstances of each case but it must be founded on some definite fact or some tangible proof which is sufficient to establish in the mind of a reasonable police officer the reasonableness or credibility of the charge, information or suspicion: *see Subodh Chandra Roy Chowdhary* v. *Emperor*(1). Further it has been held that to justify an arrest under section 54(*1*), paragraph (*7*), Criminal Procedure Code, there must be in existence as a fact, as opposed to any belief which may be entertained by any person, a warrant which has been issued under the Extradition Act: *see Subodh Chandra Roy Chowdhary* v. *Emperor*(1) and *Emperor* v. *Kalu*(2). There was no such warrant in existence in this case.

However, as I have stated, the arrest of the petitioner and the subsequent proceedings were in

(1) (1924) I. L. R. 52 Cal. 319.

(2) (1933) A. I. R. (Lah.) 159.

accordance with the terms of the notification 34 I. B., dated the 14th of January, 1937, and therefore legal. I would therefore discharge the rule.

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AGARWALA, J.—I agree.

Rule discharged.

S. A. K.

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APPELLATE CIVIL.

Before Harries, C. J. and Agarwala, J.

FEKUA MAHTO

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Mortgage—mortgagee under an obligation to pay rent—default by mortgagee resulting in rent decree—property sold in execution to third party—subsequent purchase by mortgagee—absence of fraud—equity of redemption, whether extinguished.

Where a property subject to a mortgage is sold in execution of a rent decree and at some period later purchased by the mortgagee, whose failure to pay rent had resulted in the rent decree, such purchase by the mortgagee does not, in the absence of fraud, revive the equity of redemption which is extinguished by the sale.

Gauri Shanker Sahu v. *Sheotahal Gir*(1), followed.

Nawab Sidhee Nuzur Ally Khan v. *Rajah Ojoodhyaram Khan*(2), *Deonandan Prashad* v. *Janki Singh*(3) and *Jaikaran Singh* v. *Sheo Kumar Sing*(4), distinguished.

* Appeal from appellate decree no. 155 of 1937, from a decision of Rai Sahib Bhuvaneshwar Prasad Pande, Judicial Commissioner of Chota Nagpur, dated the 30th September, 1936, reversing a decision of Babu Baidyanath Das, Special Subordinate Judge of Ranchi, dated the 23rd January, 1936.

(1) (1936) A. I. R. (Pat.) 434.
(2) (1866) 10 Moo. Ind. App. 540.
(3) (1916) I. L. R. 44 Cal. 573, P. C.
(4) (1927) I. L. R. 50 All. 36.

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Appeals by the plaintiffs.

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

B. C. De and *K. K. Banarji*, for the appellants.

Ray Guru Saran Prasad (with him *N. K. Prasad II*, *L. K. Chaudhuri* and *Ray Paras Nath*), for the respondents.

HARRIES, C. J.—This is a plaintiffs' second appeal against a decree of the lower appellate Court dismissing their suit for redemption.

The facts which gave rise to this litigation are somewhat complicated and it is necessary to set them out in some detail. In the year 1886 the ancestors of plaintiffs nos. 1 and 3 and defendants nos. 8 to 10 mortgaged their tenure in village Haratu to one Musammat Sundar Kuer. In 1892 the mortgagors sold their rights to Braj Lal who paid up the money due on the mortgage and thus redeemed it. Later Braj Lal mortgaged the property to Nawal Kishore.

In the year 1898 the ancestors of plaintiffs nos. 1 and 3 and defendants nos 8 to 10 again mortgaged the same village to defendants nos. 1 to 7 and by the terms of this mortgage the latter who were given possession were bound to pay the rent due in respect of the tenure and were made liable in damages for any loss occasioned by their default. After this mortgage litigation ensued between Nawal Kishore, who was the mortgagee under Braj Lal's mortgage and defendants nos. 1 to 7 and others and eventually Nawal Kishore actually obtained a decree for possession of this village. However, he never executed the decree and never obtained possession of the village. Defendants nos. 1 to 7 appear to have been heavily engaged in this litigation and fell in arrear with their rent. On the 18th of July, 1904, an eight-annas share in this village was sold to Ram Sewak Sahu in execution of a rent decree which the owners

of the village had obtained. On the 12th of November, 1904, the remaining eight-annas-share in this village was sold to A. T. Peppee in execution of another rent decree obtained by other owners. Therefore, by the end of 1904 the whole of this village had been sold in execution of rent decrees to Ram Sewak Sahu and A. T. Peppee. These two purchasers entered into possession of the property and remained in such possession until the year 1919. On the 22nd of May, 1919, defendants nos. 1 to 3 purchased eight-annas share held by Ram Sewak Sahu and on the 10th of August, 1919, they purchased the other eight-annas share held by A. T. Peppee. By the end of 1919, therefore, defendants nos. 1 to 3 who were the mortgagees under the mortgage executed in the year 1898 had become the owners of the sixteen annas in this village. On the 9th of February, 1933, the original mortgagors, namely, plaintiffs nos. 1 to 3 and defendants nos. 8 to 10, sold twelve-annas of their alleged mortgagor rights to plaintiffs nos. 4 and 5. The plaintiffs contended that they still held the equity of redemption in this mortgage and brought the present suit claiming redemption.

The principal defence was that the equity of redemption had been extinguished in the year 1904 when the whole of this village had been sold in execution of the two rent decrees. It was argued that once the equity of redemption had been extinguished it could not be revived thereafter by reason of any purchase of the property by the original mortgagees.

The trial Court held that the mortgagors' rights had not been extinguished and accordingly decreed the suit; but on appeal the learned District Judge held that the mortgagors' rights were extinguished by the sale in execution of the rent decrees in 1904 and, therefore, the plaintiffs had no right whatsoever to redeem the property.

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There can be no question that the defendants who were the mortgagees under the mortgage created in 1898, were bound to pay the rent due in respect of the tenure. This they failed to do and accordingly rent decrees were obtained and the whole village was sold under these two decrees. The trial Court appears to have held that the failure to pay rent was deliberate and intentional, and I am far from clear as to what the learned Subordinate Judge meant by the use of these words. The plaintiffs had attempted to show that the mortgagees had deliberately refrained from paying rent in order that the property should be sold in execution of rent decrees and purchased by their benamidars. It was hotly contended that one of the purchasers in these sales, namely, Sahu, was a benamidar for the mortgagee defendants; but the trial Court held as a fact that Sahu's purchase was a bona fide one. It was not suggested that A. T. Peppee's purchase was as benamidar for the defendants.

Though the trial Court found that the purchases were not made by benamidars, yet it came to the conclusion that these sales were fraudulent and accordingly held that the mortgagors' interest was not extinguished by them. The learned District Judge on appeal came to the conclusion that it had not been established that the defendants were guilty of any fraud. All that was established was that the mortgagees had failed to pay the rent and that the village had in consequence been put up for sale in execution of rent decrees obtained by the owners. All, therefore, that can be alleged against the mortgagees is that they failed to pay the rent due in respect of the tenure, and there is no finding whatsoever that such failure was due to collusion or fraud or anything of that nature.

It is conceded that where a sale takes place in execution of a rent decree a mortgagor's interest is in ordinary cases extinguished and the property is

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sold and purchased free from all encumbrances. It is, however, contended on behalf of the appellants that where a property is sold in execution of a rent decree and at some period later purchased by the mortgagees whose failure led to the rent decrees, such purchase by the mortgagees revives the equity of redemption and thereafter the mortgagors have a right to redeem.

Reliance is placed on two decisions of their Lordships of the Privy Council. The first case relied upon *is Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan*(1). That was a case of gross and deliberate fraud. An arrangement had been arrived at between the mortgagees and third persons that the mortgagees should allow the rent to fall into arrears so that rent decrees should be obtained and the property be put up for sale. It was further arranged that the property should be purchased and that it should come back to the mortgagees. Their Lordships of the Privy Council point out that the mortgagees in that case were guilty of a gross fraud and to allow them to hold the property free from the equity of redemption would be to allow them to gain an advantage from their own fraud. The whole decision proceeds upon the basis that mortgagees cannot gain an advantage from their own fraud and, therefore, where mortgagees in such cases have allowed rent to fall into arrear and the property to be sold in execution of rent decrees, such sale will not extinguish the equity of redemption as against the mortgagee if he subsequently acquires the property. In short, their Lordships of the Privy Council held that where fraud, such as I have indicated, exists, the sale must be treated as a private sale and not a public sale. In other words, a sale under a rent decree brought about by the fraud of the mortgagees cannot be held to defeat the rights of the mortgagors as against the mortgagees.

(1) (1866) 10 Moo. Ind. App. 540.

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A later case is *Deo Nandan Prashad* v. *Janki Singh*(1). In that case the mortgagee allowed rent to fall into arrear and a sale had taken place in execution of a rent decree. The property eventually came into the hands of the mortgagee, and their Lordships of the Privy Council held that the mortgagors had a right to redeem. In that case their Lordships came to the conclusion that the mortgagee concerned who was a minor was not himself guilty of fraud, but, on the other hand, they held that his agents had engineered the whole transaction to enable the minor mortgagee to obtain the whole interest in the property. In short, it was found that the agents of the mortgagee were guilty of fraud and, that being so, the mortgagee himself could not benefit by the fraud of his agents. The only substantial difference between this case and the earlier case of *Nawab Sidhi Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan*(2) is that in this later case the mortgagee himself was not guilty of fraud but only his agents. In my view the basis for the decision of both these cases is the fraud practised by the mortgagees or their agents. Their Lordships of the Privy Council were simply applying the well-known principle that no person should be permitted to benefit from his own fraud. These cases have no application whatsoever to cases where fraud on the part of the mortgagee has not been established.

A more recent case relied upon by the appellants is the case of *Jaikaran Singh* v. *Sheo Kumar Singh*(3). In that case a mortgagee of a fixed rate holding, who was under a covenant to pay the rent of the holding to the zamindar, made default in such payment, in consequence of which the holding was sold, and it was purchased by the mortgagee himself. It was held that the mortgagee could not by his own wrongful act deprive the mortgagor of his rights, and the mortgagor's equity of redemption still subsisted. It has

(1) (1916) I. L. R. 44 Cal. 573, P. C.
(2) (1866) 10 Moo. Ind. App. 540.
(3) (1927) I. L. R. 50 All. 86.

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been argued that no fraud was established in this case and it is contended that this case is an authority for the proposition that a mere breach of contract will have the same result as fraud. It is to be observed that the learned Judges who decided the Allahabad case purported to follow the case of *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan*(1) to which I have already referred. That, as I have pointed out, was a case of fraud. Further it is clear that the learned Judges regarded the particular case before them as a case of fraud. It was a case where the mortgagee had failed to pay the rent and had then bought the property when it was put up for sale in execution of a rent decree. At page 40 the learned Judges after discussing various cases observed:—

"It seems to us that these cases lay down a sound principle of law which prevents a fraud being practised on innocent parties. If property is sold owing to the wrongful act and default of the mortgagee himself, he cannot be allowed to claim it on the ground of his own wrong, for no cause of action can arise out of the wrong."

It appears to me that the learned Judges held in that case that the facts disclosed fraud on the part of the mortgagee and accordingly they held that the mortgagor's rights as against the mortgagee had not been extinguished by the execution sale.

The point before us has been considered by a Bench of this Court in the case of *Gauri Shanker Sahu* v. *Sheotahal Gir*(2). In that case a tenant mortgaged his property with possession. The mortgagee in possession made default in payment of rent in consequence of which the holding was brought to sale by the landlord in execution of the rent decree and purchased upon such sale by the landlord himself. Later the property came into the hands of the original mortgagee. Thereupon the mortgagor instituted a suit for

(1) (1866) 10 Moo. Ind. App. 540.
(2) (1936) A. I. R. (Pat.) 434.

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redemption claiming that his right to redeem the property had revived when the property came into the hands of the original mortgagees. A Bench of this Court, however, held that the rent sale which had not been set aside, had extinguished the mortgagor's equity of redemption as the rent sale had not been proved to be fraudulent. In this case the learned Judges discussed the case of *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan*(1) and stressed the point that in that case fraud was practised and accordingly distinguished that case from the case before them. In the case before the Court nothing had been proved beyond the fact that the mortgagees had defaulted in the payment of the rent and the learned Judges refused to hold that the mortgagee was guilty of fraud merely on the ground that he had failed to pay his rent. As no fraud had been proved, the Bench held that the equity of redemption was for ever extinguished by the sale in execution of the rent decree and did not revive when the mortgagee eventually obtained the property. If the equity of redemption is extinguished, I cannot see how it can possibly revive. If there is a fraudulent sale, the most that can be said is that the mortgagor's rights are suspended and revive when the property comes into the hands of the fraudulent mortgagees. In my view the facts of the present case cannot be distinguished from the facts of the case, *Gauri Shanker Sahu* v. *Sheotahal Gir*(2), and that case must be followed.

The result, therefore, is that the plaintiff-mortgagors have failed to show that they have a right to redeem and accordingly I would dismiss this appeal with costs. The costs will be payable to the defendants first party.

AGARWALA, J.—I agree.

Appeal dismissed.

S. A. K.

(1) (1866) 10 Moo. Ind. App. 540.
(2) (1936) A. I. R. (Pat.) 434.

APPELLATE CIVIL.

Before Rowland and Manohar Lall, JJ.

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v.

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Mortgage—suit—absence of some persons having equity of redemption from the record—effect—suit, whether should be dismissed—decree, whether should be passed for the entire amount—Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 60, *effect of—Transfer of Property (Amendment) Act,* 1929 (*Act XX of* 1929)—*transfer* pendente lite—*assignee not made party—effect—Code of Civil Procedure,* 1908 (*Act V of* 1908), *Order XXII, rule* 10—*Bihar Money-Lenders Act,* 1938 (*Bihar Act III of* 1938), *section* 11, *whether controls the powers of Courts with respect to final decrees.*

In the event of transfer or assignment of an interest by a plaintiff (or decree-holder), the assignee has the right to apply to the court to be added or substituted as a plaintiff. If this is not done the suit will proceed at the instance of the original plaintiff and any decision arrived at, whether favourable or unfavourable, will be effective for or against the interest of the assignee.

It is not, moreover, open to a defendant-mortgagor to raise any objection against the plaintiff when the interest of the mortgagee in the litigation is throughout fully represented.

Whereas the general rule is that all persons having the equity of redemption ought to be brought on the record, the failure to bring any one of them on the record does not necessitate the dismissal of the suit if the court in his absence can deal with the matters in controversy so far as regards the rights and interest of the parties actually before it.

Musammat Waleyatunnissa Begam v. *Musammat Chalakhi*(1), followed.

The intention of the legislature in amending section 60 of the Transfer of Property Act, 1882, by the Amending Act of 1929, was not to alter but to declare the law.

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*Appeal from Original Decree no. 127 of 1936, from a decision of Rai Sahib Bhubaneshvar Prasad Pande, Subordinate Judge of Shahabad, dated the 13th May, 1935/18th April, 1935.

(1) (1930) I. L. R. 10 Pat. 841.

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Therefore, notwithstanding that the decree in a mortgage suit in which the interest of certain persons having the equity of redemption is not represented may be ineffective against such persons, the amount of the mortgage debt to be entered in the decree as payable for the redemption of the mortgaged properties will not be affected by the absence of those persons from the record.

Perumai Pillai v. *Raman Chettiar*(1) and *Shaha Saheb* v. *Sadashiva Supdu*(2), followed.

Musammat Waleyatunnissa Begam v. *Musammat Chalakhi*(3). distinguished.

The expression "no court shall pass a decree" in section 11 of the Bihar Money-Lenders Act, 1938, is not intended to control the powers of the courts with respect to final decrees and, therefore, where a preliminary mortgage decree has been passed, it is open to the court to pass a final decree, or on appeal to affirm a final decree, which would award interest beyond the limits laid down in section 11.

It is a recognised principle that where one construction of an enactment will be in accordance with the existing enactments and another construction will be repugnant to them, the courts will, where possible, adopt that reading which avoids repugnancy.

Appeal by the defendants.

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

M. Yusuf (with him *A. K. Mitra, I. B. Saran* and *Amir Ali Khan Warsi*), for the appellants.

Dr. D. N. Mitter and *S. N. Bose*, for the respondents.

ROWLAND, J.—This is an appeal from the decision of the Subordinate Judge of Shahabad directing the preparation of a final decree in a mortgage suit. The mortgage bond is dated 16th December, 1905, and was for repayment of a principal sum of Rs. 600 with interest thereon at two per cent. per month with half-

(1) (1916) I. L. R. 40 Mad. 968, F. B.
(2) (1918) I. L. R. 43 Bom. 575.
(3) (1930) I. L. R. 10 Pat. 341.

yearly rests It was secured on two revenue paying properties and one house. A payment of Rs. 75 on account of interest was made on the 26th December, 1906, and thereafter nothing further having been paid, the mortgagee brought the suit on 28th November, 1916. Attachment before judgment was effected on 9th December, 1916, as against a sum of Rs. 1,859-14-6 lying in the court at Sasaram as a deposit to the credit of defendant no. 1. The Subordinate Judge, Mr. Jadunandan Prasad passed a preliminary decree for sale on 31st May, 1918, which was followed by a final decree on 7th February, 1920. The decree-holder withdrew on 2nd July, 1920, the sum of Rs. 1,859-14-6 which had been attached before judgment. Thereafter one of the mortgaged properties, namely, the house was sold on 8th December, 1920, and the decree-holder was the purchaser himself at a price of Rs. 204-8-3. Subsequently he sold it on 21st November, 1922, for a sum of Rs. 500 to one Hakim Abdul Hamid. Thereafter one of the defendants, Jagarnath Singh, defendant no. 32 against whom the decree had been made *ex parte* applied under Order IX, rule 13, alleging that the summons had not been served upon him. On his application the entire decree was set aside on 17th December, 1923, and the suit restored for hearing. It was heard and the whole suit was dismissed on the 19th December, 1924, by Mr. Abdus Shakur, Subordinate Judge. From this dismissal an appeal was preferred to this Court and was numbered 51 of 1925. The appeal was decreed and preliminary decree was passed on 17th May, 1928. Pending the hearing of the appeal, however, three of the defendants had died, that is to say, on the 14th February, 1926, Mangroo Ray, defendant no. 19; on the 1st February, 1927, Narain Prasad, defendant no. 6 and in October, 1927, Ram Nath Singh, defendant no. 26. The death of these defendants was not reported to the court and no substitution of their heirs was made. After the passing of the High Court's decree, that is to say, on 3rd July,

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1928, the death occurred of another defendant, namely, Kalika Prasad, defendant no. 3. One more transaction may be mentioned and that is a transfer by the decree-holder on 14th February, 1926, of her entire rights to her daughter Champamani Bibi and son-in-law Bhan Kumar. The application for a final decree was made on 18th March, 1930, before the Subordinate Judge in the names of the original plaintiff decree-holder and the two transferees. The objections which have been taken in the main arise out of alleged defect of parties. There are however other objections affecting the amount as due to be entered in the final decree. Before the Subordinate Judge it had been contended that the applicants for a final decree were not entitled to maintain the suit. The Subordinate Judge has dealt with this contention which seems to have no foundation in anything that I can find in the Code of Civil Procedure. The rule is that in the event of transfer or assignment of an interest by a plaintiff or decree-holder, the assignee has the right to apply to the court to be added or substituted as a plaintiff. If this is not done, the suit will proceed at the instance of the original plaintiff and any decision arrived at whether favourable or unfavourable will be effective for or against the interest of the assignee. That is on all fours with the rules about transfer pendente lite as affecting the interest of defendant in property in suit; but as against the plaintiffs, it is not for the defendant to raise any objection when the interest of the mortgagee in the litigation was throughout fully represented. In April, 1932, Lalmani Bibi, the mother of Champamani Bibi, died and Champamani Bibi was substituted for her as her heir. The interest of the mortgagee was, therefore, completely represented throughout.

We were pressed much more seriously by Mr. Yusuf in respect of the second objection which refers to the death of defendants 6, 19 and 26 during the pendency of the appeal in this Court. No steps

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were taken to substitute their heirs and it necessarily follows that the appeal against them in this Court had abated by operation of law before the date on which the appeal was heard and decided. Therefore so far as these defendants are concerned, no decree could be passed against them and any decree that has been passed cannot affect their interest or the interest of their legal representatives.

Now it is argued that as the result of the death of these defendants the entire appeal abated and no decree in the suit could be passed at all because it is said a mortgage is one and indivisible and in order to obtain a mortgage decree there must be present on the record not only all the persons interested in the mortgage but all the persons having an interest in the equity of redemption. If one or more of these are missing, it is said, the suit is not properly constituted and no decree can be passed at all. The Subordinate Judge in dealing with this had held that though no final decree could be passed as against defendants 6, 19 and 26 or could affect their interest, nevertheless this would not prevent a final decree being passed in the suit with the reservation that it would affect only the interests of defendants other than those mentioned. This is in accordance with the decision of this High Court in *Musammat Waleyatunnissa Begum* v. *Musammat Chalaki*(1) where the principle laid down in previous decisions was accepted that whereas the general rule is that all persons having the equity of redemption ought to be brought on the record, the failure to bring any one of them on the record does not necessitate the dismissal of the suit if the Court in his absence can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. The argument was on similar lines with regard to Kalika Prasad, defendant no. 3 who died on 3rd July, 1928, after the disposal of the appeal in this Court. What happened in his case was that no steps were taken until the decree-holders moved the Subordinate Judge on 18th March,

(1) (1930) I. L. R. 10 Pat. 341.

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1930, to prepare a final decree. At that stage the death of this defendant was reported and a prayer was made to substitute his heirs and to continue the proceedings against them in his place. The Subordinate Judge held that the proceedings for a final decree being proceedings in the suit, the suit must be held to be still pending and to have abated as against this defendant; that it was too late to have the abatement set aside and accordingly the substitution was refused and proceedings continued as against the other defendants on the record. We have not here to consider the correctness of the Subordinate Judge's view of the law as no cross-objection has been presented against the decision so far as the substitution matter is concerned. Assuming the procedure followed by the Subordinate Judge to be correct, the position in respect of defendant no. 3 is now analogous to the position in respect of defendants 6, 19 and 26 above referred to.

It was next argued that assuming that the suit could proceed to a final decree against those defendants who remained on the record and were represented, nevertheless the Court could only pass a decree for something less than the amount due on the mortgage and reduced proportionately to the share in the mortgaged property of those defendants who were no longer on the record. It was also pointed out that there are at present no materials on which the Court can determine what is the share of those defendants in the mortgage security and what proportion it bears to the whole of the mortgage security. Therefore the argument was that the Court being unable to ascertain for what limited amount it will be able to pass a decree should pass no decree at all but should dismiss the entire suit. For the respondents it was argued that the mortgage being indivisible, every part of the mortgaged property is liable for the whole of the mortgage debt. This is a well-established principle; but an exception is introduced by section 60 of the Transfer of Property Act which recognises the right

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of a person entitled to a share only of the mortgaged property to redeem his own share only on payment of a proportionate part of the amount remaining due on the mortgage if the mortgagee or mortgagees has or have acquired the share of a mortgagor. The appellant claims that the benefit of this exception will accrue to the remaining mortgagors and persons interested in the mortgage security not only on acquisition by the mortgagee of a part of the mortgage security but on the release whether by act of the creditor or in any other way of a portion of the mortgage security. The exception was extended in circumstances of this nature in a number of decided cases in the Calcutta High Court; but the High Courts in India were by no means unanimous as to the effect of section 60 as it stood before the amendment made in 1929. In Allahabad, Madras and Bombay different views prevailed. I may refer for instance to the Full Bench decision of the Madras High Court in *Perumal Pillai* v. *Raman Chettiar*(1). It was apparently to settle the conflict between these different views that the amendment of the section was made in 1929, the word 'only' being inserted after 'except'. As I understand it, the intention of the legislature in making this amendment was not to alter but to declare the law. It is perhaps significant that section 63 of the Amending Act names certain sections in respect of which the amendments made in 1929 are not to have retrospective effect; but the section by which the amendment was made in section 60 of the original Act is not one of those sections. This fact is in favour of the view that the amendment of this section was intended to declare what the law was and was to be regarded as having always been. If I am right in this view then notwithstanding that any decree passed in this suit will be ineffective against defendants 3, 6, 19 and 26 and their representatives the amount of the mortgage debt to be entered in the decree as payable for the redemption of the mortgaged properties

(1) (1916) I. L. R. 40 Mad. 968, F. B.

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will not be affected by the absence of those defendants from the record. It is suggested that the decision above cited, *Musammat Waleyatunnissa's* case(1), follows the Calcutta decisions in the view that the mortgage debt is to be proportionately reduced; but in that case that question was not directly in controversy. Had it been so and had we been disposed to take a different view it might have been necessary to refer the question to a larger Bench; but I find that yet another defendant died during the pendency of these proceedings and the consequences of his death were considered by Das and Allanson, JJ. in the course of their judgment dated the 17th May, 1928. That decision is inter partes and must operate as res judicata for the purpose of this litigation both on matters of fact there decided and on the view of law there taken. Das, J. accepted the view in *Shaha Saheb* v. *Sadashiva Supudu*(2) and held that there was no question of abatement of the entire suit and also proceeded to pass a decree for the entire mortgage debt without any reduction in consequence of the absence of one of the defendants. We must, therefore, follow that precedent and this objection to the decree must fail.

The next point was with regard to the allowance to which the defendants are entitled in respect of realizations made since the institution of the mortgage suit. There are two items to be considered. One is the sale of the house on 8th December, 1920. This was put up to auction on foot of the mortgage decree which had been passed by the Subordinate Judge on 31st May, 1918, preliminary and 7th February, 1920, final decree. The defendants in the present proceeding contended that an allowance should be made of the full value of the house and they led some evidence as to its cost of construction according to which it should have been valued at Rs. 3,597. The witness who was called to prove the estimate of the cost of

(1) (1930) I. L. R. 10 Pat. 341.
(2) (1918) I. L. R. 43 Bom. 575.

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construction did not impress the Subordinate Judge favourably. Moreover, if we were to assume that the house had cost so much to construct, it would still remain a matter of uncertainty how much allowance ought to be made for depreciation before arriving at its value. On the other hand it appears in evidence that the house was within two years from its purchase by the plaintiff sold for Rs. 500. That amount may safely be taken as the value of the house. The respondents before us did not resist the claim of the defendant that allowance should be made for the value of the house by entering satisfaction of the claim as Rs. 500 instead of Rs. 204-8-6; and the allowance will be made accordingly. In this connection the appellants revived the argument that the mortgagee by his purchase of this house acquired a part of the mortgaged property thereby giving the defendants a right to proportional reduction of the mortgage debt to be decreed. But the purchase of the house was not by private contract or in execution of a third party's money decree in which case such a contention must succeed. It was a purchase on the plaintiff's own decree in respect of this very debt. Therefore it can have effect only as a part of satisfaction of the claim and to the extent that I have indicated.

The other item is a sum of Rs. 1,859-14-6 which was in deposit, was attached before judgment on 9th December. 1916, and was paid out to the decree-holder on 2nd July, 1920. The Subordinate Judge has allowed credit for this as payment made towards the mortgage debt on 2nd July, 1920, the day when it was drawn out. The appellant contends that credit should be given so as to stop interest running to this extent with effect from the date on which attachment before judgment was effected so that the money was not available for the purposes of the debtor. We cannot regard this sum as one which ought to be deemed to have been paid to the plaintiff in 1916 when it was not at that time in his power to receive the money; nor can we regard it as having been taken beyond the

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reach of the debtor at that date because it was open to him to give sufficient security to the court to obtain permission himself to draw the money. But the money was available for payment to the decree-holder at any time after the passing of the final decree on 7th February, 1930. If he waited longer that was entirely at his choice. We think, therefore, that credit should be allowed for this amount as for a payment made on 7th February, 1920, instead of 2nd July, 1920. With these modifications the calculation of the amount for which the property is to be sold appears to us to be correct.

We have now to deal with one more contention of the appellants that calculation of the amount is to be made on an entirely different basis in consequence of the passing of Bihar Act III of 1938, the Bihar Money-Lenders Act and Bihar Act V, the Bihar Money-Lenders (Amendment and Application to pending suits and proceedings) Act, 1938. Reference is made to section 11 of the Act in which it is enacted that notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract, no Court shall..... pass a decree for an amount of interest for the period preceding the institution of the suit which, together with any amount already realized as interest through Court or otherwise, is greater than the amount of the loan advanced, or, if the loan is based on a document, the amount of loan mentioned in the document on which the suit is based. It is said that this section precludes the Court from passing a decree for more than Rs. 600 by way of interest. (The Amending Act declared that this and the three following sections would apply to appeals as well as suits and to litigations instituted before as well as after the commencement of the Act.) An objection is taken for the respondents that section 11 does not mean this and that if it does, it is repugnant to the provisions of certain enactments of the Indian legislature and is to the extent of that repugnancy void. To appreciate

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these contentions I must refer to the Government of India Act, 1935, sections 100 and 107 and Schedule VII. In Schedule VII there are three lists. The first is called the Federal List and with regard to the subjects of that List it is not competent to the Provincial Legislature to pass any laws. There is also a Provincial Legislative List of matters with respect to which the Provincial Legislature has and the Central Legislature has not power to make laws for a province There is thirdly a concurrent Legislative List of matters with respect to which a Federal Legislature and also a Provincial Legislature has power to make laws. Money-lenders and money-lending are referred to in Item 27 of the Provincial List in Schedule VII; but Civil Procedure Item no. 4, Contracts Item 10, jurisdiction and powers of all Courts with respect to any of the matters in this List item no. 15 are in the concurrent Legislative List. Now the scheme of the Act appears to be that when a Provincial Legislature makes laws regarding any matter in the Provincial Legislative List those laws will prevail notwithstanding that they may be repugnant to a previous all India Act. For instance, the Usury Laws Repeal Act, India Act XXVIII of 1855 states in the clearest terms that the amount of interest shall be adjudged or decreed at the rate agreed on by the parties. But the Bihar Money-Lenders Act in the section I have quoted imposes a limit on the interest that may be decreed, notwithstanding anything to the contrary in the contract or in any other law. The apparent repugnancy is not necessarily fatal to the validity of the Provincial Act if the subject is one on the Provincial Legislative List; and " Money-lenders and money-lending " is on that list. Prima facie, therefore, the Bihar Money-Lenders Act must prevail within the Province, subject to what I have next to say.

Section 107(*1*) of the Government of India Act enacts that when a Provincial Legislature passes a law regarding a matter in the concurrent Legislative

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List then if it is repugnant to an Act of the India Legislature dealing with the matter, then the existing India law is to prevail and the provincial law shall to the extent of the repugnancy be void unless the procedure indicated in the succeeding sub-sections has been followed. That procedure is to reserve the provincial law for the consideration of the Governor-General or for the signification of His Majesty's pleasure. When that has been done and the law has received the assent of the Governor-General or of His Majesty, then the provincial law shall in that province prevail. Now it has been argued before us that the expression in section 11 " no Court shall pass a decree " is intended to control the powers of the courts not only with respect to preliminary but also with respect to final decrees and that notwithstanding that a preliminary decree may have been passed, it is not open to the court to pass a final decree or on appeal to affirm a final decree which would award interest beyond the limits laid down in section 11. I feel some difficulty in reading section 11 in this very wide sense. It seems more reasonable to assume that it refers to the passing of a fresh decree and not merely to the carrying out of a decree already passed. If we were to read the section in the wide sense contended for, it would seem repugnant to section 97 of the Code of Civil Procedure as well as to several of the rules in Order XXXIV of the Code. It is a recognised principle that where one construction of an enactment will be in accordance with the existing enactments and another construction will be repugnant to them, the courts will, where possible, adopt that reading which avoids repugnancy. On that principle I think section 11 should be construed in the narrower sense as not intended to affect a decree already passed and, therefore, it seems that we cannot go behind the preliminary decree that was passed in this Court in 1928 and the requirement of the Code that a final decree should be prepared in accordance with it. It may be observed in this connection that

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this is not a money suit to recover debt from a debtor but a mortgage suit and the decree that is to be passed is not a decree requiring judgment-debtors to pay any certain amount but a decree for sale of the property unless the persons interested in the property make sufficient payment to redeem it. On this view the defendants can get no advantage from the Bihar Money-Lenders Act, 1938. It is unnecessary to decide whether if this had been a money suit there would have been a repugnancy between section 11 of the Bihar Money-Lenders Act and the Civil Procedure Code or any other India Act against which section 11 would not prevail.

In the course of the hearing it was argued before us that the present respondents were the subject of a personal disqualification from realizing the entire decretal amount. Reliance in this connection was placed on section 26 of the Indian Stamp Act; but I find nothing in that Act to assist the appellants. The section only applies where the amount or value of the subject-matter of any instrument chargeable with *ad valorem* duty cannot be ascertained at the date of its execution. Now the argument was that in the deed of gift by which Lalmani Bibi assigned her interest to the other plaintiffs this bond in suit was mentioned and its value was estimated at Rs. 10,000 and the argument is that this precludes the plaintiff as assignee from claiming more than Rs. 10,000. This is not a case in which section 26 applies at all. The parties to an assignment of a debt are also under no compulsion to value it at the entire amount due. It may well be that in consequence of a risk of non-realization the value of a debt is considerably less than its face value. There is nothing in the Stamp Act to limit the right of the parties to value a chose in action at any amount they may think fit or to penalise them for doing so. I should add, that appellants' Advocate could not tell us what was the value of the stamp on the deed of gift or show us that a stamp of higher

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value would have been needed had a higher valuation been placed on this debt.

Another objection is taken that no decree can be passed against the property of the appellants because those properties are not mentioned in the preliminary decree. This matter has a history. The mortgage security entered in the mortgage bond was a three-annas share of the entire mahal Amawan asli mai dakhli, tauzi 2075, sadr jama Rs. 1,113-6-6. In the plaint a number of villages are mentioned with specifications of the khewats as being portions of the mortgaged property. The preliminary decree as at first framed in the High Court contained a list of villages in accordance with the list in the plaint; but on an application by the defendants a direction was given that the description of the mortgaged properties in the decree should be amended to correspond with the description in the bond. This was done. The appellants contend that the effect of this was to exempt from sale the properties in the list which has been struck out of the decree. That is not so. The effect is that nothing has been decided as to what villages and shares out of those in the list in the plaint are comprised within the mortgage security of which a general description was given in the bond and repeated in the preliminary decree. That question can obviously not be decided in this appeal. It must remain to be determined by the executing court.

In the result all the objections taken by the appellants fail except with regard to the valuation of the house and the date from which credit will be allowed in respect of the sum of Rs. 1,859-14-6. Let a decree be prepared in accordance with the directions given above. It is to be noted that the decree is not executable against the mortgaged properties in the hands of defendants 3, 6, 19 and 26. If on any part of the mortgaged property being put up to sale it is claimed before the Subordinate Judge to be the property of one of those defendants, the Subordinate Judge will hear

and decide the matter. The respondents are entitled to their costs of this appeal to be realised from the mortgaged property.

MANOHAR LALL, J.—I agree.

S.A.K.

Appeal partly allowed.

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APPELLATE CIVIL.

Before Khaja Mohamad Noor and Chatterji, JJ.

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v.

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Aug. 31. *Sep.* 1, 2, 5, 6, 7, 22.

30 Cf. 613.

*Mortgage—mortgagor's interest attached—attachment, whether creates any interest in or charge upon attached property—attaching creditor, whether is necessary party to mortgage suit—attachment followed by sale during pendency of mortgage suit—*lis pendens, *applicability of—Transfer of Property Act,* 1882 (*Act IV of* 1882), *section* 52—*Code of Civil procedure,* 1908 (*Act V of* 1908), *Order XXI, rules* 54, 100, 103 *and Order XXXIV, rule* 1—*suit governed by rule* 103—*limitation—Limitation Act,* 1908 (*Act IX of* 1908), *Schedule* 1, *article* 11*A*.

An attachment does not create any title in or charge upon the attached property.

Harnandan Marwari v. *Pran Nath Ray*(1), *Firm Ganga Ram Gulraj Ram* v. *Muktiram Marwari*(2), *Moti Lal* v. *Karrabuldin*(3), *Raghunath Das* v. *Sundar Das Khetri*(4), *Fredrick Peacock* v. *Madan Gopal*(5), *C. L. Kiernander* v. *Benimadhab Khettri*(6), *Manickam Chettiar* v. *Income-tax Officer, Madura*(7), *Jitmand Ramanand* v. *Ramchand Nandram*(8) and *Ram Bhaj Datta* v. *Ram Das*(9), followed.

* Appeal from Original Decree no. 57 of 1935, from a decision of Babu Akhileshvar Prashad, Subordinate Judge of Godda, dated the 16th April, 1934.

(1) (1920) 2 Pat. L. T. 240.
(2) (1931) 12 Pat. L. T. 639.
(3) (1897) I. L. R. 25 Cal. 179; L. R. 24 Ind. App. 170.
(4) (1914) I. L. R. 42 Cal. 72; L. R. 41 Ind. App. 251.
(5) (1902) I. L. R. 29 Cal. 428, F. B.
(6) (1930) I. L. R. 58 Cal. 598.
(7) (1938) A. I. R. (Mad.) 360, F. B.
(8) (1905) I. L. R. 29 Bom. 405.
(9) (1922) I. L. R. 3 Lah. 414.

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Suraj Bansi Koer v. *Sheo Prashad Singh*(1), *Madho Prasad* v. *Mehrban Singh*(2) and *Gummidelli Anantapadmanabhaswami* v. *Official Receiver of Secundrabad*(3), distinguished.

An attaching creditor coming under clause (*f*) of section 91 of the Transfer of Property Act, 1882, as it stood before the amending Act of 1929, does not stand in the same position as a person coming within clause (*b*) of that section.

A fortiori an attaching decree-holder does not fall within the class of persons contemplated by Order XXXIV, rule 1, Code of Civil Procedure, 1908.

C. L. Kiernander v. *Benimadhab Khettri*(4), and *Chamiyappa Tharagan* v. *Rama Ayyar*(5), followed.

Lakhpat Rai v. *Fakhruddin*(6), dissented from.

Ghulam Hussain v. *Dina Nath*(7), distinguished.

In March, 1917, certain creditors of the mortgagor attached certain shares in the mortgaged property in execution of their money decree, and purchased the same in execution on the 9th of September, 1918. In the meantime, on the 1st of February, 1918, the mortgagees brought the mortgage suits without impleading the attaching decree-holders as defendants. The mortgagees obtained decrees on the 18th of December, 1918, and having purchased the properties in execution on the 28th of May, 1923, obtained delivery of possession in December, 1923. The attaching decree-holders, who had already purchased the mortgaged property, being thus dispossessed by the mortgagee-purchasers filed an application under Order XXI, rule 100, Code of Civil Procedure, 1908. The application was dismissed on the 4th of August, 1927, and on the 30th of July, 1930, the attaching decree-holders filed the present suit claiming, among other reliefs, possession of the mortgaged property upon redemption of the mortgages on the ground that they as attaching decree-holders were necessary parties to the mortgage suits, and not having been made parties their rights were not affected by the mortgage decrees and sale.

(1) (1879) I. L. R. 5 Cal. 148; L. R. 6 Ind. App. 88.
(2) (1890) I. L. R. 18 Cal. 157; L. R. 17 Ind. App. 194.
(3) (1933) L. R. 60 Ind. App. 167.
(4) (1930) I. L. R. 58 Cal. 598.
(5) (1920) I. L. R. 44 Mad. 232.
(6) (1917) I. L. R. 39 All. 536.
(7) (1901) I. L. R. 23 All. 467.

Held, (*i*) that the attaching decree-holders were not necessary parties to the mortgage suits.

(*ii*) that whatever rights the plaintiffs had as attaching decree-holders came to an end after they became purchasers in September, 1918;

(*iii*) that the rights of the plaintiffs as purchasers were affected by *lis pendens*;

(*iv*) that the suit was essentially one under Order XXI, rule 100, and was therefore barred by limitation under article 11A of the Limitation Act, 1908.

Appeal by the plaintiffs.

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

L. K. Jha (with him *M. N. Pal* and *Kameshwar Dayal*), for the appellants.

Dr. D. N. Mitter (with him *N. C. Roy*, *G. N. Mukharji* and *P. B. Ganguli*), for the respondents.

CHATTERJI, J.—The material facts of this case may be briefly stated as follows: By three deeds of mortgage executed in 1909 and 1910 the defendants third party hypothecated their entire interest in the two estates, namely, Mahal Ghat Lachhmipur and Mahal Kuraba, mentioned in schedule *A* of the plaint to the second group of the defendants first party who may be called the Mahton defendants. Subsequently these Mahton defendants assigned their 8-annas interest in the mortgages to the first group of the defendants first party who may be called the Marwari defendants. The present plaintiffs in execution of a money decree against the defendants third party attached certain shares in the said two estates on the 26th of March, 1917, and purchased the same on the 9th of September, 1918, and obtained delivery of possession on 16th of November, 1919. In the meantime on the 1st of February, 1918, the defendants first party brought two mortgage suits on the aforesaid mortgage deeds against the defendants third party and obtained decrees on the 18th of December, 1918. In execution of these decrees they purchased the

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mortgaged properties on the 28th of May 1923, and obtained delivery of possession on the 21st and 23rd of December, 1923. The plaintiffs being thus dispossessed filed an application under Order XXI, rule 100, of the Civil Procedure Code, before the Subordinate Judge of Godda, but meanwhile the settlement operations in Santal Parganas having been notified, the application was ultimately transferred to the settlement court for disposal by order of this Court in view of the special provisions of law in Santal Parganas. Eventually the application was dismissed by the order of the Divisional Commissioner, dated the 4th of August, 1927. The plaintiffs thereupon instituted the present suit on the 30th of July, 1930, claiming, among other reliefs, possession of the disputed properties upon redemption of the mortgages on the ground that they as attaching decree-holders were necessary parties to the mortgage suits and not having been made parties, their rights were not affected by the mortgage decrees and sale. The defendants second party were impleaded as they got themselves recorded in the settlement proceedings as co-sharers with the defendants first party.

It may be mentioned here that the defendants third party by virtue of a compromise with the defendants first party got the lands specified in schedule *B* of the plaint which appertain to Mahal Ghat Kuraba and these lands were recorded during the settlement proceedings as their raiyati lands. The plaintiffs sought a declaration that such record was illegal and the defendants third party could not acquire any raiyati right in those lands. The plaintiffs' claim with regard to these lands, though negatived by the Court below, has not been pressed in this appeal and no further reference to it will be necessary.

The main contest in the suit was by the defendants first party whose defence, inter alia, was that the plaintiffs were not necessary parties to the mortgage suits, that the mortgage decrees and the sale held in execution thereof are binding on them,

that their purchase during the pendency of the mortgage suits is affected by *lis pendens*, that they have no right to maintain this suit and that the suit is barred by limitation.

The learned Subordinate Judge has given effect to all these defences and dismissed the suit. Hence this appeal by the plaintiffs.

The most important point for consideration in this appeal is whether the plaintiffs as attaching decree-holders were necessary parties to the mortgage suits under Order XXXIV, rule 1, Civil Procedure Code. The learned Advocate Mr. L. K. Jha appearing for them contends, in the first place, that an attachment followed by an order for sale creates a charge on the attached properties and therefore an attaching decree-holder is a necessary party to a mortgage suit and, in the second place, that under the specific provision of clause 91(*f*) of the Transfer of Property Act as it stood before the amendment of 1929 an attaching decree-holder had the right to redeem and, therefore, he had an interest in the right of redemption within the meaning of Order XXXIV, rule 1, of the Civil Procedure Code. The nature and effect of an attachment will have to be determined with reference to the provisions of the Civil Procedure Code. The mode of effecting attachment of immovable property is prescribed in Order XXI, rule 54, of that Code as follows:

> "Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge."

The effect of an attachment, as laid down in section 64 of the Code, is that

> "any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment."

It is reasonably plain that an attachment merely prevents private alienations; it does not affect court sales. If this is so, it follows as a necessary corollary

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that an attachment does not create any charge upon the attached property, otherwise a court sale would be affected by such charge. Take, for instance, a case where two decree-holders have attached the same property in execution of their respective money decrees but for some reason or other the decree-holder whose attachment is later succeeds in selling the property, the other decree-holder whose attachment is prior cannot again bring the property to sale and if he does so the sale will be quite ineffective. This is a self-evident proposition, and if any authority is needed, a reference may be made to the decisions of this Court in *Harnandan Marwari* v. *Pran Nath Ray*(1) and *Firm Ganga Ram Gulraj Ram* v. *Muktiram Marwari*(2). The contention that an attachment creates a charge is also inconsistent with the provisions of section 73 and Order XXI, rule 57, of the Civil Procedure Code. Section 73 which relates to rateable distribution lays down that

> "Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons."

Under this section the proceeds of a sale brought about by an attaching decree-holder are made proportionately available to another decree-holder who may have just put in his application for execution immediately before the sale and had no time to take out attachment. What then becomes of the charge supposed to be created by the attachment? Again Order XXI, rule 57, lays down that

> "Upon every order dismissing an execution case in which there is an attachment, the attachment shall cease unless the Court otherwise directs."

The result would have been quite otherwise if the attachment really created a charge. Their Lordships of the Judicial Committee in the cases of *Moti Lal* v. *Karrah-ul-din*(3) and *Raghunath Das* v. *Sundar*

(1) (1920) 2 Pat. L. T. 240.
(2) (1931) 12 Pat. L. T. 639.
(3) (1897) L. R. 24 Ind. App. 170.

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Das Khetri(1) have held that attachment merely prevents private alienation but does not confer any title. This is also the view adopted by the High Courts of Calcutta, Madras, Bombay and Lahore—*see Frederick Peacock* v. *Madan Gopal*(2); *C. L. Kiernander* v. *Benimadhab Khettri*(3); *Manickam Chettiar* v. *Income-tax Officer, Madura*(4); *Jitmand Ramanand* v. *Ramchand Nandram*(5) and *Ram Bhaj Datta* v. *Ram Das*(6).

Mr. L. K. Jha in support of his contention that an attachment followed by an order for sale creates a charge on the attached property relies on the decisions of the Judicial Committee in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*(7), *Madho Prashad* v. *Mehrban Singh*(8) and *Gummidelli Anantopadmanabhaswami* v. *Official Receiver of Secunderabad*(9). In *Suraj Bunsi Koer's* case(7) the question before their Lordships was whether when the undivided interest of a member of a joint Hindu family governed by the Mitakshara School was attached and ordered to be sold in execution of a money decree against him and he died before the property was actually sold, his interest passed by the sale to the auction-purchaser or by survivorship to the surviving coparceners. Their Lordships held that the effect of the execution sale was to transfer the judgment-debtor's undivided share to the purchasers, the execution proceedings having at the time of the judgment-debtor's death gone so far as to constitute in favour of the execution creditor a valid charge thereon which could not be defeated by the judgment-debtor's death before the actual sale. The effect of the sale had to be considered with reference to the peculiar constitution of a joint Mitakshara family. Under the Mitakshara law

(1) (1914) L. R. 41 Ind. App. 251.
(2) (1902) I. L. R. 29 Cal. 428. F. B.
(3) (1930) I. R. R. 58 Cal. 598.
(4) (1938) A. I. R. (Mad.) 360.
(5) (1905) I. L. R. 29 Bom. 105.
(6) (1922) I. L. R. 3 Lah. 414.
(7) (1879) L. R. 6 Ind. App. 88.
(8) (1890) L. R. 17 Ind. App. 194.
(9) (1933) L. R. 60 Ind. App. 167.

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so long as the family is joint no member has any defined share nor can he alienate his own undivided interest for payment of his personal debt. He has, however, a right to obtain partition of his share which he can enforce at any time. As a rule of equity, justice and good conscience it has been held from the earliest times that a creditor who has obtained a decree for money against a member of a joint Mitakshara family may realise his decree by attachment and sale of his judgment-debtor's undivided interest in the family properties during his lifetime and the auction-purchaser as the representative in interest of the judgment-debtor can enforce the right to obtain partition which primarily belonged to the latter. Where, however, the judgment-debtor dies before the decree is executed, his interest passes by survivorship to the surviving coparceners and is not available for the satisfaction of the decree. To determine the limits within which the rights of the judgment-creditor can be enforced against an undivided share of the judgment-debtor the judicial decisions have laid down that the judgment-debtor's undivided share is made available if it has been attached in execution during his life-time, so that if he dies after the attachment his undivided share will not pass by survivorship to the surviving coparceners but will be liable to be sold under the attachment. To this extent their Lordships in deciding *Suraj Bunsi Koer's* case(1) held that the attachment created a charge on the judgment-debtor's undivided share. Of course in that case there was not only an attachment but an order for sale before the death of the judgment-debtor, and great stress is laid upon this fact by Mr. Jha because, as he points out, in the present case the order for sale was passed on the 30th of January, 1917, that is, prior to the institution of the mortgage suits. To my mind their Lordships in *Suraj Bunsi Koer's* case(1) referred to the order for sale simply to emphasise the fact that the execution proceeding had passed through all the necessary stages preceding the sale when the judgment-debtor died. The real

(1) (1879) L. R. 6 Ind. App. 88.

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determining factor, however, was the attachment, because by virtue of an attachment the decree-holder acquires a right to have the attached property kept in *custodia legis* for the satisfaction of his judgment-debt. Thus *Suraj Bunsi Koer's* case(1) is no authority for the broad proposition that attachment creates a charge on the attached property. With reference to this case Mr. Mayne in his treatise on Hindu Law, 9th edition, at page 450, observes as follows :—

"In speaking of an attachment as constituting a 'charge' in favour of the judgment-creditor, their Lordships were obviously using the term 'charge' in a general and not in a strictly legal sense."

In the case of *Madho Prasad* v. *Mehrban Singh*(2) the facts were quite different. There a suit was brought by the surviving coparcener to set aside a sale of joint family property affected by a deceased coparcener without his consent and without any justifying necessity. Their Lordships held, affirming the lower Court's decision, that the sale was invalid under the Mitakshara law and on the death of the alienating coparcener his undivided interest passed by survivorship to the plaintiff. In the course of their judgment their Lordships referred to the decision in *Suraj Bunsi Koer's* case(1) which was relied upon by the appellant there in support of his contention that he (the purchaser) was at least entitled to an equitable charge on his deceased vendor's share for the consideration paid by him. As regards the next case, *Gummidelli* v. *Official Receiver of Secunderabad*(3), no doubt, their Lordships referred to the decision in *Suraj Bunsi Koer's* case(1) and made certain observations which may perhaps be construed to have shaken the authority of the decisions in *Moti Lall* v. *Karrabuldin*(4) and *Raghunath Das* v. *Sunder Das Khetri*(5),

(1) (1879) L. R. 6 Ind. App. 88.
(2) (1890) L. R. 17 Ind. App. 194.
(3) (1933) L. R. 60 Ind. App. 167.
(4) (1897) L. R. 24 Ind. App. 170.
(5) (1914) L. R. 41 Ind. App. 251.

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but their Lordships in view of the facts of the particular case before them expressly said that it was irrelevant to consider whether attachment created a lien or charge or conferred title. The decisions in *Moti Lall* v. *Karrabuldin*(1) and *Raghunath Das* v. *Sunder Das Khetri*(2) definitely lay down that an attachment merely prevents private alienation but does not confer any title, and so long as these decisions stand the courts in India are bound to follow them. Thus none of the decisions of the Judicial Committee cited by Mr. Jha really supports his contention. He also refers to Sir Rashbehary Ghosh's Mortgage, fifth edition, at page 146, where the following passage occurs :—

"It does not fall within the scope of the present lecture to discuss the subject at length; and I will only content myself with the remark that though an attachment does not confer any title but only prevents alienation, it cannot be said that it creates no kind of charge; though there are certain expressions in some reported cases which if detached from the context might lend support to the notion that an attachment does not operate as a charge on the property."

The charge contemplated here cannot, in my opinion, be said to be a legal charge which would operate with all its legal consequences in all cases. At best it amounts to an equitable charge which serves the equities in favour of the attaching creditor according to the necessities of the case, the whole object of the attachment being to make the attached property available for the satisfaction of the decree. Upon the foregoing considerations I am not prepared to hold that an attachment creates any title in or charge upon the attached property—by charge I mean legal charge.

Mr. Jha's next contention is based on old section 91, clause (*f*), of the Transfer of Property Act. That

(1) (1897) L. R. 24 Ind. App. 170.
(2) (1914) L. R. 41 Ind. App. 251.

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section which was in force at the time of institution of the mortgage suits in question stood as follows :—

" Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property :—

(a) any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property;

(b) any person having any interest in or charge upon, the right to redeem the property;

(c) any surety for the payment of the mortgage-debt or any part thereof;

(d) the guardian of the property of a minor mortgagor on behalf of such minor;

(e) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot;

(f) the judgment-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property;

(g) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property."

The present section 91 after the amendment of 1929 stands as follows :—

" Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely :—

(a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;

(b) any surety for the payment of the mortgage-debt or any part thereof; or

(c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property."

Here it will be necessary to refer to the provisions of Order XXXIV, rule 1, which are as follows :—

" Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage."

Under the express provision of the old section 91, clause (f), an attaching decree-holder would be entitled to redeem or institute a suit for redemption,

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But still the question remains whether such right would amount to an interest in the right of redemption within the meaning of Order XXXIV, rule 1, of the Civil Procedure Code. Apparently it may look as if a person who is entitled to redeem has an interest in the right of redemption. But upon a comparison of the clauses (*b*) and (*f*) of the old section 91 it will appear that the legislature recognised a distinction which puts an attaching decree-holder in a different position from a person having an interest in the right of redemption, otherwise the separate provision in clause (*f*) for the attaching decree-holder, if really he could come under clause (*b*) as a person having an interest in the right of redemption, would be quite redundant. Section 91 enumerates the class of persons entitled to redeem and amongst them those who have an interest in, or charge upon, the property or the right of redemption are put under clauses (*a*) and (*b*) of the old Act which correspond to clause (*a*) of the new Act. Such persons only, in my opinion, come under the purview of Order XXXIV, rule 1, of the Civil Procedure Code. Looking to the plain phraseology of the different clauses of old section 91 of the Transfer of Property Act, it is rather difficult to hold that an attaching creditor coming under clause (*f*) has the same interest as a person coming under clause (*b*) of that section. *A fortiori* an attaching decree-holder does not fall within the class of persons contemplated by Order XXXIV, rule 1, of the Civil Procedure Code. I am supported in this view by the decision of the Calcutta High Court in *C. L. Kiernander* v. *Benimadhab Khettri*(1) and of the Madras High Court in *Chamiyappa Tharagan* v. *Rama Ayyar*(2). A contrary view appears to have been taken by the Allahabad High Court in *Ghulam Husain* v. *Dina Nath*(3) and in *Lakhpat Rai* v. *Fakhr-ud-din*(4). The case of *Ghulam Husain* v. *Dina Nath*(3) was decided

(1) (1930) I. L. R. 58 Cal. 598.
(2) (1920) I. L. R. 44 Mad. 232.
(3) (1901) I. L. R. 23 All. 467.
(4) (1917) I. L. R. 39 All. 536.

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entirely on equitable consideration as will appear from the following passage from the judgment of Aikman, J. at page 471 :—

"The defendants-respondents in their suit upon their mortgage transgressed the provisions of section 85 of the Transfer of Property Act by not impleading a person of whose interest in the mortgaged property they had notice, namely, the attaching creditor. He not being a party, and the mortgagor confessing, the case was rushed through, and a decree for possession passed in favour of the respondents. Had the respondents complied with the provisions of the law, and had the usual period been fixed within which redemption might be effected, it cannot be doubted that the plaintiff appellant here who bought the judgment-debtor's interest in the property six days after the date of the respondents' decree, would have availed himself of the right to redeem. In my opinion it would be inequitable to hold that he had been deprived of that right by the illegal action taken by the respondents."

In the other case [*Lakhpat Rai* v. *Fakhr-ud-din*(1)] the decision proceeded on the ground that the right to redeem which was conferred on the persons mentioned in old section 91 of the Transfer of Property Act seemed to be the same right to redeem in all cases—the same right which the mortgagor himself had, without considering the further question whether all the persons mentioned in the section were persons having an interest in the property comprised in the mortgage within the meaning of section 85 of the Transfer of Property Act (now Order XXXIV, rule 1, of the Civil Procedure Code), that section being applicable to the facts of that case. It was practically assumed in that case that an attaching decree-holder, by virtue of the right conferred on him by old section 91, clause (*f*), of the Transfer of Property Act, was a necessary party to a mortgage suit.

(1) (1917) I. L. R. 39 All. 536.

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From this view I express my respectful dissent. In the present case the plaintiffs, in my opinion, were not necessary parties to the mortgage suits in question.

There is a still greater difficulty in the way of the plaintiffs. Whatever rights they might have as attaching decree-holders, their attachment and with it those rights came to an end when they became the purchasers of the attached properties on the 9th of September, 1918. After their purchase they could no longer exercise their right of redemption as attaching decree-holders. It was, however, open to them, as purchasers to exercise that right. Their purchase was made during the pendency of the mortgage suits and the sale proclamation (exhibit G-1) shows that the sale was held subject to the encumbrances of the defendants first party. The mortgaged properties were, as already stated, sold in execution of the mortgage decrees on the 28th of May, 1923. The plaintiffs had thus sufficient opportunity to redeem the mortgages. The present suit has been brought by them in their capacity of purchasers, their rights as attaching decree-holders having already vanished. It is now futile for them to claim the right of redemption which has long been extinguished by the mortgage sale. In this view the plaintiffs' claim is entirely untenable.

Coming then to the question of *lis pendens*, the crucial point of time is the date of the institution of the mortgage suits. If, as the plaintiffs contend, they by virtue of their attachment had a charge on the attached properties and were consequently necessary parties to the mortgage suits, I do not see how *lis pendens* applies. No doubt the plaintiffs' purchase was during the pendency of the mortgage suits but if they had pre-existing rights quite independent of their rights as purchasers, those rights could not be affected by the result of the suit to which they were not parties. Dr. D. N. Mitter, on behalf of the respondents, relying on the decision of

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the Judicial Committee in *Parmeshari Din* v. *Ramcharan*(1), contends that the plaintiffs' purchase was affected by *lis pendens* even though they might have a charge in their favour created by the attachment. I am afraid the case cited does not support this contention at all. In that case both the attachment and sale were subsequent to the preliminary mortgage decree and were therefore held to be subject to *lis pendens*. The point taken by Dr. Mitter is that *lis* in a mortgage suit continues until the mortgaged properties are sold. This is undoubtedly so, but a person acquiring an interest in the mortgaged properties subsequent to the preliminary decree cannot be heard to say that he should have been impleaded in the mortgage suit. However, I have held that the attachment did not create any charge and whatever rights it might have created came to an end when the plaintiffs purchased the properties. In this view their purchase was obviously affected by *lis pendens*. They purchased the right, title and interest of their judgment-debtors who were parties to the mortgage suits and as their representatives in interest would be certainly bound by the decrees passed in those suits.

The last question is that of limitation. Dr. Mitter contends that the suit is barred by limitation by the one year's rule prescribed by Article 11A as well as Article 12 of the Limitation Act. As regards the latter Article, the contention is that the plaintiffs ought to have prayed for setting aside the sale within one year. But this aspect of the case does not arise. The plaintiffs' case is that they are not bound by the sale at all and in that case they were not required to set it aside and, therefore, no question of limitation would arise. On the other hand, if the plaintiffs are bound by the sale, their case must fail on the merits. As regards Article 11A of the Limitation Act, the question turns on whether the present suit is one

(1) (1937) 18 Pat. L. T. 615, P. C.

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brought under the provisions of Order XXI, rule 103, of the Civil Procedure Code. That rule runs thus :—

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

Mr. Jha contends that the present suit does not come within this rule because it is really a suit for redemption and not for establishment of the right to the present possession of the property. This contention, though it may at first sight appear to have some force, is quite fallacious. The order (exhibit 5) passed in the proceeding under rule 100 shows that there the plaintiffs claimed possession on exactly the same grounds as in the present suit with the only difference that in the present suit there is a prayer for redemption which was not and could not be made in the previous proceeding. The right which was asserted there and is also claimed here is based on the fact that the plaintiffs, not being parties to the mortgage decree and sale, are not bound by the same and therefore they, as auction-purchasers being in rightful possession of the disputed properties, could not be dispossessed therefrom by the defendants first party. The mere fact that in the present suit the plaintiffs seek to recover possession upon redemption can be no ground for holding that they do not claim the right to the present possession of the disputed properties. In fact possession is the substantial relief claimed. In my opinion, the present suit is one under Order XXI, rule 103, of the Civil Procedure Code and not having been brought within one year, it is barred by limitation.

In the result, I would dismiss the appeal with costs.

KHAJA MOHAMAD NOOR, J.—I entirely agree.

Appeal dismissed.

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APPELLATE CIVIL.

Before Dhavle and Agarwala, JJ.

1938.

September, 26, 27.

MUSAMMAT ANURAGI KUER

v.

PARMANAND PATHAK.*

Hindu Law—dedication for the worship of deity—succession to the office of shebait, whether governed by the law of inheritance—principles of inheritance—death of last shebait who succeeded as male owner—shebait's heirs, whether entitled to succeed—nature of interest inherited—shebaitship, when vests in the heirs of founder.

According to Hindu Law, when the worship of a deity has been founded, the shebaitship is vested in the heirs of the founder in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some other circumstances to show a different mode of devolution.

The management and control of the endowed property besides the right of acting as ministrant to the deities—the two together constituting the shebaiti right—therefore follows the line of inheritance from the founder.

Gossami Sri Gridhariji v. *Ramanlalji Gossami*(1) and *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*(2), followed.

The Hindu law of inheritance makes a distinction between the sexes in that a male heir becomes full owner of the property inherited by him and transmits it on death to his own heirs, while a female heir (barring such Bombay exceptions as *gotraja* females) only takes as a limited owner, the property passing on her death not to her heirs but to the next heir of the last full owner.

This principle applies to the inheritance of the shebaiti interest also.

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* Appeal from Appellate Decree no. 602 of 1936, from a decision of Mr. Nidheshwar Chandra Chandra, Additional District Judge of Gaya, dated the 13th August, 1936, modifying a decision of Babu Priya Lal Mukherjee, Munsif at Gaya, dated the 31st May, 1935.

(1) (1889) I. L. R. 17 Cal. 3, P. C.

(2) (1904) I. L. R. 32 Cal. 129, P. C.

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No shebait can alter the line of succession laid down by the founder but this again is far from inconsistent with a male who inherits a shebaiti interest taking as full owner as in the inheritance of immovable property of a secular character. The entire estate is vested in him, though his powers of alienation are qualified and restricted.

Prosunno Kumari Debya v. *Golab Chand Baboo*(1), *Ukoor Doss* v. *Chunder Sekhur Doss*(2), *Ramchandra Panda* v. *Ram Krishna Mahapatra*(3), *Rajeshwar Mullick* v. *Gopeshwar Mullick*(4), *Kunjamani Dasi* v. *Nikunja Behari Das*(5), *Panchanan Banerjee* v. *Surendra Nath Mukherjee*(6), *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*(7), *Manohar Mukherji* v. *Bhupendranath Mukherji*(8) and *Ganesh Chunder Dhur* v. *Lal Behary Dhur*(9), reviewed.

Therefore, on the death of the last shebait, who succeeded as a male owner, the shebaiti right devolves on *his* heir.

Appeal by the defendant.

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

Dr. D. N. Mitter and *G. P. Singh*, for the appellants.

Sushil Madhab Mullick and *Kedar Nath Verma*, for the respondents.

DHAVLE, J.—This is an appeal by the defendant in a suit for the establishment of the plaintiffs' sebaiti right to certain temples founded by one Hanuman Pathak, brother of the great-grand-father of the plaintiffs. Plaintiffs' case was that Hanuman was a member of a joint Hindu family and established the temples from the income of the joint family among

(1) (1875) L. R. 2 Ind. App. 145.
(2) (1865) 3 W. R. 152.
(3) (1906) I. L. R. 33 Cal. 507.
(4) (1907) I. L. R. 35 Cal. 226.
(5) (1915) 22 Cal. L. J. 404.
(6) (1929) 50 Cal. L. J. 382.
(7) (1899) I. L. R. 23 Mad. 271, P. C.
(8) (1932) I. L. R. 60 Cal. 452, F. B.
(9) (1936) L. R. 63 Ind. App. 448.

other sources and dedicated certain self-acquired properties to them. Hanuman died in Aghan, 1318, leaving behind a widow named Rajbansi Kuar and a grand-son by a pre-deceased daughter, Mahabir Misser, besides one brother Debi, his son Madho, and Ragho, Debi's grandson by a predeceased son. Debi died shortly after, and apparently also Madho, leaving him surviving a son Sarju, father of the plaintiffs. In September, 1908, an ekrarnama, Ex. A, was executed by Ragho and Sarju on one hand and Rajbansi Kuar and Mahabir Missir on the other, according to which Rajbansi Kuar was to be sebait for life and was to be succeeded by Mahabir as "absolute proprietor" of the sebaiti interest, subject only to a right of pre-emption reserved in favour of the other executants and their heirs in case any pressing necessity of the temples compelled a transfer of any of the temple properties. According to the plaintiffs this ekrarnama was invalid and did not operate to confer upon Mahabir any powers other than those of a sebait appointed by the family. Rajbansi Kuar died about a year after the ekrarnama, and Mahabir succeeded her as sebait. In August, 1932, Mahabir executed a deed of gift in favour of the defendant in respect of the temples and their properties besides certain properties acquired by Mahabir himself and dedicated to the temples. Plaintiffs claimed that the temples were their family "deo-asthans", that Mahabir had no right to appoint the defendant to be sebait, and that they had the right themselves to work as sebaits or appoint others as such. Mahabir was not impleaded as a party to the suit, the reason apparently being that he died shortly after the deed of gift in favour of the defendant while the suit was instituted in May, 1934.

The trial court found that the temples and the temple properties were the self-acquired properties of Hanuman; and there has been no further dispute on this point. It held that the sebaiti right followed

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the line of inheritance from the founder and that Mahabir thus became absolutely entitled to it after the death of Rajbansi Kuar, so that the ekrarnama, Ex. A, merely acknowledged and ratified the existing right of Rajbansi Kuar and after her of Mahabir Missir in the sebaitship. Mahabir's gift in favour of the defendant was found by the learned Munsif to be no more than the appointment of the defendant as the next sebait after Mahabir for the worship of deities, and therefore valid under the ruling in *Khetter Chunder Ghose* v. *Haridas Bundopadhya*(1). Even if the gift were to be regarded as invalid, the plaintiffs were not, in the view of the learned Munsif, entitled to claim the sebaitship as heirs of the founder since the sebaiti right had vested in Mahabir as full owner. The plaintiffs had not even made any claim as heirs of Mahabir, and therefore, the learned Munsif dismissed the suit.

The plaintiffs appealed, and the Additional District Judge who heard the appeal allowed it, holding that Mahabir had only " a life interest " in the sebaiti right, that the ekrarnama, Ex. A, was not competent to convert that interest into an " absolute right " that Mahabir had no right by his deed of gift in favour of the defendant to alter the line of succession to the sebaitship " by reason of the existence of the plaintiffs who are the heirs of Hanuman as his collaterals after Mahabir ", that " on the extinction of Hanuman's direct line of succession with the death of Mahabir as the last sebait, the sebaiti right must be deemed to have reverted to the line of the founder Hanuman " and that " consequently the plaintiffs as collaterals and heirs of Hanuman are entitled to succeed to the sebaitship and the disputed property ".

It has been contended on behalf of the defendant appellant that the lower appellate court was wrong in holding that Mahabir had no more than a life estate

(1) (1890) I. L. R. 17 Cal. 557.

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or life interest so that on his death the sebaiti right reverted to the line of the founder. In *Gossami Sri Gridhariji* v. *Romanlalji Gossami*(1) it was contended by Mr. Mayne for the respondent that neither by general law nor by special custom was it shown in the case that the sebaitship descended to the heirs of the founder. This contention was negatived by their Lordships of the Judicial Committee who held that "according to Hindu Law, when the worship of a Thakur has been founded, the sebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some other circumstances to show a different mode of devolution." In the present case the founder Hanuman acted as sebait during his life but made no disposition of the sebaitship to take effect after his death and there is no question of any usage, course of dealing or other circumstances to show a special mode of devolution. The management and control of the endowed property besides the right of acting as ministrant to the deities —the two together constituting the sebaiti right— therefore "follows the line of inheritance from the founder", as Sir Arthur Wilson said in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*(2). Now the Hindu law of inheritance makes a distinction between the sexes in that a male heir becomes full owner of the property inherited by him and transmits it on death to his own heirs, while a female heir (barring such Bombay exceptions as *gotraja* females) only takes as a limited owner, the property passing on her death not to her heirs but to the next heir of the last full owner. It may be safely assumed that this principle applied to Rajeshwar Kuar's inheritance of the sebaiti interest from Hanuman. But did Mahabir take a similarly limited interest or was he full owner of the sebaiti as a male heir? The powers of alienation possessed by him were no doubt restricted in much

(1) (1889) I. L. R. 17 Cal. 3, P. C.
(2) (1904) I. L. R. 32 Cal. 129, P. C.

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the same way as those of a female heir or the manager for an infant heir—*Prosunno Kumari Debya* v. *Golab Chand Baboo*(1)—but this does not bear directly on the nature of the interest taken by him as regards future devolution. It is also well settled that no sebait can alter the line of succession laid down by the founder, but this again is far from inconsistent with a male who inherits a sebaiti interest taking as full owner as in the inheritance of immovable property of a secular character. The way in which this right or interest devolves can be gathered from such cases as *Ukoor Doss* v. *Chunder Sekhur Doss*(2) and *Ram Chandra Panda* v. *Ram Krishna Mahapatra*(3). In the former of these cases it was held that the right of one member of a joint family to a turn of worship and other sebaiti privileges which he had assigned to a competent Brahmin "devolved", on his death without heirs, "to the other surviving members of the joint family." This was followed in the case of *Ram Chandra Panda* v. *Ram Krishna Mahapatra*(3) another Mitakshara case, in which it was held that the son became entitled by birth to a share "not only in the family property but also jointly as sebait of debottar property" and could, therefore, have an alienation by his father and uncle set aside as not for the benefit of the idol. A Mitakshara coparcener is not in these parts entitled to alienate his share in the joint family property at his pleasure, and far less to leave it by will. In *Rajeshwar Mullick* v. *Gopeshwar Mullick*(4) the question arose with reference to a sebaiti held by a Dayabhaga family, and it was ruled, as the placitum puts it, that "a sebait is a manager, or quasi trustee for the benefit of the idol, and therefore, has no power to alienate the hereditary office of sebaitship by will." There were certain observations made in this case to the effect that a sebait holds his office for life, but it

(1) (1875) L. R. 2 Ind. App. 145.
(2) (1865) 3 W. R. 152.
(3) (1906) I. L. R. 33 Cal. 507.
(4) (1907) I. L. R. 35 Cal. 226.

was pointed out in *Kunjamani Dasi* v. *Nikunja Behari Das*(1) that " this does not signify that he has a life interest in the office with the remainder presently vested in the next taker. The entire estate is vested in him, though his powers of alienation are qualified and restricted." It was further pointed out how when the last sebait, validly appointed by the founder, does not take the sebaitship *absolutely*, " the office vests in persons who at the time constitute the heirs of the founder, and when the office has so vested in them, upon the death of each member of the group, it passes by succession *to his heir*..... ". (The italics are mine.) This was followed in *Panchanan Banerjee* v. *Surendra Nath Mukerjee*(2) where Rankin, C.J. said that " consistently not only with the will in the case but also with the ordinary principle applicable to this matter ", the plaintiff was entitled to make out a right to be one of the sebaits of the Thakur by showing, not necessarily that he was an heir of the founder, but that he was an heir of Soshi Bhusan—a son of the founder who had actually been the sebait for a long time, and who, under the will, was to have been a sebait during his life to be succeeded by his son absolutely. In *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*(3) their Lordships of the Judicial Committee accepted Mr. Mayne's contention that it would be in contravention of the Hindu Law of inheritance to hold that an endowment of a heritable character should be held in a series of successive life estates by the heritors; the origin of the endowment was assumed to be a gift from the founder, the right to the management had been treated as hereditary, and Sir Richard Couch referred to the well-known Tagore case and said that " the Hindu Law of inheritance did not permit the creation of successive life estates in this endowment." In his order of reference to the Full Bench in *Manohar Mukherji* v. *Bhupendranath*

(1) (1915) 22 Cal. L. J. 404.
(2) (1929) 50 Cal. L. J. 382.
(3) (1899) I. L. R. 23 Mad. 271, P. C.

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Mukherji(1) Rankin, C.J. was inclined to question whether the application of the rules in the *Tagore* case(2) to sebaiti was not to be treated as an obiter and whether, unless the sebaiti right is regarded purely as an appointment to an office for life, there would not logically be an end of the founder's right to lay down rules of succession of any kind free from the restrictions laid down in the *Tagore* case(2). The Full Bench held that the founder has the right but "subject to the restriction that he cannot create any estate unknown or repugnant to Hindu law". This was referred to, with evident approval, by the Judicial Committee in *Ganesh Chunder Dhur* v. *Lal Behary Dhur*(3) in which it was held that a testamentary disposition confining the sebaitship to the then next eldest male lineal descendant was invalid and that "the succession to the office of sebait and the income of the estate must be according to the ordinary Hindu law of succession". The sebaiti in the present case must therefore have descended according to the ordinary Hindu law; and while Rajbansi Kuar only took a widow's limited "estate" in it, Hanuman the next heir at her death took as full owner. The view of the lower appellate court that though Mahabir was an heir of the founder he took only a life interest in the sebaiti cannot, therefore, be upheld. The learned District Judge proceeded to conclude that the ekrarnama of 1908 was invalid in so far as it converted Mahabir's life interest into an absolute right "which implies the creation of a fresh line of succession from Mahabir." Mahabir, however, as I have already said, took the sebaiti as full owner, even apart from the ekrarnama, and the trial court was right in holding that the ekrarnama only acknowledged and ratified the right of Mahabir. In fact the ekrarnama is only of value in the present case as showing how little the joint family, from which the plaintiffs are descended had to do with the temples and the endowed

(1) (1932) I. L. R. 60 Cal. 452, F. B.
(2) (1872) 18 W. R. 859.
(3) (1936) L. R. 63 Ind. App. 448.

property. This document makes it perfectly clear that the temples are not " the family deo-asthans of the plaintiffs ". Hanuman (who is called Sadhu Hanuman Saran Pathak in the ekrarnama) founded them after becoming a Baisnav, though without a formal separation from his brothers; the properties endowed by him had been acquired by him after his renunciation of the world (as the ekrarnama put it); and under the ekrarnama Hanuman's widow and daughter's son took nothing of the joint family property except 3 kathas of land for a residential house, while his brother's grandsons took the rest of the property of the joint family and renounced all claim to the sebaiti except a right of pre-emption. On the footing which was deliberately adopted in the ekrarnama the thakurbaris were the personal concern of Hanuman and Hanuman alone, and the joint family had really nothing to do with them. It is, therefore, idle for the plaintiffs to say, as they have done in the plaint, that Hanuman's brother's grandsons by the ekrarnama appointed Mahabir as sebait in their own place; and the finding of the lower appellate court that on the extinction of Hanuman's direct line of succession with the death of Mahabir as the last sebait, the sebaiti right must be deemed to have reverted to the line of the founder, is erroneous, because Mahabir, having taken the sebaiti as full owner, the sebaiti must next go to *his* heirs. There cannot be any question of reverter, properly so called, on the death of an heir who was full owner, though the sebaiti might perhaps somewhat loosely have been said to revert to the plaintiffs on Mahabir's death if the plaintiffs had been Mahabir's heirs. But a maternal grand-father's brother's great-grandsons do not stand very high in the list of Mitakshara heirs; being *bandhus*, they can only come in after all sapindas and samanodokas—*see* Mitakshara, Chap. II, section 6(10). The plaintiffs, moreover, did not claim as heirs of Mahabir at all. The lower appellate court seems to have fallen into some confusion on this

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question of reverter on the death of Mahabir, and to have mixed it up with the right of the heirs of the founder to nominate a sebait when the line of sebaits appointed by the founder becomes extinct—*Boidyo Gauranga Sahu* v. *Sudevi Mata*(1). There was no appointment by the founder in the present case, and Mahabir really took the sebaiti as the founder's daughter's son and heir.

It follows that the suit as framed ought to have been dismissed.

In this view it is not necessary to pronounce on the validity of the deed of gift executed by Mahabir in 1932. As a matter of fact this deed, though an exhibit in the case, has not been printed nor placed before us in any other way. The trial court found that it was in fact " not an alienation of the trust property, but a deed nominating the defendant as the next sebait after Mahabir Missir and the recitals are quite clear indicating that the defendant was to manage the trust properties and do the seva-puja of the Thakurjis ". This does not seem to have been controverted in the lower appellate court; and it is not improbable that, as held by the trial court on the authority of *Khettar Chunder Ghose* v. *Haridas*(2), the deed is supportable as a deed of agreement for the worship of the idols, Mahabir having no family except himself at the time. But, in any case, the validity of the deed of gift can only arise between the donee and whoever may be Mahabir's heirs under the Hindu law. We have no right to assume, in the absence even of any assertion by the plaintiffs to that effect, that Mahabir left no agnatic relations at all who would of course come before the plaintiffs.

The result is that the appeal must be allowed, and the suit dismissed with costs in all courts.

AGARWALA, J.—I agree.

Appeal allowed.

S. A. K.

(1) (1917) I. L. R. 40 Mad. 612.
(2) (1890) I. L. R. 17 Cal. 557.

APPELLATE CIVIL.

Before Harries, C.J. and Agarwala, J.

1938.

November, 2, 3.

SHIVA SHANKAR SAH

v.

MANBHARAN RAY.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 66—*plaintiff's claim based on allegation that auction-purchase was made by him jointly with certified purchaser—suit not against certified purchaser—section, whether operates as a bar.*

Section 66, Code of Civil Procedure, 1908, operates as a bar to a claim by a person who alleges that the actual purchase was either on behalf of himself exclusively or of himself jointly with the certified purchaser, whether the purchase is alleged to be in execution of an express agreement or otherwise. The fact that the principal claims only to have provided a part of the purchase money and to be entitled to only a share in the property purchased does not make any difference in principle.

Bishun Dayal v. *Kesho Prasad*(1), followed.

Bikram Ahir v. *Lala Lajpati Lal*(2), not followed.

Held, further, that section 66 would be a bar even if the suit is not brought against the certified purchaser, so long as the success of the plaintiff in the suit depends on proof of the alleged agreement.

Appeal by the defendants.

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

Hareshwar Prasad Sinha, for the appellants.

Harinandan Singh, for the respondents.

AGARWALA, J.—This appeal by the defendants arises out of the following facts. Lakshman Rai

* Appeal from Appellate Decree no. 117 of 1938, from a decision of Babu Bijay Krishna Sarkar, Subordinate Judge of Chapra, dated the 14th June, 1937, modifying a decision of Babu Ramnandan Prasad, Munsif, First Court, Chapra, dated the 26th March, 1936.

(1) I. L. R. [1937] All. 113.

(2) (1920) 62 Ind. Cas. 720.

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obtained a money decree against Hira Sah. In execution of that decree he put up to sale five items of property which belonged jointly to his judgment-debtor and the latter's brother. Two items, namely nos. 1276 and 3565 were purchased by Manbharan Rai and the remaining three items nos. 1422, 1425 and 3562 were purchased by Lakshman Rai. Each of the auction-purchasers obtained possession of the items purchased by him, respectively, jointly with the brother of the judgment-debtor. Subsequently a suit was instituted for partition as against the brother of the judgment-debtor, purporting to be a suit by Manbharan Rai and Lakshman Rai, the two auction-purchasers. Defendant no. 1 pleaded, inter alia, that Lakshman Rai was not in fact a party to the suit and that Manbharan Rai had no rights in those items of property which had been purchased by Lakshman Rai. Lakshman Rai also filed a petition supporting this plea of the defendant. He alleged that his name had been fraudulently used as a plaintiff in the suit and he had nothing to do with it. The plaintiff Manbharan Rai, on the other hand, affirmed that there had been an agreement between himself and Lakshman Rai that any of the properties to be put up to sale in execution of the money decree which should be purchased by either of them should be held on behalf of both of them by the purchaser. It is on the strength of that agreement that he claims partition. The claim is met by the bar of section 66 of the Code of Civil Procedure. As was pointed out by a Division Bench of the Allahabad High Court, in a case where the facts were indistinguishable from the facts of this case, *Bishan Dayal* v. *Kesho Prasad*(1), that section is a bar to a suit where a partnership or agreement is entered into between two persons to purchase property at an auction execution sale with funds contributed by both in the name of one person only.

(1) I. L. R. [1937] All. 113.

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The plaintiff-respondent relies on the decision of a single Judge of this Court, *Bikram Ahir* v. *Lala Lajpati Lal*(1), in which it was held that section 66 does not take away the jurisdiction of the Civil Court to deal with a cause of action based on a contract between the parties and on the equities arising out of that contract. If that decision is in fact contrary to the decision of the Division Bench of the Allahabad High Court already referred to, I respectfully disagree with it. To me it seems that the section operates as a bar to a claim by a person who alleges that the actual purchase was either on behalf of himself exclusively or of himself jointly with the certified purchaser, whether the purchase is alleged to be in execution of an express agreement or otherwise, for it is clear that no benami purchase can ever be otherwise than as the result of an agreement of some sort between the principal and the benamidar; nor does the fact that the principal claims only to have provided a part of the purchase money and to be entitled to only a share in the property purchased make any difference in principle. In my view, therefore, the section is a bar to the present suit. But it is contended by the learned Advocate for the plaintiff that this is a suit not against Lakshman Rai, the certified purchaser of three of the items of the property, but defendant no. 1. With regard to the three items of property purchased by Lakshman, the plaintiff admittedly has no title at all unless he can establish that Lakshman purchased on his behalf, so that in that event he would not be entitled to succeed in this suit for partition against defendant no. 1; and if he does rely on that agreement, as I have already indicated, section 66 bars the suit.

The learned Advocate sought to rely on the finding of the appellate court that Lakshman Rai was in fact a party to the suit. That finding was based on a statement in an affidavit filed by Manbharan Rai,

(1) (1920) 62 Ind. Cas. 720.

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the plaintiff, after the hearing of the suit had been completed, in which he alleged that Lakshman Rai had filed an affidavit of service at an earlier stage of the proceedings. Manbharan Rai's affidavit was for the purpose of inducing the court to call for this affidavit of service. The application was rejected and, therefore, the defendants had no occasion to controvert the allegation made in it. The Court below was not entitled in a suit to take evidence by affidavit. If it was necessary to secure the plaintiff's evidence with regard to any point, the other side was entitled to cross-examine.

The result of this appeal, therefore, is that with regard to items 1422, 1425 and 3562 the decree of the Courts below is set aside and the plaintiff's suit is dismissed. With regard to the other two items, namely, 1276 and 3565, the plaintiff claims in these a one-fourth share which he seeks to partition and to that extent his suit succeeds and the appeal with regard to those two items is dismissed. The parties will bear their own costs throughout.

HARRIES, C. J.—I entirely agree.

Appeal allowed in part.

S. A. K.

APPELLATE CIVIL.

1938.

November, 1, 10.

Before James and Chatterji, JJ.

SREE SREE RAMCHANDERJI

v.

HEM CHANDRA SINGH.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 86(6) *and* 167—*landlord purchasing under a rent decree, whether bound to annul encumbrance—section* 86(6), *whether*

* Appeal from Appellate Decree no. 237 of 1937, from a decision of Babu Jadunath Sahay, Additional Subordinate Judge of Bhagalpur, dated the 16th July, 1936, affirming a decision of Babu Ramchandra Misra, Munsif at Bhagalpur, dated the 31st January, 1935.

applies to non-transferable occupancy holding—Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 26-*B and* 26-*N, whether protect a mortgagee.*

Section 86(6) of the Bengal Tenancy Act, 1885, does not apply to a non-transferable occupancy holding.

A purchaser under a rent decree as such is bound by an encumbrance which he has not annulled under section 167 of the Bengal Tenancy Act, 1885, but if the purchaser happens to be the landlord, he, in his capacity as landlord, is entitled to disregard the encumbrance if not made with his consent, and may take possession of the purchased holding and may successfully maintain it in opposition to the claims of the encumbrancer.

Hargobind Das v. *Ramchandra Jha*(1), *Badlu Pathak* v. *Sibram Singh*(2) and *Sourendra Mohan Singh* v. *Kunjbihari Lal Mander*(3), followed.

Sections 26-B and 26-N of the Bihar Tenancy Act, 1885 (since repealed by Bihar Act XI of 1938), which in terms apply to transfers by sale, exchange, gift or will do not apply to mortgages and cannot, therefore, protect a mortgagee.

Appeal by the plaintiffs.

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

Chandeshwar Prasad Sinha, for the appellants.

S. M. Mullick and *Nitai Chandra Ghose,* for the respondents.

CHATTERJI, J.—This is a second appeal by three Hindu deities represented by their shebait, Rameshwar Prasad Singh, who brought a suit under Order XXI, rule 103, of the Civil Procedure Code. The dispute relates to an area of 33 bighas 13 kathas out of a nakdi jote which belonged to the defendants second party. They executed a sudbharna bond, dated the 14th June, 1921, in respect of the disputed

(1) (1926) I. L. R. 6 Pat. 235.
(2) (1927) I. L. R. 7 Pat. 155.
(3) (1928) I. L. R. 8 Pat. 439.

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33 bighas 13 kathas in favour of the plaintiff. In 1930 the defendants first party who are the landlords of the holding brought a suit for rent against the defendants second party, describing the holding to be of 36 bighas 7 kathas 3 dhurs, and obtained a decree in execution of which they purchased the holding and took possession of it on the 18th May, 1932. The plaintiffs then filed an application under Order XXI, rule 100, of the Civil Procedure Code but it was dismissed on the 16th January, 1933. Thereupon they brought the present suit on the 15th January, 1934. Their main allegations were that the decree for rent obtained by the defendants first party was a money decree because the suit was brought in respect of a portion of the holding, the area of the entire holding being 38 bighas 1 katha 3 dhurs, and all the tenants interested in the holding were not made defendants in the suit. They further asserted that even if the decree was a rent decree their encumbrance not having been annulled under the provisions of section 167 of the Bengal Tenancy Act, the defendants first party as purchasers had no right to dispossess them.

The main defence in the suit was that the sudbharna bond of the plaintiffs was not a bona fide transaction and that the decree in question was a rent decree, the suit being in respect of the entire holding and against the entire body of tenants. It was alleged that though the previous area of the entire holding was 38 bighas 1 katha 3 dhurs the raiyats surrendered two plots of the holding, namely, plots 54 and 373, having an area of 1 bigha 14 kathas, in 1331 and since then the landlords were in khas possession of those two plots. The area of the holding was thus reduced to 36 bighas 7 kathas 3 dhurs and it was for this area that the rent suit was brought.

The learned Munsif who tried the suit dismissed it holding that the decree in question was a rent decree because the claim was for an entire holding and all the tenants interested in the holding were

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made defendants in the suit. On the question whether the sudbharna bond of the plaintiffs was a bona fide transaction he found in their favour. On appeal his decision has been affirmed by the Additional Subordinate Judge. Hence this second appeal.

The first point raised on behalf of the appellants is that the decree for rent was a money decree. The first ground urged in support of this contention, namely, that all the tenants interested in the holding were not made defendants in the suit is concluded by the concurrent findings of fact. Both the courts below have found that all the persons who were recorded in the landlord's books were made parties to the suit. That being so, the plea that the suit was not brought against the entire body of tenants must fail.

On the question whether the suit was in respect of a portion of the holding it has also been found by the courts below that at the time of the suit the area of the holding was 36 bighas 7 kathas 3 dhurs and the suit was for the rent of this holding. The previous area of the holding of course was 38 bighas 1 katha 3 dhurs, but in 1331 the raiyats surrendered the plots 54 and 373 comprising an area of 1 bigha 14 kathas and this has been found by both the courts below. The learned Advocate for the appellants, however, contends that the two plots 54 and 373 being included in their sudbharna bond, there could be no valid surrender in respect of those plots without their consent. In support of this contention reliance is placed on section 86, clause 6, of the Bengal Tenancy Act. The learned Subordinate Judge has found that since the surrender in 1331 the landlords have been in possession of the surrendered plots 54 and 373 and the plaintiffs never raised any objection to their possession. The learned Subordinate Judge has therefore held that there was implied consent of the plaintiffs to the surrender. Apart from this fact,

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section 86, clause 6, of the Bengal Tenancy Act does not, in my opinion, seem to apply to a non-transferable holding. Though the section speaks in general terms of a holding it has to be read with the other provisions of the Act. Occupancy holdings in the absence of proof of any custom to the contrary are presumed to be non-transferable. Suppose a raiyat after mortgaging his holding surrenders it without the mortgagee's consent to his landlord who comes into possession; the mortgagee then sues upon his mortgage and obtains a decree in execution of which he purchases the holding and seeks to obtain possession. The landlord unless he has given his consent to the purchase is entitled to ignore it altogether and though he might have come into possession on the strength of an invalid surrender he can successfully resist the purchaser's claim for possession. The purchaser cannot force himself upon the landlord as his tenant without his consent. If this is the position of the mortgagee, how can he claim that the surrender could not be valid unless it was made with his consent? Thus section 86, clause 6, would obviously be of no avail to him.

The next contention on behalf of the appellants is that their encumbrance, not having been annulled under the provisions of section 167 of the Bengal Tenancy Act, is effective and binding against the defendants first party who are the purchasers under the rent decree. The answer to this contention is that the defendants first party are themselves the landlords and they need not have annulled the encumbrance. Indeed section 167 by its terms does not exclude a landlord-purchaser but the section has to be read in accordance with the general provisions of the Act. In the case of a non-transferable holding, as I have already pointed out, the mortgagee cannot by enforcing his rights under the mortgage claim possession from the landlord unless he has recognised him as his tenant. Of course a purchaser under a rent decree as such is bound by an encumbrance which he

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has not annulled under section 167 of the Bengal Tenancy Act, but if the purchaser happens to be the landlord he, in his capacity as landlord, is entitled to disregard the encumbrance, if not made with his consent, and may take possession of the purchased holding and may successfully maintain it in opposition to the claims of the encumbrancer. The view I take is in accordance with the decisions of this Court in *Hargobind Das* v. *Ramchandra Jha*(1), *Badlu Pathak* v. *Sibram Singh*(2) and *Sourendra Mohan Singh* v. *Kunjbihari Lal Mander*(3). The learned Advocate for the appellants contends that these decisions are no longer good law because under the amended provisions of section 26 of the Bihar Tenancy Act of 1934 all occupancy holdings have been made transferable. The relevant clauses of that section are 26-*B* and 26-*N*. Section 26-*B* runs as follows:—

"(1) An occupancy raiyat shall have power to transfer his occupancy holding or any portion thereof, together with the right of occupancy therein, by sale, exchange, gift or will, but, except as provided in sub-section (2), no such transfer shall be valid against the landlord unless he has given, or is deemed under section 26-F to have given, his consent thereto."

Section 26-*N* runs as follows:

"Every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion by sale, exchange, gift or will made before the first day of January, 1923, and, in the case of the transfer of a portion of a holding, to have accepted the distribution of the rent of the holding as stated in the instrument of transfer, or if there is no such instrument, as settled between the transferor and the transferee."

These sub-sections by their terms apply to transfers by sale, exchange, gift or will. They do not apply to mortgages and, therefore, do not protect the plaintiffs who are sudbharnadars. It may, however, be said that when a mortgage is followed by a sale in execution of a decree on the mortgage the execution

(1) (1926) I. L. R. 6 Pat. 235.
(2) (1927) I. L. R. 7 Pat. 155.
(3) (1928) I. L. R. 8 Pat. 439.

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sale may be treated on the same footing as a voluntary sale and would therefore come within the purview of section 26-*B*. Assuming for a moment that this view is correct, it does not hold good with regard to usufructuary mortgagees. The plaintiffs are usufructuary mortgagees and they claim to have been in possession of the mortgaged lands till they were dispossessed by the landlord-purchasers. Even under the amended provisions of the Bihar Tenancy Act their claim cannot be enforced against the landlord.

There is another aspect of the case. The plaintiffs as usufructuary mortgagees were liable to pay rent of the mortgaged property which formed the major portion of the holding. They did not pay the rent and for the arrears, the bulk of which was payable by them, the rent suit was brought. Rent is a first charge on the holding and the holding having been sold in execution of the rent decree, it is now too late for the plaintiffs to assert their right as encumbrancers against the landlord-purchasers.

There is no substance in any of the contentions raised by the appellants and I would dismiss the appeal with costs.

JAMES, J.—I agree.

Appeal dismissed.

S. A. K.

REVISIONAL CIVIL.

Before Khaja Mohamad Noor and Dhavle, JJ.

1938.

December, 16.

HALUMAN PRASHAD MAHASETH

v.

PURAN TATMA.*

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *section* 74—kathiari, *whether is an* abwab—*landlord, when entitled to* kathiari—abwab, *meaning of.*

*Civil Revision no. 384 of 1938, from an order of Babu Jagannath Lall, Munsif, 2nd Court, Madhubani, dated the 30th April, 1938.

The law as to *abwab* has not been changed by the Bihar Tenancy Act, what was *abwab* before is *abwab* now and what was not an *abwab* before has not been made an *abwab* by the new Act. *Kathiari* is payable by weavers to their landlords not on the basis of land occupied by them but on the basis of looms which they work and is not an *abwab*.

A landlord is entitled to *kathiari*, (*i*) when the homestead is recorded as belagan and the *kathiari* is payable in respect of it, or (*ii*) where *kathiari* was one of the terms on which land was settled.

Application in revision by the plaintiff.

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

B. B. Saran and *Badri Prasad Mahaseth*, for the petitioner.

No one for the opposite party.

KHAJA MOHAMAD NOOR AND DHAVLE, JJ.—This application in revision is directed against a decree of the learned Munsif of Madhubani passed in a suit for rent of 1341 to 1344 Fs. As the value of the suit was less than Rs. 50 and the learned Munsif was vested with powers under section 153 of the Bengal Tenancy Act, no appeal lay against the decree and the petitioner who was the plaintiff in the suit has come up in revision.

The plai[illegible] rent at the rate of Rs. 1-15-0 per annu[illegible] including 12 annas per ar[illegible] ndant admitted that [illegible] as *kathiari* but asked [illegible] elief under the law fr[illegible] should get it, otherwise [illegible] paying it. The learned Munsi[illegible] *kathiari* to be an *abwab* and has, therefore, di[illegible] it and passed a decree at the rate of Rs. 1-[illegible]

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The learned Munsif seems to be under an erroneous impression that the law as to *abwab* has been changed by the recent amendment of the Bihar Tenancy Act. This is not so. What was *abwab* before is *abwab* now and what was not an *abwab* before has not been made an *abwab* by the new Act. The only modification in this connection has been as to the nature and amount of punishment for exacting an illegal *abwab*. The question, therefore, for consideration is whether *kathiari* is an *abwab*.

Kathiari is payable by the weavers to their landlords not on the basis of land occupied by them but on the basis of looms which they work on the land. In other words, it is a rent payable not on the basis of the area of the land occupied but on the basis of the work which is to be done on that land. It comes in the same category as the money realised by the landlords for the use and occupation of land at fairs at the rate of so many annas per animal according to whether the animals exposed for sale are horses, camels, elephants or bullocks.

In some cases the Settlement Department after investigation as to the history and nature of *kathiari* have entered it in the record-of-rights. A case like this came up before this Court where it was held to be an amount which was legally payable to the landlord. [*See* the case of *Bhagwati Prasad* v. *Mahbub Momin*(1).] The Glossary of the Survey and Settlement Department published by Government describes *kathiari* as the synonym of '*Bithouri*' or '*Mutarfa*'. In the Remarks Column it is mentioned that literally it is a consideration for settling. *Mutarfa* is ground-rent and *kathiari* profession tax according as the settler takes up cultivation or merely trade. *Bithouri* may be either *mutarfa* or *kathiari*. It is practically rent for homestead land based on the profession which is carried on on that land. The learned Munsif has not approached this case from this point of view. He

(1) (1916) 37 Ind. Cas. 813.

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has started with an idea that *kathiari* is illegal. In the plaint the plaintiff clearly stated that under the record-of-rights he was entitled to get Rs. 1-15-0 which included *kathiari* also. The learned Munsif apparently did not examine the record-of-rights, and had he done so and if the statement of the plaintiff was borne out by the record-of-rights, it would have been obvious to him that this was not an *abwab*.

The case is, therefore, remanded to the learned Munsif. He will call upon the plaintiff to produce the record-of-rights and if the rent there is Rs. 1-15-0, whether the *kathiari* be mentioned or not, the decree will be at that rate. If it appears that the homestead land was otherwise belagan and that the *kathiari* is payable in respect of it, the plaintiff will be entitled to a decree for it. If the tenancy was created after the record-of-rights was published and this *kathiari* was one of the terms on which the land was settled the plaintiff is obviously entitled to it. If these conditions do not exist the plaintiff will not be entitled to a decree, not on the ground that it is an *abwab* but on the ground that it is in excess of the settled rent.

The application is allowed, but as there has been no appearance on behalf of the opposite-party there will be no order for costs.

Rule made absolute.

J.K.

APPELLATE CIVIL.

Before Fazl Ali and Varma, JJ.

1938.

December, 22, 23.

RADHEY LAL

v.

KANHAI LAL.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Schedule II, paragraphs* 14 *and* 16(2)—*arbitration—award—decree based on award, when appealable—decree based on an invalid*

*Appeal from Original Decree no. 134 of 1936, from a decision of Babu Nidheswar Chandra Chandra, Subordinate Judge of Patna, dated the 23rd December, 1935.

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award, whether appealable—commissioner and arbitrator, difference between the powers of.

No appeal lies from a decree based on an award unless the decree is in excess of or not in accordance with the award. No appeal is maintainable on the ground that the award is void or invalid or illegal.

There is ample provision in paragraphs 14 and 15 of Schedule II of the Code to enable the court to which the award is submitted to refuse to give effect to the award if in its opinion it is either void or invalid or illegal. If, however, the award is accepted it means that in the opinion of the court it is neither void nor invalid and the Legislature does not appear to have intended that the opinion of the court should be challenged in appeal.

Paragraph 16 merely gives effect to the principle of finality of awards and the intention of the Legislature evidently is that an award should be subjected to the scrutiny of one court only, namely, the court through whom the reference is made to arbitration and not that court and an appellate court.

Ghulam Khan v. *Muhammad Hassan*(1), relied on.

Durga Charan Deb Nath v. *Gangadhar Deb Nath*(2), dissented from.

The essential difference between a commissioner appointed to effect a partition and an arbitrator appears to be that the former is an officer selected and appointed by the court, in whose selection the parties have not, as of right, any choice, whereas the latter is a person selected by the parties in whose selection the court has no choice. In the former case the parties have expressed no consent to be bound by the decision of the commissioner who is appointed by the court and whose decision the parties may challenge before the court passing a final decree. In the latter case they have expressed such consent and cannot challenge the arbitrator's decision on questions of law and fact except on the limited grounds mentioned in the Second Schedule of the Code.

Bholanath Ray v. *Bata Kristo Ray*(3), followed.

(1) (1901) I. L. R. 29 Cal. 167, P. C.
(2) (1930) 34 Cal. W. N. 813.
(3) (1926) 7 Pat. L. T. 739.

Appeal by the defendant.

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

Sir Manmatha Nath Mukherjee (with him *B. C. De*, *S. N. Mukherjee*, *Mehdi Imam* and *K. P. Verma*), for the appellant.

Khurshaid Husnain (with him *N. K. Prasad II* and *Ramanugrah Prasad*), for the respondent.

FAZL ALI, J.—This is an appeal from a final decree in a partition suit which purports to be based upon an award given by certain arbitrators appointed by the parties just before the final decree in the suit was passed. The parties are brothers, the plaintiff being the younger brother of the defendant and both being the sons of one Basant Lal.

On the 18th June, 1934, the plaintiff instituted the present suit for the partition of properties, both moveable and immoveable, and in the first schedule of the plaint he claimed that one of the items of the properties to be divided between him and the defendant was cash amounting to nine lakhs of rupees. The plaintiff also made an application to the court for the appointment of a commissioner to make an inventory of the joint properties on the allegation that the moveable properties were in danger of being removed by the defendant. The defendant did not file any written statement, but he filed an application in which he denied some of the allegations made by the plaintiff and tried to resist the appointment of the commissioner. Ultimately a commissioner was appointed and before him on the 23rd June, 1934, the parties presented a compromise petition. This petition recited that it had been settled between the parties (*1*) that the plaintiff would accept 7-annas share in all the moveable properties, articles, cash, ornaments, etc., and the defendant would take the

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FAZI ALI, J.

remaining 9 annas and (2) that the properties should be partitioned by three persons who had been chosen by the parties, the names of these persons being Nanda Lal Bhagat, Lachman Sao and Hari Kishun. The petition further stated

"that in whatever manner the aforesaid arbitrators shall partition and allot the properties, cash, articles and bond, ijara (deeds), hundis, decree, etc., shall be acceptable to both parties, and should, for any reasons, they fail to agree in the partition of any property the opinion of the majority shall prevail and the partition shall take effect accordingly."

The arbitrators subsequently gave their award setting out therein details of properties allotted to the plaintiff and the defendant respectively. They decided that the defendant had concealed a sum of three lakhs and not over nine lakhs of rupees as was alleged by the plaintiff, and to equalise the share of the plaintiff in the total asset, they directed the defendant to pay to him a sum of Rs. 98,773 odd. Certain objections were preferred by the defendant to the award, but they were disallowed by the Subordinate Judge who directed the preparation of the final decree in accordance with the award. The defendant then moved this Court against the order of the Subordinate Judge giving effect to the award, but his application was dismissed. He has now preferred this appeal from the final decree passed by the learned Subordinate Judge and the main question which has been argued in this Court is whether an appeal lies from the decree.

Paragraph 16 (2) of the Second Schedule of the Code of Civil Procedure provides—

"Upon the judgment pronounced according to the award a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award."

Prima facie, therefore, no appeal can be entertained from the decree passed in the present suit. It is, however, contended by Sir Manmatha Nath Mukherjee who appears on behalf of the appellant that in the present case an appeal will lie, because in the first

place the Second Schedule of the Code of Civil Procedure has no application to the facts of the present case; and, secondly, because the so-called award of the arbitrators was without jurisdiction and was, therefore, in law no award at all.

As to the first point it is contended that the parties having agreed among themselves as to their respective share in the properties to be divided, there was no longer any matter in difference between them so as to bring the case under paragraph 16 of the Second Schedule and the position of the so-called arbitrators was not unlike that of a commissioner who is usually appointed for the partition of properties in a suit for partition after the preliminary decree is passed. This contention is obviously untenable, because the compromise petition itself shows that all the differences between the parties had not been settled. Indeed, in the very preamble of the petition it is recited that the reference to the three persons named in the petition became necessary because " many kinds of harassment and monetary loss are involved in a dispute between the parties and it is not known how long the suit will be going on and what will be the result ". Evidently the parties were not agreed among themselves as to how the properties were to be divided, otherwise there would have been no necessity of referring the question to the arbitrators. The expression " the matter in difference between the parties " which has been used in paragraph 1 of the Second Schedule is quite general and I have no doubt that it fully covers the present case. As to the distinction between a commissioner and an arbitrator it has been clearly pointed out in *Bolanath Ray* v. *Bata Krishto Ray*(1) and I shall merely quote the following passage from the judgment delivered in that case:

" The essential difference between a commissioner appointed to effect a partition and an arbitrator appears to me to be that the former is an officer

(1) (1926) 7 Pat. L. T. 739.

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selected and appointed by the court, in whose selection the parties have not, as of right, any choice, whereas the latter is a person selected by the parties in whose selection the court has no choice. In the former case the parties have expressed no consent to be bound by the decision of the commissioner who is appointed by the court.....and whose decision the parties may challenge before the court passing a final decree. In the latter case they have expressed such consent and cannot challenge the arbitrator's decision on questions of law and fact except on the limited grounds mentioned in the Second Schedule of the Code." Thus the first contention put forward on behalf of the appellant must fail.

It is next contended that the present case does not fall within the Second Schedule of the Code of Civil Procedure at all because this Schedule is intended to apply to those cases only where a decree is based wholly upon the award of the arbitrators, whereas in the present case the final decree is based partly upon a preliminary decree and partly upon the award of the arbitrators. This contention must be negatived on the short ground that there is nothing in the Code to prevent the parties from referring the matter in difference between them to arbitration at any stage of the suit and that it is not quite correct to say that the final decree which has been passed in the suit is not wholly based upon the award of the arbitrators. It is true that the parties agreed among themselves as to their respective shares and this agreement was incorporated in the preliminary decree but the division of the properties which is the subject of the final decree was wholly based upon the award of the arbitrators.

Lastly it was contended that the award of the arbitrators is void because they had no authority to divide the cash which was not produced before them. It is contended that the arbitrators had been authorised merely to divide those properties the existence of which was admitted and they went beyond their

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jurisdiction in deciding that the defendants had concealed a sum of three lakhs of rupees. It appears that this was precisely one of the points raised by the appellant before this Court in the Civil Revision to which reference has already been made, but it was overruled, it being pointed out that the arbitrators had been empowered not only to divide the properties but also to ascertain what was to be divided. It appears to us that the view which was expressed in that case is the only reasonable view which can be taken when the compromise petition is carefully read. As I have already stated, one of the properties which the plaintiff asked the court to divide was cash amounting to about nine lakhs of rupees. The compromise petition does not suggest anywhere that the allegations of the plaintiff in this respect were to be entirely ignored nor does it say that the arbitrators were to divide only such properties as were produced before them. On the other hand it recites that in whatever manner the arbitrators shall partition and allot the properties *including the cash* shall be acceptable to both parties. I do not think, therefore, that the compromise petition which is the basis of the arbitrators' authority imposed any such limitation upon the power of the arbitrators as to prevent them from trying to ascertain what was to be divided. This is quite sufficient to dispose of the contention put forward on behalf of the appellant; but the legal aspect of the matter must also be examined, inasmuch as the learned Advocate for the appellant argued upon it at some length and cited various authorities in support of his contention.

It appears that previous to the decision of the Judicial Committee in *Ghulam Khan* v. *Mohammad Hassan*(1) it was held in a number of cases that though a decree might be in accordance with an award, an appeal would lie from the decree if the award upon which the decree was passed was invalid. This view,

(1) (1901) I. L. R. 29 Cal. 167, P. C.

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however, has been abandoned by the majority of the High Courts in India since the pronouncement of the Judicial Committee in that case. The Judicial Committee dealing with section 522 which corresponded to paragraph 16 of the Second Schedule of the Code of Civil Procedure observe as follows with reference to the concluding words of this provision which are to the effect that no appeal shall lie from a decree passed upon a judgment pronounced according to an award except in so far as a decree is in excess of or not in accordance with the award :

"Those words appear to be perfectly clear. Their Lordships would be doing violence to the plain language and the obvious intention of the Code if they were to hold that an appeal lies from a decree pronounced under section 522 except in so far as the decree may be in excess of or not in accordance with the award. The principle of finality which finds expression in the Code is quite in accordance with the tendency of modern decisions in this country. The time has long gone by since the courts of this country showed disposition to sit as a court of appeal on award in respect of matters of fact or in respect of matters of law."

It may be pointed out here that the Code of Civil Procedure does take into account those cases where an award determines any matter not referred to arbitration and paragraph 14 of the Second Schedule clearly provides that in such cases the Court may remit the award to the reconsideration of the arbitrator upon such terms as it thinks fit. In the present case the defendant did not ask the court specifically to remit the award or any part of it to the arbitrators under paragraph 14, but it is pointed out that one of his objections to the award was that the arbitrators had gone beyond the scope of the reference in awarding a decree for Rs. 98,773-2-3. This objection, however, even if we assume it for the purpose of this appeal to have been an objection under paragraph 14, was

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considered and overruled and the application made by the appellant to the High Court to revise the order of the Subordinate Judge overruling his objection did not also succeed. Then comes paragraph 15 which provides, firstly, that the award remitted under paragraph 14 becomes void on the failure of the arbitrators to re-consider it; and, secondly, that an award may be set aside on certain grounds specified in that paragraph. The first part of the paragraph had no application to the case, as the award was never remitted to the arbitrators and the defendant did not succeed in persuading the Subordinate Judge to set it aside under the second part of the paragraph. Paragraph 16 says—

"Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in the manner provided in paragraph 14 and where the Court has refused an application made to it to set aside an award, the Court shall proceed to pronounce judgment according to the award."

In the present case the court below followed the course clearly indicated in this paragraph and pronounced a judgment according to the award. It follows, therefore, that under clause (*2*) of this paragraph, in order to determine whether an appeal lies from a decree based upon a judgment so pronounced, all that is to be ascertained is whether the decree is in excess of or not in accordance with the award. Here it is not disputed that the decree is in accordance with the award but it is contended that the award itself is in excess of the powers conferred upon the arbitrators. It appears to me in these circumstances that no appeal lies from the decree and I am fortified in this view by several decisions of this High Court and other High Courts of this country. Sir Manmatha Nath Mukherjee referred us to the decision of a Division Bench of the Calcutta High Court in *Durga Charan Deb Nath* v. *Gangadhar Deb Nath*(1) in which it was held that there is a distinction between an award which is irregular and an award which is

(1) (1930) 34 Cal. W. N. 813.

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void, and that where the decree is based upon an award which is without jurisdiction, the decree is really based on something which is not an award. That case, however, has not been followed by the other High Courts and with great respect to the learned Judges who decided it I am unable to agree to the proposition enunciated therein. The expressions "void and without jurisdiction" are sometimes used in a loose sense as bearing the same meaning as the terms "invalid" and "illegal". But in whatever sense they may be used I think that there is ample provision in paragraphs 14 and 15 of Schedule II of the Code of Civil Procedure to enable the court to which the award is submitted to refuse to give effect to the award if in its opinion it is either void or invalid or illegal. If, however, the award is accepted, it means that in the opinion of the court it is neither void nor invalid and the legislature does not appear to have intended that the opinion of the court should be challenged in appeal. Paragraph 16 merely gives effect to the principle of finality of awards and the intention of the legislature evidently is that an award should be subjected to the scrutiny of one court only, namely, the court through whom reference is made to arbitration and not that court and an appellate court. I would thus prefer to follow the decisions of our own court which seem to be in consonance with the decision of the Judicial Committee as well as the plain language of paragraph 16 of the Second Schedule of the Code of Civil Procedure.

I would, therefore, dismiss this appeal with costs. Hearing fee ten gold mohurs.

VARMA, J.—I agree.

The contention on behalf of the appellant against the decree is not that the decree is in excess of or not in accordance with the award but that the award itself is defective in some of the ways pointed out by Sir Manmatha Nath Mukherjee. Firstly, he contends that the arbitrators had exceeded the powers that were

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conferred upon them, because although the plaint referred to the property ascertained and unascertained, the petition of compromise did not refer to the unascertained portion of the property. Now, reading the various documents in connection therewith, namely, the petition of compromise and the preliminary decree passed thereon, it is clear to me that even the unascertained cash was included because when the arbitrators were to divide the property between the brothers all the properties could not be known to the arbitrators from the very beginning and they had to ascertain as to what the properties were which they were to divide. Moreover, the defendant raised this point before the court below. The petition of objection shows that they wanted to question (though not very clearly but in a round-about way) the authority of the arbitrators to give an award with regard to the property not ascertained by them. But that objection was disallowed. That is to say, even if we assume that there was a petition under paragraph 14 of the Second Schedule of the Code of Civil Procedure, that petition was rejected and then comes the mischief of paragraph 16 of the Second Schedule—that after a petition under paragraph 14 is rejected, a judgment must follow and a decree passed thereon and when that decree is passed, then, unless the party questioning the decree can show that the decree is in excess of the award or not in accordance with the award, he has no right of appeal. About the other point that this is not a decree passed entirely upon the award, it is clear from the materials before us that although a large number of documents had to be referred to, it is really a decree based on the award.

I agree that no appeal lies in this case.

Appeal dismissed.

J. K.

APPELLATE CIVIL.

Before Harries, C.J. and Rowland, J.

1938.
December, 6.

MAHANT SIDHAKAMAL RAMANUJ DAS

v.

BETAKRISHNA MAHAPATRA.*

Orissa Tenancy Act, 1913 (*B. & O. Act II of* 1913), *sections* 126 *and* 127—*entry in the record-of-rights as to rent, whether final—suit—declaration as to nature of tenancy, whether can displace the irrebuttable presumption as to correctness of rent—tanki bahaldar, whether is a tenant for purposes of part I of Chapter XI—revenue officer, whether has jurisdiction to settle and record his rent—second appeal —question as to finality of entry in the rent roll, whether is a point of law—practice to clothe a decision on a question of law with the appearance of a finding of fact deprecated.*

Failing a suit under section 126 of the Orissa Tenancy Act, 1913 (corresponding to section 104H of the Bengal Tenancy Act), the entry in the record-of-rights as to the rent settled under part I of Chapter XI of the Act is final.

A declaratory suit (such as is contemplated by the proviso to section 141 of the Orissa Tenancy Act) can no doubt be entertained and a declaration can be had that the tenancy is of a different class from that shown in the record-of-rights; but such a declaration does not displace the irrebuttable presumption of correctness of the rent entered in the rent roll.

Protap Chandra Jana v. *The Secretary of State for India*(1) and *Raja Promoda Nath Roy* v. *Asiruddin Mandal*(2), followed.

The only ground on which an entry of rent can be challenged is that of want of jurisdiction.

Although a holder of a *tanki bahal* land is a sub-proprietor within the meaning of section 3, clause (*21*), of the Act, he is

*Circuit Court, Cuttack. Appeal from Appellate Decree no. 4 of 1936, from a decision of A. N. Banerji, Esq., District Judge of Cuttack, dated the 23rd September, 1935, reversing a decision of Babu C. Acharya, Deputy Collector of Puri, dated the 8th January, 1935.

(1) (1922) I. L. R. 49 Cal. 1026.
(2) (1911) 15 Cal. W. N. 896.

a tenant for purposes of Part I of Chapter XI and what he pays kist by kist to the proprietor is for those purposes rent. Therefore, the revenue officer has jurisdiction to settle and record the rent of a *tanki bahaldar*.

The question whether an entry of rent in the settlement rent roll is conclusive or whether a party can prove by evidence that it is incorrect is a point of law which can be raised in second appeal.

Observations deprecating the practice which has been observed in the judgments of some of the lower appellate courts of attempting to shut out a second appeal by the use of language designed to clothe a decision on a question of law with the appearance of a finding of fact.

Appeal by the plaintiff.

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

B. N. Das, for the appellant.

B. Mahapatra, for the respondent.

ROWLAND, J.—This is an appeal by the plaintiff who sued as proprietor for the rent of the period second kist of 1337 to first kist of 1341 in respect of a tenure described in the current record-of-rights as a *tanki bajyafti* tenure and entered as bearing a rent of Rs. 7-3-0. The claim was laid in accordance with the settlement rent roll. The defendant resisted it, contending that the land was *tanki bahal* and not *tanki bajyafti* and that its rent was Rs. 3-5-3. The Rent Deputy Collector considered himself precluded from giving effect to this plea of the defendant by section 127 of the Orissa Tenancy Act, the settlement rent roll having been prepared in the course of a settlement of land revenue in the local area under part I of Chapter XI of the Act. Under this part a settlement rent roll is prepared which, after sanction by the confirming authority, is finally framed and incorporated in the record-of-rights. Any person aggrieved by entries in the record-of-rights can prefer within two months an appeal under section 125 or within six

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months a suit under section 126, such suit being limited to the grounds specified in clause (*3*) of the latter section. No such appeal or suit was preferred. The Rent Deputy Collector considered himself therefore bound by section 127, which enacts that subject to the provisions of section 126, all rents settled under the preceding sections shall be deemed to have been correctly settled and to be fair and equitable rents. He passed a decree for the rent as claimed. He held that the operation of section 127 was not affected by the result of a suit brought by the defendant in 1929 more than a year after the final publication of the rent roll, in which he obtained a declaration that the land was *tanki bahal* and not *tanki bajyafti*.

From this decision an appeal was preferred to the District Judge in which two contentions were raised. First, that rent was recoverable only for the period subsequent to the 4th May, 1932; and, secondly, that the status of the defendant being that of a *tanki bahal* tenant, the rent which in earlier settlement records had been recorded as Rs. 3-5-3 could not be enhanced and should have been held notwithstanding the entry in the settlement rent roll to be still only Rs. 3-5-3. The District Judge accepted both these contentions and allowed the appeal.

In second appeal the finding that rent is recoverable only for the period after 4th May, 1932, is not challenged. We are concerned only with the question whether the annual rent payable is Rs. 7-3-0 or Rs. 3-5-3.

The learned District Judge has said in his judgment "I find it as a fact that the rent payable by the defendant is only Rs. 3-5-3." When an obvious point of law has arisen, I deprecate the practice which has been observed in the judgments of some of the lower appellate courts of attempting to shut out a second appeal by the use of language designed to clothe a decision on a question of law with the appearance of a finding of fact. The question whether an entry of rent in the settlement rent roll is conclusive

or whether a party can prove by evidence that it is incorrect, is undoubtedly a point of law, and the plaintiff is perfectly competent to raise this question in second appeal. In fact, no attempt has been made by the respondent to contend that the finding of the District Judge as to the rent binds us as a finding of fact.

The appeal first came before a single Judge of this Court who, considering that a question of some general importance was involved, has referred it to a Division Bench, indicating at the same time his own view that the courts are bound to give effect to the entries of rent incorporated in the rent roll. The particular point does not appear to have been decided under the Orissa Tenancy Act, but in the decisions under the corresponding provisions of the Bengal Tenancy Act there is ample authority that failing a suit under section 104H of that Act (corresponding to section 126 of the Orissa Tenancy Act) the entry as to the rent is conclusive. A declaratory suit (such as is contemplated by the proviso to section 141 of the Orissa Tenancy Act) can no doubt be entertained and a declaration can be had that the tenancy is of a different class from that shown in the record-of-rights —*Raja Promoda Nath Roy* v. *Asiruddin Mandal*(1); but such a declaration does not displace the irrebuttable presumption of correctness of the rent entered in the rent roll. In *Protap Chandra Jana* v. *The Secretary of State for India*(2) even where it appeared that the entry of rent in the record-of-rights had been made by mistake and the actual rent was much higher and where the certificate procedure for recovery of the higher rent had been resorted to by the landlord, the Secretary of State, it was held on a suit by the tenant that the revenue authorities, not having taken the procedure contemplated by the statute, could not reopen the question in defence to a suit to set aside the certificate. The only ground on which an entry

(1) (1911) 15 Cal. W. N. 896.
(2) (1922) I. L. R. 49 Cal. 1026.

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of rent can be challenged is that of want of jurisdiction. The District Judge thought that a *tanki bahal* tenant being a tenant at fixed rent there was no jurisdiction to settle higher rent or to enhance his rent. There is some confusion here. The decisions relied on by the District Judge do not support him. The District Judge was entitled to enquire whether it was within the jurisdiction of the Settlement Officer to record a rent in respect of the tenancy, but if that question is answered affirmatively, the Settlement Officer was within his jurisdiction whether he recorded it correctly or erroneously, and if erroneously, the statute has provided one procedure and one procedure only for correcting the mistake. That procedure the respondent did not utilise. When he did sue to correct the entry regarding his status (as to which the record has a presumptive but not a conclusive value), he no doubt advisedly abstained from asking for any declaration as to the quantum of rent: advisedly because had he asked for such a relief it must have been refused. The District Judge says "unfortunately" and proceeds as if the decision operated to give him the very relief which the civil court could not have given him.

When it appeared in the course of the hearing that the decision of the District Judge could not possibly be supported on the grounds on which it was based the learned advocate for the respondent raised a novel contention that the holder of *tanki bahal* land being a sub-proprietor is not a tenant at all but a proprietor and the duty of the revenue officer to settle rents "for all classes of tenants" did not include the settling of rents for *tanki bahal* holders—a class who are not tenants at all. No doubt the holder of a *tanki bahal* land is a sub-proprietor within the meaning of section 3, clause (*21*), of the Act, and we are asked to hold that a sub-proprietor is a proprietor within the meaning of section 3, clause (*14*) which defines "proprietor" as including also the sub-proprietary interest referred to in section 3, clause (*2*),

That clause, however, defines *bajyaftidars* but contains no reference to *tanki bahaldars*. We must look further, therefore, to see whether a *tanki bahaldar* is a tenant. Section 15(*1*)(*a*) speaks of sub-proprietors other than sarbarahkars as one of the classes of tenure-holders, and section 6, clause (*iii*), enacts that for the purposes of certain sections every sub-proprietor shall be deemed to be a tenure-holder, and for the purposes of section 74 shall be deemed to be a permanent tenure-holder. With the other sections we are not particularly concerned here, but section 74 is the section imposing liability on a tenant to have his tenure or holding sold in execution of a decree for the rent thereof and declaring that the rent shall be a first charge thereon. It is difficult in face of these provisions to hold that what the sub-proprietor is to pay to the proprietor is not rent, and it does not seem to have been suggested in the courts below that the defendant was not a tenant under the plaintiff. The distinctive characteristics of tenancy are that a person should hold land under another person and be liable to pay rent for it to him. "Sub" is Latin for "under" and by its derivation the expression "sub-proprietor" would seem to mean a person holding land under another proprietor just as an under-tenure-holder holds land under a tenure-holder and an under-raiyat holds under a raiyat. A *tanki bahaldar* pays a fixed *tanki* and the word "tanki" is explained in the glossary to Mr. Maddox's Settlement Report thus: "Tanki (rent)—A quit rent".

Tanki lands are referred to as tenures in paragraph 317 at page 215 of Mr. Maddox's Settlement Report. Again in paragraph 512 at page 347 is a list of classes of tenancy and in this list appears *tanki bahal*. *Tanki bahaldars* are again referred to as a class of tenants in paragraph 515 at page 349 of the report. At the time of Mr. Maddox's settlement the Orissa Tenancy Act had not been passed and corresponding provisions of the Bengal Tenancy Act were in force. There was no such status as "sub-proprietor" recognised at that time. I may refer

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then to the final report of the current settlement operations—Mr. Dalziel's report. In paragraph 50, page 19, he refers to sub-proprietors as tenure-holders whose position approximates to that of proprietors of estates. In paragraph 447 at page 157 he says that "Section 15 recognizes their right to transfer their tenures without the consent of their landlords. But in other respects their position is practically that of an ordinary permanent tenure-holder, with fixity of rent." In the form of kabuliat for sub-proprietors annexed to the same report column 3 is for the "Date on which rent falls due". I have no doubt that what the sub-proprietor pays kist by kist to the proprietor is for our present purposes rent and he is for those purposes a tenant. It follows that the revenue officer had jurisdiction to settle and record the rent of the respondent.

The result is that the entry in the rent roll of annual rent Rs. 7-3-0 must be deemed to be correct. I would allow the appeal and give the plaintiff a decree for rent at this rate for the period in respect of which he has been held entitled to it with costs of the appeal and proportionate costs in the courts below.

HARRIES, C.J.—I agree.

Appeal allowed.

S. A. K.

REVISIONAL CIVIL.

1938.

December, 7.

Before Harries, C.J. and Rowland, J.

BHARI JENA

v.

GAURANGA CHARAN SAHU.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 89—*full decretal amount and compensation*

*Circuit Court, Cuttack. Civil Revision no. 56 of 1937, from an order of A. N. Banarji, Esq., District Judge of Cuttack, dated the 5th October, 1936, affirming an order of Babu Dwarikanath Das, Munsif of Jajpur, dated the 18th April, 1936.

deposited in court within thirty days—application for setting aside sale not filed—sale, whether can be set aside.

An execution sale cannot be set aside under Order XXI, rule 89, Code of Civil Procedure, 1908, in the absence of an application for setting aside the sale, even though the full decretal amount together with compensation is deposited in court within thirty days.

Raoji v. *Bansilal Narayan Marwari*(1), *Mathura Prasad* v. *Ram Lal*(2), *R. Venkatasubba Rao* v. *K. Narayana Rao*(3) and *Ramshivendra Narayan Ojha* v. *Awadh Bihary Saran*(4), followed.

Appeal by the judgment-debtor.

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

H. Sen, for the petitioner.

S. N. Sen Gupta, for the opposite party.

HARRIES, C.J.—This is an application for revision of an appellate order passed by the learned District Judge of Cuttack upholding an order of the learned Munsif rejecting an application for setting aside a sale.

It appears that the present petitioner's property was sold in execution of a mortgage decree on the 15th of January, 1936. Within thirty days of the date of the sale the petitioner deposited in court the entire decretal amount and compensation; but this deposit was not accompanied by any petition requesting the court to set aside the sale. The chalan showing the deposit was put up before the learned Munsif on the 17th of February, 1936, and it was noted in the ordersheet that no petition for setting aside the sale had been filed. On the 20th of February, 1936, the learned Munsif passed an order that the sale could not be set aside as no petition for setting it aside had been presented to the court. The sale was, therefore, confirmed.

(1) (1919) I. L. R. 43 Bom. 735.
(2) (1910) 9 Ind. Cas. 33.
(3) (1922) A. I. R. (Mad.) 83.
(4) (1923) A. I. R. (Pat.) 159.

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On the 29th of February, 1936, the petitioner made an application purporting to be under section 151 and Order XXI, Rule 89, of the Code of Civil Procedure, for reviewing the order of the learned Munsif. This application was heard in due course, and it was then suggested that the failure to make an application to set aside the sale was due to a pleader's clerk, but eventually this point was not pressed. The learned Munsif refused to interfere and his order was upheld by the learned District Judge.

There can be no doubt that no written or verbal application was made to the court when the decretal amount and compensation was deposited, and upon the findings of the court below it is impossible for this Court to hold that such failure was due to any pleader's clerk or to any error or failure on the part of any officer of the Court. The failure to present an application for setting aside the sale was apparently due to the petitioner's ignorance of the provisions of law applicable to the case. It was contended in the Court below and has been contended in this Court that the depositing of the decretal amount together with compensation amounted to an application for setting aside the sale. In any event it is said that such an application must be implied from the very fact that the decretal amount and compensation was deposited.

This contention has been put forward on many occasions previously. In the case of *Raoji Walad Baburao* v. *Bansilal Narayan Marwari*(1) a Bench of the Bombay High Court held that a sale could not be set aside in the absence of an application even though the full decretal amount had been deposited. The Court further held that it had no power under section 115 of the Code of Civil Procedure to interfere in such a case. In *Mathura Prashad* v. *Ram Lal*(2) a single Judge of the Allahabad High Court came to the same conclusion. The same view was expressed by a single Judge of the Madras High Court in

(1) (1919) I. L. R. 43 Bom. 735.
(2) (1910) 9 Ind. Cas. 33.

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R. Venkatasubha Rao v. *K. Narayana Rao*(1). There is no Patna case precisely in point; but the case of *Ramshivendra Narayan Ojha* v. *Awadh Bihary Saran* (2) supports the view which I have expressed. There can be no question that there is a body of authority for the view held by the learned District Judge. The case is undoubtedly a very hard one, but that does not permit the Court to interfere where it has no power so to do.

In my view no ground has been made out for interfering with the decision of the lower appellate Court and accordingly I would dismiss this application and make no order as to costs.

ROWLAND, J.—I agree.

Rule discharged.

S. A. K.

REVISIONAL CIVIL.

Before Harries, C. J. and Rowland, J.

MANMATHA NATH MULLICK

v.

JITENDRA NATH MUKHARJI.*

1938.

December, 7.

Legal Practitioners (Fees) Act, 1926 (*Act XXI of* 1926), *section* 4—*several pleaders engaged in a case—absence of specific agreement as to amount of fees—each pleader, whether entitled to full fee assessed at the hearing.*

Where several pleaders have been engaged in a case and no agreement is specifically entered into as to the amount of their fees, each pleader is entitled to his fees up to the full fee assessed at the hearing.

*Circuit Court, Cuttack. Civil Revision nos. 33 of 1937, 10 of 1938. and 106 of 1938, from the orders of Babu R. C. Mitra, Small Cause Court Judge of Puri, dated the 8th May, 18th September and 23rd December, 1937.

(1) (1922) A. I. R. (Mad.) 83.

(2) (1923) A. I. R. (Pat.) 159.

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Vellanki Ramakrishna v. *P. Venkataramayya*(1) and *Musammat Babui Radhika Debi* v. *Ramasray Prasad Choudhry*(2), followed.

Sarat Chandra Roy Chowdhry v. *Chandi Charan Mitra*(3), not followed.

Application in revision by a client against the decision of the lower court granting decrees for the amount of fees claimed by three separate pleaders who had appeared for him in a litigation.

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

B. K. Ray, for the petitioner.

R. N. Sinha, for the opposite party.

ROWLAND, J.—These three civil revision applications which have been heard together are presented by a client against the decision of the Small Cause Court Judge granting decrees for the amount of fees claimed by three separate pleaders who had appeared for him in a litigation. It does not appear that at the time of engaging the pleaders any agreement was specifically entered into as to the amount of their fees. They are accordingly entitled to such fees as are payable to them under section 4 of the Legal Practitioners (Fees) Act (Act XXI of 1926). The Small Cause Court Judge in each case entered into evidence as to the amount of work done by the pleader, assessed a reasonable charge and gave a decree accordingly making allowance for the amounts already paid. He did not award to any individual pleader more than the taxed fee of Rs. 650 which is entered in the decree of the court in the litigation; but the total of the amounts decreed very materially exceeds that.

The contention before us is that we should follow the decision in *Sarat Chandra Roy Chowdhry* v. *Chandi Charan Mitra*(3) where the view was taken

(1) (1916) 38 Ind. Cas. 210.
(2) (1931) A. I. R. (Pat.) 137.
(3) (1902) 7 Cal. W. N. 300.

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that in the absence of an agreement where several pleaders have been engaged they should divide among them a single hearing fee of the amount assessed as pleader's fee in the suit. This view, however, was not accepted by the Madras High Court in *Vellanki Ramakrishna* v. *P. Venkataramayya*(1) and does not appear to be tenable on the language of section 4 of the present Act which is different from that of section 28 of the Legal Practitioners Act, 1879, which has been repealed. The matter came before a Division Bench of this Court in *Musammat Babui Radhika Debi* v. *Ramasray Prasad Chowdhry*(2) and it was held that each pleader engaged was entitled to his fees up to the full fee assessed at the hearing. This decision, by which we are bound, fully supports the view taken in these cases by the Small Cause Court and I would dismiss the applications with costs.

HARRIES, C. J.—I agree.

S. A. K.

Applications dismissed.

REVISIONAL CRIMINAL.

Before Harries, C. J. and Rowland, J.

1939.

December, 20, 21, 22. January, 6.

RANCHI ZAMINDARI COMPANY, LTD.

v.

MAHARAJA PRATAP UDAINATH SAHI DEO.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 145—*proceeding under the section, whether can be instituted in cases of dispute relating to possession of minerals —questions relating to title, when can be considered—actual physical possession, nature of—owner of unworked minerals,*

*Criminal Revisions nos. 662 and 671 of 1938, from an order of Maulavi A. H. Khan, Subdivisional Magistrate of Ranchi, dated the 24th September, 1938, applications against which were dismissed by T. Luby, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, by his order, dated the 14th November, 1938.

(1) (1916) 38 Ind. Cas. 210.

(2) (1931) A. I. R. (Pat.) 137.

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when can be deemed to be in actual physical possession—trespasser wrongfully working minerals, whether can be said to be in possession of any of the unworked minerals—permanent tenure-holders, whether can claim subsoil rights in the absence of express grant.

Proceedings under section 145 of the Code of Criminal Procedure, 1898, can be instituted in cases of dispute relating to the possession of minerals.

Sunder Mull v. *Jhari Lal*(1), *Andrew Yule and Company* v. *A. H. Skone*(2) and *Bimala Prosad Mookerjee* v. *Tata Iron and Steel Company, Limited*(3), followed.

In a proceeding under section 145 the court can properly consider questions relating to title where such is necessary in order to ascertain who is in possession.

Ram Saroop Chaudhry v. *Musammat Darsano Koer*(4) and *Panaganti Parthasarathy Nayanim Garu* v. *Pallikapu Venkatasami Reddy*(5), followed.

Actual physical possession, such as is contemplated by section 145 of the Code, must of necessity vary with the subject-matter. The owner of unworked minerals is in actual possession of the same if he is in a position, at any moment, to work them or to permit others to do so.

Bimala Prosad Mookerjee v. *Tata Iron and Steel Company, Limited*(3), followed.

Agni Kumar Das v. *Mantazaddin*(6) and *Rajnandan Missir* v. *Chhedi Thakur*(7), distinguished.

If the owner of unworked minerals under a defined area begins to work the minerals in that area, he can properly be said to be in actual physical possession of the whole of the minerals in that area. In the same way if the owner of minerals under a defined area grants to third parties mining leases of the minerals under portions of such area, he exercises acts of ownership over those minerals and he can truly be said

(1) (1917) 2 Pat. L. J. 637.
(2) (1919) 4 Pat. L. J. 154.
(3) (1922) 35 Cal. L. J. 456.
(4) (1920) 1 Pat. L. T. 387.
(5) (1910) I. L. R. 34 Mad. 138.
(6) (1928) I. L. R. 56 Cal. 290, F. B.
(7) (1930) 13 Pat. L. T. 178.

to be in possession of the whole of the minerals under that defined area.

Lodna Colliery Company, Limited, v. *Bipin Behari Bose*(1), followed.

A trespasser wrongfully working minerals is in possession of only such of the minerals as he has actually mined, but he cannot be said to be in possession of any of the unworked minerals.

Glyn v. *Howell*(2), *Lodna Colliery Company, Limited* v. *Bipin Behary Bose*(1), *Kumar Pramatha Nath Mallia* v. *A. J. Meik*(3) and *Ashton* v. *Stock*(4), followed.

Nageshwar Bux Roy v. *Bengal Coal Company*(5) and *Bhupendranarayan Singha* v. *Rajeswar Prasad Bhakat*(6), distinguished.

Holders of permanent, heritable and transferable tenures created by a zamindar can have no claim to subsoil rights unless they are granted in express terms by the zamindar.

Bhupendranarayan Singha v. *Rajeswar Prasad Bhakat*(6), followed.

Criminal Revision no. 662 on behalf of the 2nd party and Criminal Revision no. 671 on behalf of the 1st party.

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

P. C. Manuk and *N. N. Sen*, for the petitioners in Criminal Revision no. 662 and the opposite party in Criminal Revision no. 671.

P. R. Das (with him *S. M. Mullick*, *B. C. De*, *K. K. Banerjee* and *Rai Bahadur P. K. Banerji*), for the opposite party in Criminal Revision no. 662 and the petitioners in Criminal Revision no. 671.

(1) (1920) 1 Pat. L. T. 84.
(2) (1909) 1 Ch. 666.
(3) (1920) 1 Pat. L. T. 360.
(4) (1877) 6 Ch. 719.
(5) (1930) I. L. R. 10 Pat. 407, P. C.
(6) (1931) I. L. R. 59 Cal. 80, P. C.

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HARRIES, C. J.—These are two applications for revision of orders relating to certain minerals made under section 145 of the Code of Criminal Procedure by the learned Subdivisional Officer of Ranchi and the learned Judicial Commissioner of Chota Nagpur. The applications arise out of a dispute concerning the possession of bauxite ore under a hill situate in plot no. 215 in the village of Bhusar, police-station Lohardagga, in Chota Nagpur. The first party were the Maharaja of Chota Nagpur and his employees, whilst the second party were the Ranchi Zamindari Company, Limited, and their employees. The Maharaja of Chota Nagpur claimed to be in possession of the whole of this bauxite ore and alleged that the second party was interfering with his possession. On the other hand, the second party claimed to be in possession of these minerals and complained of wrongful interference by the Maharaja. The Courts below have held that the minerals are partly in the possession of the first party and partly in possession of the second party. Each still claims possession over the whole, hence the present applications.

The case for the Maharaja is that the entire village of Bhusar together with the hills surrounding it is comprised in tauzi no. 1 in the Chota Nagpur Raj of which the Maharaja is the proprietor. He claimed that all the minerals and underground deposits within the Chota Nagpur Raj belonged to him and that he was in possession of the same. According to the case of the first party, a grant of surface rights in the village of Bhusar was made in the year 1824 to Thakur Udai Nath Sahi Deo and by the terms of this grant the land was resumable by the then Maharaja or his successors on extinction of the male heirs of the grantee. It is contended by the Maharaja that no rights to minerals or other deposits were granted to the said grantee. In the year 1918 the entire jagir including village Bhusar, which is described in these proceedings as the Kairo lot, was sold in execution of a rent decree and purchased by the predecessors of the

second party. Later the Maharaja granted a fresh patta to the auction-purchaser in order to end disputes and define the rights of the parties. The second party are the assignees of the auction-purchaser of this property and are now in possession of the jagir. According to the Maharaja, the second party are in possession of the surface rights only in the village of Bhusar and they have no right whatsoever to work the minerals under the said village. It appears that bauxite ore has been discovered recently in the hills and near the village and in hills near a neighbouring village called Bagru. The Maharaja has granted mining leases of property in the village of Bagru and other villages in the vicinity; but it is to be observed that he has granted no lease of, neither has he attempted to work, the minerals in or adjacent to the village of Bhusar. According to the Maharaja's case, information was received in January last that the employees of the Ranchi Zamindari Company, Limited, had wrongfully commenced to quarry bauxite in a hill adjacent to the village of Bhusar. The Maharaja protested, but the employees of the second party continued quarrying.

The case for the second party is that they are the successors in title of an independent talukdar. According to them, at some time long before the Permanent Settlement the then Maharaja of Chota Nagpur who exercised sovereign rights over what is now the Chota Nagpur Raj, made an absolute gift of the Kairo lot to one Dandu Rai. It is contended that the said Dandu Rai was the absolute owner of the property and that the second party now have similar rights and accordingly it is argued that they are the owners of the minerals and are therefore entitled to work the same.

There can be no doubt, however, that the second party's apparent title is that of tenure-holders under a patta, dated the 11th of December, 1936, granted by the Maharaja of Chota Nagpur to Raja Baldeo Das

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Birla, the immediate predecessor in title of the second party. According to the terms of this grant, Kairo lot is a jagir resumable by the Maharaja on extinction of the male heirs of Raja Baldeo Das Birla. It appears that there had been some dispute as to the nature of the respective interests of the two parties in this property and Raja Baldeo Das Birla challenged the rights of the Maharaja. The suit was compromised and the patta to which I have referred was granted by the Maharaja to Raja Baldeo Das Birla in order presumably to put an end to all disputes. This patta while granting to the second party a *putra-putradik* jagir contained a clause reserving to both parties all their antecedent rights; but the claim of the second party to be regarded as the successors in title of an independent talukdar was not found by the Magistrate to be supported by any reliable evidence and for the purpose of these proceedings must be taken as negatived.

The second party, however, have persisted in their claim that they are the proprietors of this property including the minerals and have for some time been working the same. There is evidence that they had some years previously employed geologists to survey the minerals, though it is impossible to say whether this was a really comprehensive survey. They had also for some years extracted small quantities of bauxite from the land; but it is clear that intensive mining had only been going on for about a month or two before these proceedings were launched.

The learned Magistrate to whom application was made by the Maharaja came to the conclusion that a breach of the peace was likely and eventually proceedings were drawn up under section 145 of the Code of Criminal Procedure. The learned Magistrate heard the evidence adduced by both the parties and came to the conclusion that the Maharaja was in possession of all the unworked minerals under the land in dispute but that the Ranchi Zamindari Company were in

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possession of the minerals in the area which had been actually worked by them. As the area actually worked by the Company was not clearly defined in the map which had been put in evidence, the learned Magistrate ordered that a kanungo should be deputed to demarcate the actual areas in possession of the respective parties. He, therefore, forbade all disturbance of such possession of the Maharaja and the Company until they are evicted therefrom in due course of law.

Both parties applied to the learned Judicial Commissioner for revision of this order; but the latter declined to make a report to this Court under section 438 of the Code of Criminal Procedure and dismissed both applications. Both parties being dissatisfied with the orders passed have made the applications to this Court which are now under consideration.

It has not been contended by either party that proceedings under section 145 of the Code of Criminal Procedure are not applicable to possession of minerals and indeed it would be difficult for either party so to contend. It has been held by this Court and by the Calcutta High Court that proceedings under section 145 of the Code of Criminal Procedure can be instituted in cases where disputes have arisen relating to the possession of minerals. In the case of *Sunder Mull* v. *Jhari Lal*(1) a Bench of this Court upheld an order passed by a Magistrate under this section regarding the possession of certain mica deposits. In *Andrew Yule and Company* v. *A. H. Skone*(2) Roe, J. held that proceedings under section 145 of the Code of Criminal Procedure could be taken in cases of disputes concerning the possession of coal mines or seams of coal. In *Bimala Prosad Mookerjee* v. *Tata Iron and Steel Company, Limited*(3) a Bench of the Calcutta High Court held that proceedings under section 145 of the Code of Criminal Procedure could be taken in a case

(1) (1917) 2 Pat. L. J. 637.
(2) (1919) 4 Pat. L. J. 154.
(3) (1922) 35 Cal. L. J. 456.

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where a dispute existed as to mining rights. Having regard to these authorities, I am bound to hold that proceedings under section 145 of the Code of Criminal Procedure are appropriate in cases of disputes as to the possession of minerals. It must be observed that in the present applications no question arises as to the possession of the surface. The second party are clearly entitled to possession of the surface and the only dispute relates to the seam or deposit of bauxite which lies underneath the surface.

The application by the second party was the first to be presented to this Court and it will be convenient to deal firstly with this application. Mr. Manuk who has appeared on behalf of the second party has strenously contended that the order in so far as it declares the Maharaja to be in possession of the unworked minerals should be set aside. He has argued that the Maharaja is not in possession of these minerals but that the second party are in actual possession of the same. He has contended that the learned Magistrate has in this case decided questions of title which he could not do. According to Mr. Manuk, the learned Magistrate has held that the Maharaja is in possession of the unworked minerals solely on the ground that he is the owner of these minerals and that possession follows title. In any event it is contended that the Maharaja is not in possession though he may be the owner of these minerals.

There can be no doubt that the learned Magistrate has considered the question as to who is the owner of these minerals and has held that the Maharaja is the owner of them; but he has only considered this aspect of the case in order to determine who is in actual possession of the same. In my view the court in proceedings under section 145 of the Code of Criminal Procedure can properly consider questions relating to title where such is necessary in order to ascertain who is in possession. This is clearly laid down in the case

of *Ram Saroop Chawdhry* v. *Musammat Darsano Koer*(1). At page 388 Sultan Ahmad, J. observed :—

"The learned Magistrate has gone very elaborately into the question of title of the parties, much more, in my opinion, than a proceeding under section 145 would justify. A Magistrate in proceedings under section 145 is entitled to look into the question of title only to arrive at a satisfactory conclusion on the question of possession. He has got no power to decide the question of title or look into it apart from the question of possession. If he wanted to go into the question of title in order to effectively decide the question of possession he would be perfectly justified in doing so. On the other hand, if the question of possession could be effectively decided without a decision on the question of title, he would not be entitled to go into the title of the parties."

The case of *Panaganti Parthasarathy Nayanim Garu* v. *Pallikapu Venkatasami Reddy*(2), is to the same effect. There it was held that evidence of title is admissible in an inquiry under section 145 of the Code of Criminal Procedure to enable the court to decide the question of actual possession though proof of title was not proof of actual possession.

In the present case the learned Magistrate had to decide who was in possession of certain unworked minerals. Unworked minerals are not capable of such possession as is the surface of land or a house. Land can be cultivated; house can be occupied; but unworked minerals cannot even be occupied. Minerals can be possessed by actual working; but in this case a large portion of the mineral area had admittedly not been worked. In such a case it was in my view necessary that the learned Magistrate should consider who was the owner of these minerals in order to assist him in coming to the conclusion as to who was in possession of the same. Admittedly the first party had not

(1) (1920) 1 Pat. L. T. 387.
(2) (1910) I. L. R. 34 Mad. 138.

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worked any minerals in the village of Bhusar, though he had granted mineral leases of bauxite under adjacent villages. Before a court could come to the conclusion as to who was in possession of the unworked bauxite ore in the village of Bhusar the question of ownership had to be considered.

In my view there is evidence in this case to support the Magistrate's finding that the Maharaja of Chota Nagpur is the owner of the minerals underlying the Chota Nagpur Raj. It has been held on numerous occasions by their Lordships of the Privy Council that the Maharaja holds a permanently settled estate. If the second party hold under the patta, dated the 11th of December, 1936, an interest in the land which is resumable by the Maharaja on extinction of the male heirs of Raja Baldeo Das Birla, and if the patta makes no grant of minerals, it follows that the second party are not the owners of these minerals. It has been held by their Lordships of the Privy Council in a series of cases of which the case of *Bhupendranarayan Singha* v. *Rajeswar Prasad Bhakat*(1) is an example that holders of an interest such as that held by the second party are not the owners of the minerals underlying the land. In that case it was held that patni tenures, generally, are on the same footing as to subsoil rights as other permanent, heritable and transferable tenures created by a zamindar, that is to say, the subsoil rights pass to the patnidar only when granted in express terms; general vernacular words signifying "with all rights" are insufficient for that purpose. In the present case the second party hold an interest which can be described as permanent, heritable and transferable. They cannot found a title to subsoil rights on the patta when the patta does not in express terms grant them such rights. On the evidence the Magistrate rightly held the Maharaja of Chota Nagpur to be the owner of the minerals underlying Bhusar village. However, that is not sufficient

(1) (1931) I. L. R. 59 Cal. 80, P. C.

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to conclude the case because in proceedings under section 145 of the Code of Criminal Procedure it is possession that matters and not ownership. In the case of unworked minerals possession follows title and the owner of unworked minerals is in possession of them though he is not actually engaged in working them. He is in a position to work them when he so desires, and he can lease them to others who may work them.

Mr. Manuk, however, has contended that such possession of unworked minerals as follows title is not sufficient to sustain an order under section 145 of the Code of Criminal Procedure. He has strenuously urged that the possession which is contemplated under this section is actual physical possession and not constructive possession which is the nature of possession which follows title to unworked minerals. Great reliance has been placed upon the case of *Agni Kumar Das* v. *Mantazaddin*(1) which is a Full Bench case decided by five Judges of the Calcutta High Court. In that case the Court held that the words "actual possession" in sub-section (*1*) of section 145 of the Code of Criminal Procedure mean actual physical possession even though wrongful, e.g., that of a recent trespasser in actual possession at the time of the proceedings under section 145. The same view was taken in this Court by Rowland, J. in the case of *Raj Nandan Missir* v. *Chhedi Thakur*(2). Mr. P. R. Das on behalf of the first party does not question the law as laid down in these two cases, but he has contended that actual physical possession must of necessity vary with the subject-matter. The owner of land can live on or cultivate the land, he may build on it or he may use it for some other specific purpose. Such in the case of land is actual physical possession; but such user of unworked minerals is impossible. According to Mr. Das, the owner of unworked minerals is in actual possession of the same if he is in a position, at

(1) (1928) I. L. R. 56 Cal. 290, F. B.
(2) (1930) 13 Pat. L. T. 178.

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any moment, to work them or to permit others to do so. That the nature of actual physical possession varies with the subject-matter has been recognized by a Bench of the Calcutta High Court in the case of *Bimala Prosad Mookerjee* v. *Tata Iron and Steel Company, Limited.*(1) That was a case of a dispute as to mining rights. At page 458 Suhrawardy, J. discussing an earlier case of *Indian Iron and Steel Company* v. *Banso Gopal*(2) observed :—

" The definition of land as given in the Criminal Procedure Code of 1908 is wide enough to cover mining rights and even prospecting or boring licenses which can only be utilised by going upon the land and exercising some rights relating to it. Nor do I assent to the proposition which seems to have been stated in that case that section 145, Criminal Procedure Code, is limited in its scope to disputes relating to actual possession only if by that expression is meant possession by squatting on the land. It is conceivable that actual possession in that restricted a sense may be with some one else and the real dissension between the parties may be regarding the exercise of some right over it or even under without interfering to any appreciable extent with the actual or manual possession of any one To this category falls the dispute relating to collection of rents or profits which is expressly included in the definition of ' land ' and ' water ' as given in the section ".

Here Suhrawardy, J. recognizes that there may be actual possession of minerals or mining rights though the person in such possession is not exercising such rights as a squatter or a cultivator of land. It is to be observed that Suhrawardy, J. was a party to the Full Bench case of *Agni Kumar Das* v. *Mantazaddin*(3), to which I have previously referred, which laid

(1) (1922) 35 Cal. L. J. 456.
(2) (1919) 32 Cal. L. J. 54.
(3) (1928) I. L. R. 56 Cal. 290, F. B.

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down that in the case of land "actual possession" meant actual physical possession. The earlier case of *Bimla Prosad Mookerjee* v. *Tata Iron and Steel Company, Limited*(1), is not questioned in this later Full Bench Case.

The possession of these unworked minerals does not depend entirely upon the evidence as to ownership. There was also evidence that the Maharaja had granted leases of or rights to work bauxite underlying the surface of adjoining lands or villages. Mr. Manuk on behalf of the second party has argued that such evidence is worthless; but in my view it is valuable evidence of possession of the unworked minerals. In my view if the owner of unworked minerals under a defined area sinks a shaft and begins to work the minerals in that area, he can properly be said to be in actual physical possession of the whole of the minerals in that area. In the same way if the owner of minerals under a defined area grants to third parties mining leases of the minerals under portions of such area, he exercises acts of ownership over those minerals and he can truly be said to be in possession of the whole of the minerals under that defined area. In *Lodna Colliery Company, Limited*, v. *Bipin Behari Bose*(2) Das, J. observed :—

"It has been held that if a person having title to all the seams of the coal under a defined surface enters upon one seam, he will be taken to be in possession of all the seams over which he has title: *Low Moor and Company* v. *Stanley Coal Company*(3) and *Davis* v. *Shepherd*(4)".

As I have stated, the Maharaja is the owner of all the minerals underlying a defined area, namely the Kairo lot. He has granted leases of the minerals in portions of this area. This evidence together with the evidence as to title does provide material upon

(1) (1922) 85 Cal. L. J. 456.
(2) (1920) 1 Pat. L. T. 84, 100.
(3) (1875) 34 L. T. 186.
(4) (1866) 1 Ch. 410.

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which the learned Magistrate could come to the conclusion that the Maharaja was in actual physical possession of the unworked minerals.

Mr. Manuk has further contended that even if the Maharaja had been in actual physical possession of the unworked minerals, he has been ousted from such possession by reason of the mining operations of the second party. The learned Magistrate has found that the second party have been quarrying or mining bauxite at three points and have stacked quantities of the ore obtained at or near the sites. The second party have further built a road of about four miles in length to the nearest railway station, presumably, for the purpose of carting bauxite for transit by rail. Lastly, the learned Magistrate has found that the second party had built a bhandar for the use of coolies working on the site. These acts together with the geological survey mentioned previously constitute, according to Mr. Manuk, an ouster of the Maharaja from possession of the whole of the minerals under the land in dispute. A map was produced which showed the workings of the second party. The learned Magistrate has pointed out that this map does not accurately set out the limits of these workings; but from a perusal of it it is clear that the second party has only worked on one side of plot 215 in which the disputed hill is situate. The precise size of the hill is not clear; but it is obvious from the map that the second party have not worked over the whole of the area. The evidence showed that intensive working had only taken place for a very short period of time before these proceedings, and it is clear that up to the time of the proceedings work had only taken place on the extreme western edge of the hill in dispute. As I have pointed out already, it is not clear whether the whole of this area was surveyed by geologists; but in any event the Magistrate has found that the second party have not mined bauxite at any place other than the three sites marked on the plan.

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Mr. Manuk has urged that this case falls within the principle enunciated by their Lordships of the Privy Council in the case of *Nageshwar Bux Roy* v. *Bengal Coal Company, Limited*(1). In that case their Lordships of the Privy Council held that the Bengal Coal Company were in adverse possession of the minerals underlying a defined area though they were not in fact working all such minerals. It is argued that the second party by working the minerals in these three places have like the Bengal Coal Company taken possession of the whole of the minerals underlying the disputed hill. The facts of the case of *Nageshwar Bux Roy* v. *Bengal Coal Company, Limited*(1) are very different from the facts of the present case. In that case the Company held a mukarrari lease of the area concerned and honestly believed that they were entitled to mine the minerals under the land. They had openly carried on mining operations for twelve years in various parts of the village by sinking and working coal pits and making bore holes. In short they had for more than twelve years conducted themselves as if they were entitled to work the minerals underlying the whole area. Lord Macmillan who delivered the judgment of the Board, at page 414, observed :—

"In considering the character and effect of acts of possession in the case of a mineral field, it is necessary to bear in mind the nature of the subject and the possession of which it is susceptible. Owing to the inaccessibility of minerals in the earth, it is not possible to take actual physical possession at once of a whole mineral field: it can be occupied only by extracting the minerals and until the whole minerals are exhausted the physical occupation must necessarily be partial. The real question is what in fact has been possessed.....

The workings have been commonly described as a colliery, a comprehensive term which includes both the

(1) (1930) I. L. R. 10 Pat. 407, P. C.

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worked and the as yet unworked minerals within a defined area. It was of the colliery in this sense that the company claim to have been in possession. The actings of the coal company have throughout, indeed, been consistent only with the assertion of a right to the minerals under the whole village to which they thought they had right. They openly sank at least three pits at different points, two of them being half a mile distant from the third. They selected the places at their own discretion, brought the requisite plant on to the ground and erected bungalows for their mining employees. Mr. Evans who was resident assistant manager of the colliery at Rajhara from 1907-08 to 1913 himself made bores in the mineral field during his time. It is nothing to the purpose that the company may not have worked any one pit for twelve years continuously if for twelve years they have carried on operations in various parts of the mineral field. The fact that one pit in a mineral field is discontinued and another opened in a different part of the field and that bores are sunk in likely places is excellent proof of possession of the whole area. There was no concealment on the part of the company; they behaved openly as persons in possession not of one pit, but of the mineral field underlying the village as a whole, and as entitled to sink pits anywhere in the village they chose. All this they did without any challenge from the plaintiff or his predecessors, and in the bona fide belief that their lease entitled them to work the minerals anywhere in the area let."

In the present case intensive working only began a month or so before these proceedings though it is clear that some work had been done for a considerable time previously. There is nothing in the present case to show that the second party had any bona fide belief that they were entitled to work the minerals underlying the whole of this area and in any event they did not do so. In my view it cannot possibly be contended that merely by working at three points on the western

end of the disputed hill possession has been taken of the whole of the minerals underlying the hill. It is true that a bhandar was erected and a road made; but even so the operations in my view fall far short of what is necessary in order to take possession of the whole of the minerals underlying this hill. The present case is more like the case of *Glyn* v. *Howell*(1) where it was held that mining by a trespasser in an area of two acres only did not amount to possession of the whole of the mineral field.

The second party also relies upon the case of *Bhupendranarayan Singha* v. *Rajeswar Prasad Bhakat*(2). In that case a person who had no right to the minerals quarried stones and gravel over the whole of a certain area of land. Underneath the stone and gravel was discovered a deposit of yellow ochre. Their Lordships of the Privy Council held that the operation of quarrying the stones and gravel amounted to possession of the whole of the stone and gravel in the area concerned but did not amount to possession of the yellow ochre which formed a distinct strata. In that case it is clear that stone and gravel had been quarried over the whole of the area in question, and, therefore, it could truly be said that possession had been taken of the whole of the subsoil containing such stone or gravel. Mr. Manuk has contended that such is the case here; but in my view the operations of the second party in the present case fall far short of taking possession of the whole of the bauxite underlying the hill. In my view the learned Magistrate was perfectly entitled to hold that the Maharaja's possession of the unworked minerals had not been ousted by the operations of the second party. The learned Magistrate has held, however, that the second party are in possession of the minerals at the places which are actually being worked by them.

(1) (1909) I Ch. 666.

(2) (1931) I. L. R. 59 Cal. 80, P. C.

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The application of the first party relates to that portion of the order which maintains the possession of the second party of the minerals at the actual scene of their quarrying or mining operations. It has been contended by Mr. P. R. Das that this portion of the order is clearly wrong and that the second party cannot be held to be in possession of even the minerals at the actual sites of their quarrying or mining. It has been frequently laid down that a person wrongfully working minerals is only in possession of such of the minerals as he has actually mined and that he is not in possession of any of the unworked minerals. In *Lodna Colliery Company, Limited*, v. *Bipin Behary Bose*(1) it was held by a Bench of this Court that a trespasser wrongfully working a seam of coal from an adjacent mine acquires possession only of the coal worked, and cannot be said to be in possession of the mine itself. This case was expressly approved of in the case of *Kumar Pramatha Nath Mallia* v. *A. J. Meik*(2) where it was held that a trespasser, wrongfully working a seam of coal from an adjacent mine acquired possession only of the coal worked but not of the mine or the seam itself and that a mere surface working could not give any claim by adverse possession to the whole of a coal seam or any portion of it beyond that which has already been taken. A similar decision is *Ashton* v. *Stock*(3). In that case Hall, V. C. was of opinion that a trespasser might in certain cases acquire possession over a seam of coal in a defined area, but on the facts of the case he came to the conclusion that the trespasser had acquired possession over nothing more than he had actually worked. At page 726 the learned Judge observed :—

"I can well understand that there might be some cases in which, from the manner of working coal, a person who began to work it, and was a mere wrongdoer and trespasser, might have acquired a title to a

(1) (1920) 1 Pat. L. T. 84.
(2) (1920) 1 Pat. L. T. 360.
(3) (1877) 6 Ch. 719.

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certain seam or area of coal, and that, by the mode of driving the levels and opening a certain area of coal, there might have been possession acquired to the whole thing as a mine or as a seam of coal, and not merely to the particular quantity of coal that was actually hewn and gotten. That is not, however, this case; and it is not necessary for me to say more than that such a case may exist."

The learned Magistrate might have come to the conclusion that the second party in this case obtained possession of nothing more than the bauxite which they had actually mined or quarried. On the other hand, it was open to the learned Magistrate to find that the methods employed did amount to possession over the minerals at the actual scene of operations. He has declined to find that the second party obtained possession over the whole of the unworked bauxite; but he has found that they have acquired possession over the bauxite at the three points where work had actually taken place. In my view he was entitled so to find and it is impossible upon the state of the authorities for me to say that such a decision is clearly erroneous. In my judgment there was abundant material before the learned Magistrate upon which he could base his findings that the first party was in actual possession of the unworked minerals and that the second party was in possession of the minerals at the points where such minerals were being worked.

For the reasons which I have given, I hold that no ground has been made out for interfering with the orders made by the courts below and accordingly I would dismiss both these applications.

ROWLAND, J.—I entirely agree.

S. A. K.

Rule discharged.

PRIVY COUNCIL.

J. C.*
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January, 20.

PAKALA NARAYAN SWAMI

v.

THE KING-EMPEROR.

(On Appeal from the High Court at Patna.)

Evidence—Criminal trial—Statement by deceased person —Conditions governing admissibility—Evidence Act (I of 1872), *s.* 32(*1*)*—Statement of accused to police during investigation—Admissibility of statement—Code of Criminal Procedure (Act V of* 1898), *s.* 162, *as amended by Act XVIII of* 1923.

On March 20, *K* told his wife that he was going to Berhampore as *P*'s wife had written and asked him to come and receive payments due to him. On March 21, *K* left his house in time to catch a train for Berhampore where *P* lived with his wife. On March 23, *K*'s dismembered body was found in a trunk which had been purchased for *P*.

Held, that, on the trial of *P* for the murder of *K*, the statement made by *K* to his wife was admissible in evidence under section 32(*1*) of the Indian Evidence Act as a circumstance of the transaction which resulted in *K*'s death. The phrase " Circumstances of the transaction " in the section conveys some limitations. It is not as broad as " circumstantial evidence " which includes evidence of all relevant facts. It is narrower than " res gestæ ". The circumstances must have some proximate relation to the actual occurrence and must be of the transaction which resulted in the death of the declarant.

Statements made to a police officer by an accused person under section 162 of the Code of Criminal Procedure are not admissible in evidence even when the person making them was not accused at the time of making the statements but was so at the time the statements were tendered.

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* *Present*: Lord Atkin, Lord Thankerton, Lord Wright, Lord Porter and Sir George Rankin.

Azimuddy v. *Emperor*(1), *In re Syamo Meha Patro*(2), *Grey* v. *Pearson*(3) and *Commissioners for Special Purposes of Income-tax* v. *Pemsel*(4), referred to.

Judgment of the High Court* on the admissibility of the statement of the accused reversed.

Appeal by Special Leave (no. 81 of 1938) from a judgment of the High Court (November 9, 1937) which confirmed a judgment of the Sessions Judge of Berhampore (September 15, 1937).

The appellant was convicted of the murder of a man whose dismembered body was found in a trunk on March 23, 1937.

In the trial, a statement made by the appellant to his wife on March 20, 1937, to the effect that he was going to the house of the deceased on March 21 and a statement to a police officer investigating the crime on April 4 to the effect that the deceased slept at the appellant's house on the night of March 21 and left the following day were admitted in evidence.

It was contended on behalf of the appellant that, having regard to section 32 of the Indian Evidence Act and section 162 of the Code of Criminal Procedure, these statements were inadmissible in evidence and that, apart from these statements, the evidence was insufficient to justify a conviction.

The material facts are more fully stated in the judgment of the Board.

1938, *December* 12, 15, 16 *and* 19. *Pritt, K.C., and Williams*, for the appellant: On the question of the admissibility of a statement made by an accused person to a police officer during his investigation and recorded under section 162 of the Code of Criminal Procedure, there has been a divergence of view in the High Courts in India. The judgment of Rankin, J.

(1) (1926) I. L. R. 54 Cal. 237.
(2) (1932) I. L. R. 55 Mad. 903.
(3) (1857) 6 H. L. C. 61.
(4) (1891) A. C. 531.
*(1937) I. L. R. 17 Pat. 15.

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in *Azimuddy* v. *Emperor*(1) and that of Reilly, J. in *Syamo Maha Patro, In re*(2) are typical of the two views. In my submission, the correct view is that taken by Reilly, J. The section in terms absolutely prohibits statements made to the police during investigation being used except for the purposes therein provided for and a statement made by an accused person cannot fall within the saving clause. The view taken in *Jogendranath Gorai* v. *Emperor*(3), a later Calcutta case, differed from that in *Azimuddy's* case(1), but *Azimuddy's* case(1) was not referred to in it. There are a number of decisions on the question. We have an agreed list of cases on the point, and, with permission, will put it in.

[The Board directed the list to be handed in.]

If the statement is one of an incriminating nature, it would also be ruled out as a confession under section 25 of the Evidence Act. "Confession" is not defined. But, upon the authorities, if I have read them aright, it appears that if the statement of the accused proves facts which are part of the incriminating facts of the prosecution's case, if the accused says something which can fairly be construed as "I committed the offence", his statement would be a confession. If the statement is a mere admission which simply provides a fact which is not sinister, then it is not a confession. The case here, I submit, falls within the rule in *Imperatrix* v. *Pandharinath*(4) which is confirmed in *Queen-Empress* v. *Nana*(5). The strongest case the other way is *Emperor* v. *Kangal Mali*(6). The other question is that of the admissibility of the statement made by the deceased to his wife to the effect that he was going to the house of the accused. I submit that this statement cannot

(1) (1926) I. L. R. 54 Cal. 237.
(2) (1932) I. L. R. 55 Mad. 903.
(3) (1935) I. L. R. 63 Cal. 419.
(4) (1881) I. L. R. 6 Bom. 34.
(5) (1889) I. L. R. 14 Bom. 260, F. B.
(6) (1905) I. L. R. 41 Cal. 601.

be said to be a statement as to a circumstance of the transaction which resulted in his death. The transaction, in my submission, means the activities which resulted in the death: *Rego* v. *Emperor*(1). But this case is against me on the question under section 162 of the Code of Criminal Procedure.

[The rest of the argument was directed to the facts, on the assumption that the two statements were inadmissible in evidence.]

Roberts, K. C., Wallach and Magaw, for the respondent: (Called on to reply only on the questions raised under section 162 of the Code of Criminal Procedure and sections 25 and 32 of the Evidence Act). I submit that the words "any person" in section 162 of the present Code do not and were not intended to include an accused person. That these words were not intended to include an accused person can be made plain by a reference to the Code of Criminal Procedure of 1861, (Act XXV of 1861). The provisions in that Code as regards investigation are in sections 144 to 150. Section 145 corresponds to section 162 of the present Code and section 148 is now section 25 of the Evidence Act. Under the provisions of that Code, the police were empowered to take statements during an investigation, but statements so taken were protected by section 145 and could not be used as evidence. If statements by accused persons are covered by section 145 then section 148 which protects a confession made to a police officer would be superfluous. The inference, I submit, is that the two sections were dealing with different subjects and this is made more apparent by the fact that in 1872 sections 148 to 150 were removed from the Code of Criminal Procedure and re-enacted more appropriately in the Evidence Act. "Investigation" is defined in section 4(*l*) and, in my submission section 162 and the connected sections in the present Code have reference to the collection of evidence and not

(1) (1933) I. L. R., 29 Nag. 251, 259.

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to the accused person. In that view it is not necessary to consider whether the admissibility of a statement under section 162 should depend on whether the person making it was accused at the time the statement was made. In *Syamo's* case(1) the statement was made before the accused was formally arrested. Here there is nothing to show whether the appellant made the statement in question before or after he was accused. Reference was made to *King-Emperor* v. *Maung Tha Din*(2).

"Any person", though an expression of the widest import, is used in other parts of the Code in a sense which clearly excludes an accused person, e.g. section 540. I submit that the statement here is not a confession. It may be that the statement is an admission within the definition in section 17 of the Indian Evidence Act. Reference was made to *King-Emperor* v. *Haji Sher Mahomed*(3).

[The Board intimated that it did not wish to hear him further on this point.]

Pritt, K. C., replied.

The agreed list of cases put in was as follows:

Azimuddy v. *Emperor*(4), *In re Syamo Maha Patro*(1), *Sheikh Kalesha, In re*(5), *Emperor* v. *Issuf Mohammad*(6), *King-Emperor* v. *Maung Tha Din*(2), *Emperor* v. *Faujdar*(7), *Rannun* v. *The Crown*(8), *Jagwa Dhanuk* v. *King-Emperor*(9), *Jogendranath Gorai* v. *Emperor*(10), *Queen-Empress* v. *Jadub*

(1) (1932) I. L. R. 55 Mad. 903.
(2) (1926) I. L. R. 4 Rang. 72, F. B.
(3) (1921) I. L. R. 46 Bom. 961.
(4) (1926) I. L. R. 54 Cal. 237.
(5) (1931) 62 M. L. J. 71.
(6) (1930) I. L. R. 55 Bom. 435.
(7) (1933) I. L. R. 55 All. 463.
(8) (1926) I. L. R. 7 Lah. 84.
(9) (1925) I. L. R. 5 Pat. 68.
(10) (1935) I. L. R. 63 Cal. 419.

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Das(1), *Rego* v. *King-Emperor*(2), *Amin Sharif* v. *Emperor*(3), *Imperatrix* v. *Pandharinath*(4), *Queen-Empress* v. *Nana*(5), *Queen-Empress* v. *Javecharam*(6), *Emperor* v. *Balmakund*(7), *Emperor* v. *Harman Kisha*(8), *King-Emperor* v. *Haji Sher Mahomed*(9), *King-Emperor* v. *Ramanujam*(10), *Emperor* v. *Kangal Mali*(11), *Barindra Kumar Ghose* v. *Emperor*(12) and *Legal Remembrancer* v. *Lalit Mohan Singh Roy*(13).

The judgment of the Judicial Committee was delivered by—

LORD ATKIN.—This is an appeal by special leave from a judgment of the High Court of Patna who affirmed the decision of the Sessions Judge at Berhampur who had convicted the appellant of the murder of one Kurree Nukaraju and sentenced him to death. The accused, his wife, his wife's brother, and his clerk living at his house were charged with the murder before the Subdivisional Magistrate, Chatrapur, in May and June, 1937. After hearing the evidence the examining magistrate discharged all the accused holding that there was no sufficient evidence to support the charge. Thereupon the Sessions Judge, Berhampur, exercising his powers under the Code of Criminal Procedure, called upon the accused to show cause why they should not be committed for trial and in July, 1937, ordered the present accused and his wife to be committed to the Court

(1) (1899) I. L. R. 27 Cal. 295.
(2) (1933) I. L. R. 29 Nag. 251.
(3) (1934) I. L. R. 61 Cal. 607, F. B.
(4) (1881) I. L. R. 6 Bom. 34.
(5) (1889) I. L. R. 14 Bom. 260.
(6) (1894) I. L. R. 19 Bom. 363.
(7) (1930) I. L. R. 52 All. 1011.
(8) (1934) I. L. R. 59 Bom. 120.
(9) (1921) I. L. R. 46 Bom. 961.
(10) (1934) I. L. R. 58 Mad. 642, F. B.
(11) (1905) I. L. R. 41 Cal. 601.
(12) (1909) I. L. R. 37 Cal. 467.
(13) (1921) I. L. R. 49 Cal. 167.

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of Sessoins to stand their trial for offences under sections of the Indian Penal Code 120B (conspiring to murder), 302 (murder) and 201 (causing evidence of an offence to disappear). At the trial the Sessions Judge acquitted the appellant's wife of all the charges but convicted the appellant of murder and sentenced him to death. The appeal is based upon the admission of certain evidence said to be made inadmissible by provisions of the Code of Criminal Procedure and the Evidence Act: and is further maintained upon the contention that whether the disputed evidence be admitted or not and certainly if it ought to have been rejected there is no evidence sufficient to support this conviction.

On Tuesday, March 23, 1937, at about noon the body of the deceased man was found in a steel trunk in a third class compartment at Puri the terminus of a branch line on the Bengal Nagpur Railway, where the trunk had been left unclaimed. The body had been cut into seven portions, and the medical evidence left no doubt that the man had been murdered. A few days elapsed before identification but eventually the body of the deceased was identified by his widow. He was a man of about 40 and had been married about 22 years. He had been a peon in the service of the Dewan of Pithapur one of whose daughters was the wife of the accused. It was suggested by the prosecution that before her marriage and about 19 years before the events in question the wife of the accused then a girl of about 13 had had an intrigue with the deceased. Four letters were produced by the deceased's widow purporting to be signed by the girl bearing date 1918 supporting this suggestion. The judge was not satisfied with the evidence of handwriting: there was no other evidence worth considering in support: and this suggested motive must be definitely rejected. The fact however remains that the deceased was in possession of these four documents purporting to be signed by the wife of

the accused. About 1919 the accused and his wife were married. They went to live at Berhampur about 250 miles from Pithapur. About 1933 they returned to Pithapur where they appear to have stayed with her father. They seem at that time to have been in need of money: and during 1936 the accused's wife borrowed from the deceased man at various times and in relatively small sums an amount of 3,000 rupees at interest at the rate of 18 per cent. per annum. About 50 letters and notes proving these transactions signed by the accused's wife were found in the deceased man's house at Pithapur after his death. On Saturday, March 20, 1937, the deceased man received a letter the contents of which were not accurately proved but it was reasonably clear that it invited him to come that day or next day to Berhampur. It was unsigned. The widow said that on that day her husband showed her a letter and said that he was going to Berhampur as the appellant's wife had written to him and told him to go and receive payment of his due. The evidence was objected to: it was admitted as falling under the provisions of section 32(*1*) of the Indian Evidence Act. The admission of this evidence is one of the grounds of the appeal, and will be discussed later. The deceased left his house on Sunday, March 21st, in time to catch the train for Berhampur. On Tuesday, March 23rd, his body was found in the train at Puri as already stated.

Police suspicion does not appear to have been directed against the accused and his household until April 4th on which date the police visited the house, examined the inhabitants and obtained a statement from the accused the admissibility of which is one of the principal grounds of the appeal. They searched the premises as is said for incriminating documents only, and in the afternoon arrested the four persons already mentioned. In addition to evidence of the facts above stated the prosecution adduced the

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evidence of two employees in a shop at Berhampur where trunks were made and sold who gave evidence that on Monday, March 22nd, in the afternoon the dhobie or washerman of the accused called at the shop and ordered a trunk: that a trunk was taken to the accused's house and shown to him and his wife. It was rejected as being too large, and a smaller one of the size of the trunk in question was then delivered to the dhobie at the shop and he took it away. The transaction was entered in the rough day book and in the fair copy book of the shop as of the day in question: and though the trial judge thought that the entry had been tampered with so as to insert the height of the trunk the trial judge and the High Court both of whom inspected the entries were satisfied that they genuinely established the sale of such a trunk on that day. The witnesses identified the trunk in which the body was found as being the trunk of their manufacture which was sold in the circumstances stated on the Monday afternoon. The dhobie was called and proved the purchase of a trunk after the rejection by the accused of the first one brought from the shop. He however placed the date as being on a Saturday. The judge thought his evidence was unreliable and said that he ignored it. He however found the sale of the particular trunk was proved to have taken place as stated by the witnesses on Monday, March 22nd. The prosecution then sought to prove that the accused took the trunk to the train in which it was found on Tuesday, March 23rd. Evidence was given by a jetka driver who lived near the accused that early in the morning some four months before the trial the accused had come to his house and said he wanted a jetka; that he drove to the accused's house, a trunk which was like the trunk in question was loaded on the jetka and he drove the accused with the trunk to the station where the trunk was unloaded and taken into the station. The evidence was corroborated by a man who ran alongside the jetka in charge of the horse which was

fresh. The defence relied strongly on statements made by both these witnesses on cross-examination that they remembered that the occasion was a Saturday as it was a shandy (fair) day at Berhampur. Both courts accepted the evidence as relating to the carriage of this trunk on the 23rd. They thought that the difference as to date was an inaccuracy due to a bona fide mistake. A witness of repute spoke to seeing the accused at the station on the morning of March 23rd when the train on which the trunk was found arrived. He could not say that he saw the accused enter the train. When the accused was examined by the police at his house on April 4th it is alleged that he made the statement which the defence sought to have rejected and which must be further discussed. The alleged statement was that the deceased had come to his house on the evening of March 21st, slept in one of the outhouse rooms for the night and left on the evening of the 22nd by the passenger train. That on the morning of March 23rd the accused went to the station with Gangulu (the jetka driver) in his jetka, and went off by the passenger train to Chatrapur on some private business with one Delhi Chiranjicirao. Hearing at the Chattrapur station that this man was away he returned by the Vizagapatam passenger train as far as Jagannadhpur whence he went to Narendrapur to see one Juria Naiko. He too was absent so the accused returned to Berhampur by jetka. This statement was obviously important for it admitted that the murdered man arrived at the accused's house on the 21st. Both courts admitted it. Their Lordships are of opinion that it should have been rejected for reasons that will be given later. The accused and the other three members of his household were arrested on the 4th, and the house remained unoccupied. On the 7th a further search of the premises was made by the police, and a bundle of rags which apparently had been washed but contained blood-stains was found buried at a depth of about 18 inches in the compound. Some

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rags also bloodstained but still damp were found in a box in the bathroom. The trial judge accepted this evidence: on appeal both of the judges thought that the articles found were not on the premises when the police searched on the 4th: Mr. Justice Manohar Lall thought that the discovery was made under highly suspicious circumstances and that no inference should be drawn against the accused in respect of it. In this state of the case their Lordships think that it would be unsafe to rely upon the discoveries on April 7th. Before the examining magistrate the accused's statement was that he was not guilty. He had come to Berhampur on March 17 in connection with a lawsuit of which he gave some particulars. He neither purchased the trunk through the washerman nor did he take it to any place in any jetka. The deceased never came to his house at any time in March last. He did not know the deceased. At the trial he said that the statement he had made in the lower court was correct. When asked by the judge whether he could suggest any reason why so many witnesses should come and give evidence against him he said "The witnesses are mistaken and the police are suffering from excessive zeal".

The first question with which their Lordships propose to deal is whether the statement of the widow that on 20th March the deceased had told her that he was going to Berhampur as the accused's wife had written and told him to go and receive payment of his dues was admissible under section 32(*1*) of the Indian Evidence Act, 1872. That section provides:

"Statements written or verbal of relevant facts made by a person who is dead.....are themselves relevant facts in the following cases (*1*) when the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death and whatever may be the nature of the proceeding in which the cause of his death comes into question."

A variety of questions has been mooted in the Indian courts as to the effect of this section. It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, that the "circumstances" can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction: general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. "Circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than "res gestæ". Circumstances must have some proximate relation to the actual occurrence: though as for instance in a case of prolonged poisoning they may be related to dates at a considerable distance from the date of the actual fatal dose.

It will be observed that "the circumstances" are of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the

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declarant has ultimately been caused, for the condition of the admissibility, of the evidence is that " the cause of [the declarant's] death comes into question ". In the present case the cause of the deceased's death comes into question. The transaction is one in which the deceased was murdered on 21st March or 22nd March: and his body was found in a trunk proved to be bought on behalf of the accused. The statement made by the deceased on 20th or 21st March that he was setting out to the place where the accused lived, and to meet a person, the wife of the accused, who lived in the accused's house, appears clearly to be a statement as to some of the circumstances of transaction which resulted in his death. The statement was rightly admitted.

It is now necessary to discuss the question whether the alleged statement of the accused to the police before arrest was protected by section 162 of the Code of Criminal Procedure which provides (sub-section 1):—

" No statement made by any person to a police officer in the course of an investigation under this Chapter shall if reduced into writing be signed by the person making it: nor shall any such statement or any record thereof whether in a police diary or otherwise or any part of such statement or record be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such trial was made."

This section which in its amended form was substituted for the original section by section 34 of the Code of Criminal Procedure Amendment Act, 1923, has been the subject of repeated decisions in the High Courts of India and has given rise to a distinct cleavage of opinion. The majority of the High Courts have held that it has no application to a statement made by a person who at the time it is tendered in evidence is an accused person: the minority have held that there is no such limitation. Their Lordships have been referred to at least twelve reported cases, all of which with others they have considered. The representative opinions on either side may be

taken to be *Azimuddy* v. *Emperor*(1) in a judgment of the then Rankin, J. admitting such a statement against the accused and *Syamo Maha Patro, In re*(2) in a judgment of Reilly, J. sitting in a full Bench of the High Court of Madras rejecting the statement. The present Board have had the advantage of the presence of Sir George Rankin in giving a full consideration to all the reported decisions: and they have come to the conclusion that the words of the section lead to the conclusion that the statement is not admissible even when made by the person ultimately accused.

The reference in the section to "this chapter" is to the group of sections beginning with Chapter XIV forming Part V of the Code entitled "Information to the Police and their powers to investigate". After giving powers to certain police officers to investigate certain crimes the Code proceeds in section 160 to give power to any police officer making an investigation by an order in writing to require the attendance before himself of persons who appear to be acquainted with the circumstances of the case. By section 161 any policeman making an investigation under the chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and such person shall be bound to answer all questions put to him other than those the answers to which may tend to incriminate him. Then follows the section in question which is drawn in the same general way relating to "any person". That the words in their ordinary meaning would include any person though he may thereafter be accused seems plain. Investigation into crime often includes the examination of a number of persons none of whom or all of whom may be suspected at the time. The first words of the section prohibiting the statement if recorded from being signed must apply to all

(1) (1926) I. L. R. 54 Cal. 237.
(2) (1932) I. L. R. 55 Mad. 903.

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the statements made at the time and must therefore apply to a statement made by a person possibly not then even suspected but eventually accused. "Any such statement" must therefore include such a case: and it would appear that if the statement is to be admitted at all it can only be by limiting the words "used for any purpose" by the addition of such words "except as evidence for or against the person making it when accused of an offence". If such an exception were intended one would expect to find it expressed: and their Lordships cannot find sufficient grounds for so departing from the plain words used. If one had to guess at the intention of the legislature in framing a section in the words used, one would suppose that they had in mind to encourage the free disclosure of information or to protect the person making the statement from a supposed unreliability of police testimony as to alleged statements or both. In any case the reasons would apply as might be thought *a fortiori* to an alleged statement made by a person ultimately accused. But in truth when the meaning of words is plain it is not the duty of the Courts to busy themselves with supposed intentions.

"I have been long and deeply impressed with the wisdom of the rule, now I believe universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed status, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther."

[Lord Wensleydale in *Grey* v. *Pearson*(1).]

"My Lords, to quote from the language of Tindal, C. J. when delivering the opinion of the judges in the *Sussex Peerage Case*, 11 C.L. & F., at p. 143 (1844) 'The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the

(1) (1857) 6 H. L. C. 61, p. 106.

intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble which according to Dyer C.J. [*Stowel* v. *Lord Zouch* (Plowd. at p. 369) (1562)] is a key to open the minds of the makers of the Act, and the mischiefs which they are intended to redress.' "

[Lord Halsbury L. C. in *Commissioners for Special Purposes of Income-tax* v. *Pemsel*(1).]

In this case the words themselves declare the intention of the legislature. It therefore appears inadmissible to consider the advantages or disadvantages of applying the plain meaning whether in the interest of the prosecution or the accused. It would appear that one of the difficulties that has been felt in some of the Courts in India in giving the words their natural construction has been the supposed effect on sections 25, 26 and 27 of the Indian Evidence Act, 1872. Section 25 provides that no confession made to a police officer shall be proved against an accused. Section 26.—No confession made by any person whilst he is in the custody of a police officer shall be proved as against such person. Section 27 is a proviso that when any fact is discovered in consequence of information received from a person accused of any offence whilst in the custody of a police officer so much of such information whether it amounts to a confession or not may be proved. It is said that to give section 162 of the Code the construction contended for would be to repeal section 27 of the Evidence Act for a statement giving rise to a discovery could not then be proved. It is obvious that the two sections can in some circumstances stand together. Section 162 is confined to statements made to a police officer in course of an investigation. Section 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation. Section 27 seems to be intended to be a proviso to section 26 which

(1) (1891) A. C. 531, p. 542.

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includes any statement made by a person whilst in custody of the police and appears to apply to such statements to whomsoever made, e.g., to a fellow prisoner, a doctor or a visitor. Such statements are not covered by section 162. Whether to give to section 162 the plain meaning of the words is to leave the statement still inadmissible even though a discovery of fact is made such as is contemplated by section 27 it does not seem necessary to decide. In the present case the declarant was not in the custody of the police, and no alleged discovery was made in consequence of his statement. The words of section 162 are in their Lordships' view plainly wide enough to exclude any confession made to a police officer in course of investigation whether a discovery is made or not. They may therefore *pro tanto* repeal the provisions of the section which would otherwise apply. If they do not presumably it would be on the ground that section 27 of the Evidence Act is a "special law" within the meaning of section 1(*2*) of the Code of Criminal Procedure, and that section 162 is not a specific provision to the contrary. Their Lordships express no opinion on this topic for whatever be the right view it is necessary to give to section 162 the full meaning indicated. It only remains to add that any difficulties to which either the prosecution or the defence may be exposed by the construction now placed on section 162 can in nearly every case be avoided by securing that statements and confessions are recorded under section 164. In view of their Lordship's decision that the alleged statement was inadmissible by reason of section 162, the appellants contention that it was inadmissible as a confession under section 25 of the Evidence Act becomes unnecessary. As the point was argued however and as there seems to have been some discussion in the Indian Courts on the matter it may be useful to state that in their Lordships' view no statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the

offence alleged to be confessed. Moreover a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession e.g., an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession. Some confusion appears to have been caused by the definition of confession in Article 22 of Stephen's "Digest of the Law of Evidence" which defines a confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime. If the surrounding articles are examined it will be apparent that the learned author after dealing with admissions generally is applying himself to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions, in order to have a general term for use in the three following articles, confession secured by inducement, made upon oath, made under a promise of secrecy. The definition is not contained in the Evidence Act, 1872: and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused "suggesting the inference that he committed" the crime.

The statement of the accused has now been held to have been wrongly admitted. What effect should that have on the appeal? Mr. Pritt, for the appellant, forcibly argued that the trial judge relied on the statement as sufficient evidence in itself to show that the deceased man arrived at the accused's house on the night of 21st March; and that when that evidence failed there was not sufficient evidence to support a conviction for murder. Their Lordships cannot take that view. For this purpose they will be content to abide by the rule governing the Patna High

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Court expressed in section 537 of the Code of Criminal Procedure:—

"No finding sentence or order passed by a Court of competent jurisdiction shall be reversed.....on appeal.....on account of any error in the judgment or other proceedings during trial..... unless such error has in fact occasioned a failure of justice."

They will for this case adopt this rule though it probably is wider than the rules which this Board has laid down for the exercise of their powers in dealing with criminal appeals. It will be observed that the sole effect of the disputed statement was to supply the prosecution with evidence of the material fact that the deceased reached the accused's house at the critical time. But though this evidence be rejected there is other evidence of overwhelming strength to the same effect. It must be taken to have been proved that a trunk was bought by order of the accused and taken to his house on the afternoon of 22nd March. At about 6 A.M. on 23rd March that trunk containing the body of the deceased was placed on the train at the station of Berhampur having been conveyed there in a vehicle ordered by the accused in which he and the trunk travelled to the station. The deceased had on the day before set out from his house for the express purpose of visiting the accused's house.

In these circumstances there is ample evidence of the presence of the deceased at the accused's house; the fact which alone the statement sought to establish. Faced with this difficulty Mr. Pritt sought to establish that in no case whether the statement be rejected or admitted was there sufficient evidence of his client's guilt. The facts were consistent, he said, with the accused being merely an accessory after the fact to a murder to which he was no party. Their Lordships are unable to say that there was not ample evidence upon which the judge of fact could properly convict of murder. The accused man was found to have been in possession of a trunk in which was the mutilated body of a man recently murdered: a trunk which he

purchased a little more than 12 hours before the trunk was placed in the train. He gave no explanation: and contented himself with a denial that he knew the man, or that the man had visited his house, or that he had seen the trunk. All these statements were untrue. In these circumstances it is impossible to say that the proceedings which ended with a conviction for murder resulted in a failure of justice. For these reasons the appeal should be dismissed and their Lordships will humbly advise His Majesty accordingly.

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

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

APPELLATE CIVIL.

Before Harries, C.J. and Manohar Lall, J.

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v.

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January, 20.

Limitation Act, 1908 (Act IX of 1908), section 20 (1)—payment made by debtor without specification—appropriation by creditor towards interest as such—the words "as such" in the amended section 20(1), whether are redundant.

Where a payment is made by the debtor to his creditor within the period of limitation, and the debtor does not specify whether the payment is towards interest or principal but the creditor appropriates the payment towards interest, the payment is a payment of interest as such within the meaning of section 20(1) of the Limitation Act, 1908.

The words "as such" in section 20(1) of the Act, as amended in 1927, are now redundant.

*Appeal from Original Decree no. 38 of 1937, from a decision of Charles Ernest Walze, Esq., Subordinate Judge of Deoghar, dated the 28rd December, 1936.

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Liquidator, Bagha Co-operative Society v. *Debi Mangal Prasad Sinha*(1) and *Bankanidhi Tantra* v. *Godipatna Co-operative Society*(2), followed.

Udaypal Singh v. *Lakshmi Chand*(3), dissented from.

Appeal by the plaintiff.

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

Sir Sultan Ahmed and *S. N. Bose*, for the appellant.

G. P. Das (with him *D. C. Varma* and *Sambhu Brahmeswar Prasad*), for the respondent.

HARRIES, C.J.—This is a plaintiff's appeal from a decree of the learned Subordinate Judge of Deoghar dismissing his claim for monies due as principal and interest under a promissory note.

On the 10th of February, 1929, the defendant executed a promissory note for Rs. 9,200 and by the terms of the said note he agreed to pay interest thereon at the rate of one per cent. per mensem. It appears that from time to time the defendant made payments to the plaintiff and these payments were all endorsed by the defendant in his own hand on the back of the promissory note. At the date of this suit a sum of Rs. 15,652-12-0 was due and owing as principal and interest upon the said note.

A number of defences were raised; but it is only necessary to consider one of them, namely limitation. The learned Judge found that the note had been duly executed and that the sum claimed was due for principal and interest. He, however, found that the claim was barred by limitation and accordingly dismissed the suit.

The plaintiff contended that certain admitted payments made by the defendant extended the time

(1) (1936) I. L. R. 16 Pat. 27.
(2) (1936) I. L. R. 16 Pat. 294.
(3) (1935) I. L. R. 58 All. 261, F. B.

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of limitation and that the suit was within time. The two payments relied upon were a payment of Rs. 400 on the 21st of April, 1933, and a payment of Rs. 722-4-0 on the 7th of January, 1934. These payments were within limitation, but, according to the defendant's contention, they were not such payments as would extend the time in favour of the plaintiff.

The payments are set out in paragraph 3 of the plaint, and it is to be observed that nowhere is it stated whether these payments were made towards interest or towards principal or both. All that is pleaded is :—

"That thereafter on 3rd February 1932 the defendant repaid Rs. 70 and on 17th March 1932 repaid Rs. 60 and on 21st April 1933 repaid Rs. 400 and on 7th January 1934 repaid Rs. 722-4-0 towards the dues for the said loan and endorsed all the aforesaid repayments in his own hand on the back of the said promissory note."

It is further clear from the next paragraph in the plaint that these payments were appropriated by the plaintiff towards interest, because he states that on the 3rd of February, 1936, that is, when the plaint was filed, the sum of Rs. 9,200 was due as principal, that is, the original sum advanced and Rs. 6,452-12-0 as interest. It is clear, therefore, that the plaintiff must have appropriated all the payments made towards interest.

It is to be observed that the defendant does not deny this in his written statement. He says that the allegations contained in paragraphs 3 and 4 of the plaint, which relate to payments and appropriation, are partially correct, though he says that the plaintiff had not given credit for all the amounts paid by the defendant. Further, it is clear that the defendant had made endorsements on the back of the promissory note in respect of each of these payments.

Though the learned Judge was satisfied that two payments had been made within the period of limitation, yet he felt constrained to hold that the suit was barred by reason of certain decisions of other courts

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upon the construction to be given to section 20 of the Limitation Act. He accordingly dismissed the suit.

The only point for consideration is whether time was extended by these payments by reason of section 20(*1*) of the Limitation Act as amended by Act I of 1927. Section 20(*1*) of the Limitation Act as amended is in these terms:—

"Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf,

or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf,

a fresh period of limitation shall be computed from the time when the payment was made:

Provided that, save in the case of a payment of interest made before the 1st day of January 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment."

It is to be observed that before the Amending Act of 1927 a written acknowledgment of the payment was only necessary in the case of a part payment of the principal sum due. Further before and after the amendment the words "paid as such" appear in connection with sums paid as interest.

It has been argued before us by Sir Sultan Ahmed on behalf of the appellant that this case is concluded by authority of this Court, and in my view this contention is well-founded. The precise point which arises in this case was decided by a Division Bench of this Court in the case of *Bankanidhi Tantra* v. *Godipatna Co-operative Society*(1). In that case a payment was made by the debtor to the creditor within the period of limitation, though the debtor did not specify whether the payment was towards interest or principal. The creditor appropriated the payment towards interest, and a Bench of this Court held that the payment was a payment of interest as such, and

(1) (1936) I. L. R. 16 Pat. 294.

as the fact of payment appeared in the handwriting of the person making the same, a new period of limitation commenced from the date of such payment by reason of section 20(*1*) of the Limitation Act. In that case it was argued, as it has been argued before us, that a payment by a debtor to a creditor without any specification cannot be a payment of interest as such even though the creditor exercising his option has appropriated the payment towards the interest. The Bench of this Court expressly held that where such a payment is made and is appropriated by the creditor towards interest, it is a payment of interest as such by the debtor and saves limitation by reason of section 20(*1*) of the Limitation Act.

This point was also argued in an earlier case of this Court, namely, *Liquidator, Bagha Co-operative Society* v. *Debi Mangal Prasad Sinha*(1). In that case a Bench was inclined to hold that a payment made without specification and appropriated by the creditor to interest was a payment by the debtor which prevented the bar of limitation.

A contrary view has been taken by a majority of three Judges in the Full Bench case of *Udaypal Singh* v. *Lakshmi Chand*(2). In that case section 20(*1*) of the Limitation Act was fully considered. The majority held that where money is paid by a debtor without specifying whether the payment is towards interest or towards principal, leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it wholly towards interest due, there is neither a payment of interest as such nor a part payment of the principal within the meaning of section 20 of the Limitation Act. A contrary view was taken by two Judges. I am inclined to agree with the view of the minority in this Full Bench case. It was pointed out by Thom, J. that the words "as such" in the section appear to

(1) (1936) I. L. R. 16 Pat. 27.
(2) (1935) I. L. R. 58 All. 261 F. B.

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be redundant. In his view, a payment of interest is a payment of interest, and it is no more a payment of interest if the words "as such" are added. Any other interpretation would lead to the absurd result that though the payment made without specification must either be towards interest or towards principal or partly towards both, it will not give a fresh start to limitation. Thom, J. was of opinion that according to the rules of interpretation of statutes, it is permissible to ignore or reject words which are redundant or which lead to an absurd result. In my judgment, these words are now redundant since the amendment of this section of the Limitation Act by the Amending Act of 1927. Previous to the amendment, the fact of payment of interest needed no acknowledgment in writing by the person making the payment, whereas a payment towards principal required such an acknowledgment to extend limitation. After the Amending Act payments towards interest or principal require acknowledgments of the payments in the handwriting of the person paying in order to be effective in extending the time. The words "paid as such" may have been necessary in the section before it was amended; but after the amendment I cannot see what effect can be given to them, and in my view they are redundant. If they are not redundant, then in my view a payment made to a creditor which can be appropriated by the creditor at his option either towards principal or interest, is a payment of interest as such the moment the creditor appropriates the payment towards interest. If a debtor, for example, in terms said to the creditor that he was sending him Rs. 100 so that the latter could apply it either towards principal or interest as he desired, then in my view the payment would be a payment as such towards either principal or interest the moment the creditor had appropriated it to one or other. Unless some such view is taken, a payment by a debtor to a creditor without any specification becomes no payment at all, so far as section 20 is

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concerned, if the creditor appropriates it towards interest. If he appropriates it towards principal, it would extend the time provided there was the necessary written acknowledgment. Even if there is such an acknowledgment, it will have no effect at all on limitation if the money is appropriated towards interest. Such, to my mind, is a result which the legislature could never have intended. In my view the minority view of the Allahabad Full Bench is to be preferred to the majority view. In any event this Bench must follow the previous decisions of this Court and accordingly I hold that the suit is not barred by limitation. There is no dispute as to the amount due under the note, and I would, therefore, allow this appeal, set aside the decree of the Court below and decree the plaintiff's claim for the amount claimed together with pendente lite interest at the rate of six per cent. and interest from the date of this decree onwards at the same rate.

The appellant is entitled to the costs in this Court and in the Court below.

MANOHAR LAL, J.—Having listened to the argument of the learned Advocate for the respondent, I am not in the least convinced that the decision of this Court in *Bankanidhi Tantra* v. *Godipatna Co-operative Society*(1) is erroneous. That decision follows the minority decision of the Allahabad Full Bench case in *Udaypal Singh* v. *Lakhmi Chand*(2) which, in my opinion, is correct, if I may say so respectfully.

The payments in this case are said to be Rs. 400 in April, 1933, and Rs. 722-4-0 in January, 1934. The question is whether these payments are payments towards principal or towards interest or partly towards principal and in part towards interest. This can be decided either by the writings themselves or by some other evidence or by the operation of law. The defendant gives no evidence that he made these

(1) (1936) I. L. R. 16 Pat. 294.
(2) (1935) I. L. R. 58 All. 261, F. B.

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payments towards interest or towards principal. The plaintiff, on the other hand, states in his plaint in paragraph 4 that he appropriated these towards interest. The law allows him to do so. On the dates of these payments interest due was more than the amounts paid in. The result, therefore, is that on the evidence, as it stands and upon the pleadings, it must be held in law that these payments were made towards interest.

It was then argued that the payments have never been made expressly towards interest "as such". I do not understand the meaning of the words "as such" in section 20(*1*) of the Limitation Act even as it stood before the amendment. If that section is read, all it means is that where interest is paid on a debt before the expiration of the prescribed period by the person liable to pay the debt, certain consequences will follow. The words "as such" appear to me to be redundant in that section and are merely put in as ex cautela. The words are not "where money is paid by the debtor" but where interest is paid. The amendment to the section by the Act of 1927 contemplates these very meanings as pointed out by Sir Courtney Terrell, late Chief Justice, in *Bankanidhi Tantra* v. *Godipatna Co-operative Society*(1). The legislature now as a result of experience has directed that all acknowledgments of payments should be in the handwriting of, or in a writing signed by, the person making the payment as a safeguard against the reckless allegation that used to be advanced on behalf of the creditors that the debtor had made certain payments towards interest. The result is that if there is an acknowledgment in writing as in the present case, it can easily be seen from the accounts whether the payment is intended to be made towards interest or principal or both. In case of doubt it will be decided by the appropriation made by the creditor. In any case the debt has been

(1) (1936) I. L. R. 16 Pat. 294.

acknowledged and this saves limitation. If the argument of the learned Advocate for the respondent was sound, no evidence other than the writing was admissible to prove the nature of the payment. But that is not the meaning of the proviso as added by the legislature. I, therefore, agree that the appeal should be allowed with costs.

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Appeal allowed.

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APPELLATE CIVIL.

Before Manohar Lall and Chatterji, JJ.

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v.

KHEMRAJ MARWARI.*

1939.

January, 5, 23.

Appeal—Compromise—parties agreeing to be bound by the decision of the court—appeal, whether lies from the decision—test—intention of the parties.

Where the parties agree to be bound by the decision of the Court with regard to a dispute which they specifically ask it to decide, no appeal lies from the decision.

Where the party invites the Court to adopt a procedure which is not contemplated by the Code of Civil Procedure, 1908, and in fact the procedure is extra cursum curiae, he cannot turn round and say that the Court is to blame for the very procedure which he invited the Court to follow. In each case the appellate Court will try to find as to what the true intention of the party was and the question whether an appeal lies or not will depend upon the conclusion arrived at by the Court.

Jaggu Mal v. *Brij Lal*(1), *Robert Murray Burgess* v. *Andrew Morton*(2), *Ballabh Das* v. *Sri Kishen*(3) and *Pisani* v. *Attorney General for Gibraltar*(4), reviewed.

*Appeal from Original Decree no. 204 of 1936, from a decision of Maulavi Saiyid Muhammad Ibrahim, Subordinate Judge of Ranchi, dated the 27th June, 1936.

(1) (1930) A. I. R. (All.) 127.
(2) (1896) A. C. 136.
(3) (1926) A. I. R. (All.) 90.
(4) (1874) 5 P. C. 516.

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Appeal by the plaintiff.

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

B. C. De and *K. K. Banerjee*, for the appellant.

U. N. Banerjee and *L. K. Chowdhury*, for the respondents.

MANOHAR LALL, J.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge, dated the 27th June, 1936, by which he decreed the suit of the plaintiff in terms of the compromise arrived at between the parties on the 8th June, 1936.

The suit was instituted on the 1st of December, 1934, to recover a sum of Rs. 9,000 and interest to be enforced against the properties mentioned in a security bond, dated the 5th July, 1927. In paragraph 5(*v*) of the plaint the property subject to the mortgage was specified. The action was contested challenging that the amount due was not as stated in the plaint; the liability was also denied. On the 8th June, 1936, it appears that the parties came to terms and actually filed a petition to that effect which is printed at page 12 of the paper-book. The petition states that the parties have compromised the above suit on the terms stated therein, namely, that the claim of the plaintiff against defendant nos. 1 to 3 is settled at Rs. 7,000 and the defendants 1 to 3 shall execute a conveyance by way of absolute sale of the properties mortgaged by the bond in suit in favour of plaintiff for the aforesaid amount of Rs. 7,000. It was also agreed that on execution of this sale deed the plaintiff shall file a petition for full satisfaction in court and that the defendants 4 to 7 will be discharged from the suit. The parties on filing this petition prayed as stated therein that the suit be postponed for a week to enable the parties to execute the necessary sale deed. On the 15th June, 1936,

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the parties informed the court that there was a hitch to the execution of the kebala, that they could not agree as to whether certain survey plots were or were not actually covered by the security bond and they requested the court to decide this matter. The court by its order no. 61, stated the points in dispute between the parties in these terms:

"The hitch to the execution of the kebala is about the survey numbers of the first three properties. According to the plaintiff the first property mortgaged is entered as survey plots 1523, 1537 to 1542 and Holding no. 459 of Ward no. 1 and the second mortgaged property is entered as survey plot 1426 of Holding no. 411 of Ward no. II. Whereas defendants 1 to 3 state that portions of plots 1523, 1537 to 1542 and portion of plot 1426 are the properties 1 and 2 mortgaged. This dispute they require now to be decided by the court."

Order no. 62 records that the pleader for the plaintiff urged that plot 1425 was a part of the second property mortgaged and was left out in the plaint through mistake of the scribe. Defendants took one day's time to give their definite version. On the 16th June, 1936, the parties put in their documents which were taken into consideration, formal proof of exhibits A and 4 being waived. Argument was then heard and the parties put in a joint petition that the court should make a local enquiry regarding the mortgaged property and then decide the matter. The Judge accordingly held a local enquiry on the 17th June, 1936, but no record was kept thereof. He then by his order, dated the 27th June, 1936, decided on the documents which were filed before him and as a result of what he saw and heard at the local enquiry that "the mortgaged property no. 1 consists of plot nos. 1537 to 1542 only and that plot no. 1523 is outside the mortgaged property". There was no dispute regarding property no. 2. As a result of this decision the court made the following decree:

"It is ordered that the suit is decreed in part according to the terms incorporated in the petition filed by the parties on 8th June 1936. The mortgaged property no. 1 consists of plots nos. 1537 to 1542 and the mortgaged property nos. 2 and 3 are as stated in the plaint."

Against this decision the present appeal has been preferred by the plaintiff.

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It was stated before us that the only dispute between the parties now is about plot 1523.

A preliminary objection has been raised on behalf of the respondents that the suit having been decided as a result of a compromise the present appeal is not maintainable and that the parties must be taken in law to have agreed to be bound by the decision of the court with regard to the dispute which they specifically asked it to decide.

In my opinion the contention of the respondents is correct. As soon as the compromise petition was filed on the 8th June, 1936, the suit stood disposed of in terms of the compromise petition, that is to say, the claim of the plaintiff was settled at Rs. 7,000 and that "the defendants shall execute a conveyance by way of absolute sale of the properties mortgaged by the bond in suit". The further condition in the compromise petition that "on execution of the sale deed the plaintiff shall file a petition for full satisfaction in court" relates to the discharge of the decree or the claim which had already been accepted at Rs. 7,000 and for which the defendants had undertaken to execute a conveyance.

A large number of cases were cited on behalf of both the parties in support of their respective contentions. I have examined each and every one of these cases. The true rule, in my opinion, is that the intention of the parties must be gathered in each case and if the intention is clear that the parties are binding themselves by the decision that might be given by the court no appeal would lie; but if such an intention cannot be gathered then the right to appeal is not shut out. In some cases it has been held that all that the parties did was that they refrained from adducing any oral evidence but asked the court to decide upon the documentary evidence and upon local inspection. No hard and fast rule can be laid down.

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In *Jaggu Mal* v. *Brij Lal*(1) an application was jointly made by the parties to the Munsif asking him to make an inspection of the locality to decide the matters in question and in place of evidence the Munsif might ask questions on the spot. In these circumstances it was held that it was not open to the defeated party to bring in an appeal after he had agreed to the Munsif deciding the case in the manner stated above and the learned Judges observed that " it is not open to a party to ask for a departure from the ordinary course of procedure and require the court to decide questions of fact in this manner by local inspection and oral statements on the spot and then come forward and ask the appellate court to decide the same question. For one thing there is no evidence in the record which would enable the court to come to a decision ".

In *Robert Murray Burgess* v. *Andrew Morton*(2) it was held by the House of Lords that " where in pursuance of an agreement between the parties the court proceeds outside its ordinary jurisdiction, the proper inference would be that there was to be no appeal from the decision as would be in the case if the trial were in the ordinary way ". But it does not follow, as pointed out by Sulaiman, J. in *Ballabh Das* v. *Sri Kishen*(3), that this is a test of universal application because unless the court has proceeded outside its ordinary jurisdiction, a right to appeal always exists ". On the other hand, in the case of *Pisani* v. *Attorney-General for Gibraltar*(4) where the parties agreed " that the rights, if any, of the several defendants may be ascertained and declared by decree of the court and that they may be ordered to pay each to the others and other of them their and his costs of this suit, and that the court will give such further directions as shall be necessary ", it was held that the

(1) (1930) A. I. R. (All.) 127.
(2) (1896) A. C. 136.
(3) (1926) A. I. R. (All.) 90.
(4) (1874) 5 P. C. 516.

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"above words clearly meant that the parties were to keep themselves in curia and that it was plain also that the parties and the Judge thought that an appeal was open".

It is unnecessary to refer to further cases. The true rule, which I conclude, is that where the party invites the court to adopt a procedure which is not contemplated by the Code of Civil Procedure, and in fact the procedure is extra cursum curiae, he cannot turn round and say that the court is to blame for the very procedure which he invited the court to follow. In each case the appellate court will try to find as to what the true intention of the party was and the question whether an appeal lies or not will depend upon the conclusion arrived at by the court.

In the present case it is clear to my mind that the suit was disposed of in terms of paragraphs 1, 2, 3 and 5 of the compromise petition; accordingly the court should have ordered that the suit is decreed in part according to the terms incorporated in the petition of compromise filed by the parties on the 8th June, 1936. The court had no jurisdiction to enter in the decree the words "The mortgaged property no. 1 consists of plots nos. 1537 to 1542 and the mortgaged property nos. 2 and 3 are as stated in the plaint". Whatever the court did on the 15th, 16th and 17th June, 1936, was merely to decide the dispute which the parties asked him to decide but the result of that decision could not be incorporated in the decree.

Accordingly, I hold that no appeal lies against the decree passed by the learned Subordinate Judge dated the 3rd July, 1936, following his decision dated the 27th June, 1936, but in the exercise of our powers of revision I would delete the portion indicated above, namely, "The mortgaged property no. 1 consists of plots nos. 1537 to 1542 and the mortgaged property nos. 2 and 3 are as stated in the plaint" from the decree.

Parties will bear their own costs of this appeal.

CHATTERJI, J.—I agree.

Appeal dismissed in limine.

S. A. K.

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MANOHAR LALL, J.

1939.

January, 26.

REVISIONAL CIVIL.

Before James and Rowland, JJ.

SITAL PRASAD SAH

v.

RAMDAS SAH.*

Court-Fees Act, 1870 (*Act VII of* 1870), *section* 7, *sub-sections (iii), (iv)(c)* and *(v)—partition suit partaking of the nature of title suit—plaintiff out of possession of a portion of the subject-matter—ad valorem court-fee payable on the amount by which plaintiff's share in possession is of less value than the share claimed.*

So far as a partition suit may actually be in the nature of a title suit, ad valorem court-fee is payable by the plaintiff whether the suit is regarded as governed by section 7 *(iv)(c)* or by sub-section *(iii)* or *(v)* of section 7 of the Court-Fees Act, 1870.

Rachhya Raut v. *Musst. Chando*(1), followed.

Where the plaintiff is out of possession of a portion of the property of which he seeks partition, he has to pay ad valorem court-fee on the amount by which his share in possession is stated to be of less value than the share which he claims.

Dip Chand Rai v. *Chhetru Lal*(2) and *Sundara Ganapathi Mudali* v. *Daivasikamani Mundali*(3), followed.

Hara Gowri Saha v. *Dukhi Saha*(4), distinguished.

*Civil Revision no. 652 of 1938, from an order of Babu Anugrah Narain, Subordinate Judge of Muzaffarpur, dated the 21st September, 1938.

(1) (1921) 6 P. L. J. 662.
(2) (1917) 1 Pat. L. T. 529.
(3) (1930) 129 Ind. Cas. 824.
(4) (1910) 5 Ind. Cas. 582.

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SITAL PRASAD SAH v. RAMDAS SAH.

Application in revision by the plaintiff.

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

B. C. De and *K. K. Banarji*, for the petitioner.

N. K. Prasad II and *A. N. Lal*, for the opposite party.

JAMES AND ROWLAND, JJ.—The plaintiff instituted a suit for partition alleging that his uncle Ramdas Sah had recently made a partition of a portion of the family property which had been unfair. He alleged that a house had been allotted to him which no longer belonged to the joint family; that certain other property made over to him had been overvalued; that certain bad debts had been made over to him and that the partition had generally been unfair. He estimated his loss due to this unfair partition at Rs. 8,775-8-6. Schedule *B* of the plaint contained the description of property still held by the family as tenants in common. The plaint bore a court-fee stamp of Rs. 15; but the Subordinate Judge considered that the suit ought to have been treated as falling under section 7(*iv*)(*c*) of the Court-Fees Act and he required the plaintiff to pay ad valorem court-fee on the whole value of the property contained in schedule *A* of the plaint. The learned Subordinate Judge in coming to this conclusion followed what he considered to be the effect of the decision in *Hara Gowri Saha* v. *Dukhi Saha*(1). The plaintiff applies for revision of that order on the ground that his case cannot properly be treated as falling under section 7(*iv*)(*c*) of the Court-Fees Act. Since the decision in *Ramkhelawan Sahu* v. *Bir Surendra Sahi*(2) it can no longer be argued that this Court has no jurisdiction to enter into this question in revision where the decision of the court below on the question of the classification of the suit has been adverse to the plaintiff.

(1) (1910) 5 Ind. Cas. 582.
(2) (1937) I. L. R. 16 Pat. 766.

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Mr. B. C. De on behalf of the plaintiff argues that the effect of that decision would be to remove this suit from the category of a suit for declaration with consequential relief; because some attempt was made in that decision to define the kind of declaration which is affected by sub-section (*c*) of section 7(*iv*). It appears to us that it makes little practical difference whether the suit is to be regarded as a suit for a declaration with consequential relief or as a suit for the possession of moveable and immoveable property governed by sub-sections (*iii*) and (*v*) of section 7, since in the courts of Bihar and Orissa where the consequential relief sought is recovery of possession of land the plaintiff is not permitted to value that land at a lower rate than would be assessed under section 7(*v*).

In the present case the plaintiff states that he is in possession of what purports to be his share in the property in schedule *A*; but that the property of which he is in possession is of less value than the property to which he is entitled. In *Hara Gowri's* case(1) the plaintiff sought to set aside a decree for partition and the court held that ad valorem court-fee was payable. In the present case there is no decree and the plaint alleges that the only instruments of partition were an unregistered deed and some unregistered chithas. Whether these documents would be admissible in evidence or not, we need not say at this stage; but the plaintiff asks that the partition should be set aside and so a parallel might be found with the facts in *Hara Gowri's* case(1). The learned Subordinate Judge interpreted that decision as implying that court-fee was to be paid on the whole value of the property which was to be brought under partition, though there is nothing in the decision which implies that this was the intention of the court. The learned Subordinate Judge mentioned a decision of the Madras High Court in *Sundara Ganapathi Mudali* v. *Daivasikamani Mundali*(2) where the difference between the value of the properties allotted

(1) (1910) 5 Ind. Cas. 582.
(2) (1930) 129 Ind. Cas. 824.

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to the plaintiff in a partition and the value which he claimed was treated as the value of the suit for the purposes of court-fee. The learned Subordinate Judge considered that he was bound by the decision of the Calcutta High Court; but, as we have said, there is nothing to indicate in the Calcutta case on what basis the ad valorem court-fee was to be calculated. It is suggested on behalf of the respondent that court-fee ought to be calculated on the value of the plaintiff's share in the properties contained in schedule *A*; but it appears from the plaint that the plaintiff is already in possession of a share which is approximately what he claims though in deficit by Rs. 8,775. In *Dip Chand Rai* v. *Chhetru Lal*(1) the Taxing Judge of this Court was dealing with a partition suit in which the plaintiff was out of possession of a portion of the property of which he sought partition. The direction of the Taxing Judge amounted to this that the plaintiff had to pay ad valorem court-fee on the amount by which his share in possession was stated to be of less value than the share which he claimed; and that so far as he was in possession of an adequate share, no ad valorem court-fee was payable. It has always been held in this Court that so far as a partition suit may actually be in the nature of a title suit ad valorem court-fee is payable by the plaintiff whether the suit is regarded as governed by section 7(*iv*)(*c*) or by sub-section (*iii*) or (*v*) of section 7. We need only cite the decision in *Rachhya Raut* v. *Musst. Chando*(2).

The petition will accordingly be allowed to this extent that the order of the Subordinate Judge requiring the payment of ad valorem court-fee on the sum of Rs. 85,294 is set aside. The plaintiff has to pay court-fee on the amount by which his share in possession is in deficit of the share which he claimed, namely, on Rs. 8,775-8-6. We make no order for costs.

Order accordingly.

S. A. K.

(1) (1917) 1 Pat. L. T. 529.
(2) (1921) 6 Pat. L. J. 662.

APPELLATE CIVIL.

Before Harries, C.J. and Manohar Lall, J.

1939.
January, 27.

KEDAR NATH SAHU

v.

BASANT LAL SAHU.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXXII, rule* 7, *and Schedule II, paragraph* 1—*reference to arbitration by guardian or next friend of a minor party—leave of court, whether must be obtained—paragraph* 1 *of Schedule II, whether is subject to the provisions of Order XXXII, rule* 7—*omission to obtain leave, whether renders the award and the decree voidable against the minor.*

Paragraph 1 of the second Schedule to the Code of Civil Procedure, 1908, is subject to the provisions of Order XXXII, rule 7, of the Code.

Where, therefore, the next friend or guardian ad litem of a minor party agrees to join in a reference to arbitration, the leave of the court to do so on behalf of the minor must first be obtained by the next friend or guardian ad litem and expressly recorded in the proceedings in compliance with the terms of Order XXXII, rule 7, of the Code; the omission to obtain leave renders an award or any decree based upon it voidable at the instance of the minor.

Mariam Bibi v. *Amna Bibi*(1), *Davuluru Vijaya Ramayya* v. *Davuluru Venkatasubba Rao*(2), *Sadashivappa Gangappa* v. *Sangappa Chanvirappa Mahamadkoti*(3), *Hanuman Rai* v. *Jagdis Rai*(4) and *Nurul Anwar* v. *Sm. Golenoor Bibi*(5), followed.

Debiruddin v. *Amina Bibi*(6) [judgment of Suhrawardy, J.], dissented from.

Ganesha Row v. *Tuljaram Row*(7), referred to.

*Appeal from Original Decrees nos. 182 and 190 of 1937, from a decision of Babu Ananta Nath Banarji, Subordinate Judge, Muzaffarpur, dated the 23rd August, 1937.

(1) I. L. R. (1937) All. 317, F. B.
(2) (1915) I. L. R. 39 Mad. 853.
(3) (1931) A. I. R. (Bom.) 500.
(4) (1916) A. I. R. (Pat.) 223.
(5) (1934) A. I. R. (Cal.) 845.
(6) (1925) A. I. R. (Cal.) 475.
(7) (1913) I. L. R. 36 Mad. 295, P. C.

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KEDAR NATH SAHU v. BASANT LAL SAHU.

Appeal no. 182 on behalf of the plaintiff, and appeal no. 190 on behalf of defendants nos. 2 to 4.

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

B. C. De and *K. K. Singh*, for the appellants.

Ray Guru Saran Prasad (with him *Ray Parasnath* and *Brahmadeva Narayan*), for the respondents.

HARRIES, C.J.—These are two connected appeals from a decree of the learned Subordinate Judge of Muzaffarpur dismissing the plaintiff's claim for a declaration that a certain award and a final partition decree based upon it is not binding against the plaintiff-appellant.

First Appeal no. 182 of 1937 is an appeal brought by the unsuccessful plaintiff, whereas First Appeal no. 190 of 1937 has been preferred by defendants nos. 2 to 4. As will appear hereafter, it is clear that these defendants cannot challenge the decree of the Court below, and Mr. De who has appeared on their behalf has asked for permission to withdraw the appeal. In the circumstances, I think it is right that this appeal should be withdrawn; but these defendants must pay to Basant Lal Sahu, defendant no. 1, the costs which the latter has incurred as a result of this appeal.

In the year 1929 Basant Lal Sahu, defendant no. 1, brought a partition suit no. 89 of 1929 against defendants nos. 2 to 4, and the present plaintiff who was a minor, represented by his guardian ad litem defendant no. 3. On the 29th of February, 1932, a preliminary decree was passed and defendant no. 2 who was the karta of the joint family was ordered to furnish a full account of his dealings with the family property. On the 18th of December, 1934, during the pendency of the proceedings relating to the account which had been ordered the parties agreed to refer the matter to arbitration and in due course a

reference to arbitration was made by the court. At this stage the present plaintiff, who was then a minor and a defendant, was represented, as I have stated, by defendant no. 3 as his guardian ad litem. No application was made on behalf of the present plaintiff to the court for leave to refer the matter to arbitration. On the 2nd of March, 1935, the appointed arbitrator made his award. Objections were preferred by various parties which were disposed of, and in due course a decree was passed in terms of the award.

The suit out of which this appeal arises was brought by the plaintiff for a declaration that this award and the final decree, which is based upon it, is null and void and not binding upon him. It was contended on behalf of the plaintiff that as the leave of the court was not obtained by the guardian ad litem before agreeing to refer the matter to arbitration the whole of the proceedings thereafter were vitiated and in consequence the award and decree are a nullity. Defendants nos. 2 to 4 did not file a written statement and have in fact appeared through Counsel in this Court and supported the plaintiff's contention. Defendant no. 1 contested the suit in the Court below and urged that the omission to obtain the leave of the court before agreeing to arbitration did not vitiate the proceedings.

The learned Subordinate Judge came to the conclusion that the failure to obtain leave of the court before referring the matter to arbitration was not fatal and that the award and the decree based upon it were binding upon the plaintiff. As I have stated, both the plaintiff and the defendants nos. 2 to 4 have preferred appeals; but as the appeal by defendants nos. 2 to 4 has been withdrawn, it is now only necessary to consider the plaintiff's appeal.

It is common ground that no application was made to the court by the guardian ad litem of the present plaintiff for leave to enter into an agreement to refer the matter to arbitration. According to the plaintiff's

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contention, the failure to obtain such leave vitiates the whole of the subsequent proceedings. Defendant no. 1, who is the only contesting respondent, has argued that no such leave is necessary and accordingly that failure to obtain leave does not vitiate the whole proceedings.

The procedure to be followed when all parties to a suit agree to refer their differences to arbitration, is governed by paragraph 1 of the Second Schedule, Code of Civil Procedure, and that paragraph is in these terms:

"(1) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference.

(2) Every such application shall be in writing and shall state the matter sought to be referred.

This paragraph makes no reference to the procedure to be adopted where one of the interested parties is a minor. However, Order XXXII, rule 7, of the Code of Civil Procedure, deals with the procedure to be followed when a next friend or guardian of a minor enters into any agreement or compromise. Order XXXII, rule 7, provides as follows:

"(1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor."

On behalf of the plaintiff-appellant it has been argued that paragraph 1 of the Second Schedule, Code of Civil Procedure, is subject to the provisions of Order XXXII, rule 7. Accordingly it is contended that where the next friend or guardian ad litem of a minor party agrees to join in a reference to arbitration, the leave of the court to do so on behalf of the minor must be obtained by the next friend or guardian

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ad litem and expressly recorded in the proceedings in compliance with the terms of Order XXXII, rule 7, of the Code of Civil Procedure, and that the omission to obtain leave will render an award or any decree based upon it voidable at the instance of the minor.

In my opinion this view is well founded. The precise point arose in a case decided by a Full Bench of the Allahabad High Court, *Mariam Bibi* v. *Amna Bibi*(1). The Full Bench, of which I was a member, held that paragraph 1 of the Second Schedule to the Code of Civil Procedure was subject to the provisions of Order XXXII, rule 7. Accordingly it was held that where a guardian ad litem had failed to obtain the leave of the Court to refer a matter to arbitration an award and a decree based upon it were voidable at the instance of the minor. There was some difference of opinion in that case; but upon this point the three Judges comprising the Bench were unanimous.

In the case of *Davuluru Vijaya Ramayya* v. *Davuluru Venkatasubba Rao*(2) a Bench of the Madras High Court also stressed the necessity of a guardian ad litem obtaining the leave of the court before entering into an agreement. The Bench held that a suit could be brought on behalf of minors to set aside a decree passed on a compromise in another suit or appeal in which the minors were parties, on the ground that leave of the court under Order XXXII, rule 7, of the Code of Civil Procedure, was not obtained by their guardian ad litem to enter into the compromise on their behalf. The Bench further held that leave of the court under Order XXXII, rule 7, must be obtained by a guardian ad litem of minors for agreeing on their behalf to refer through court the subject-matter of a suit to arbitration; and where no such leave was obtained, a decree passed on an award is not binding on the minors and a suit could be

(1) I. L. R. [1937] All. 317, F. B.
(2) (1915) I. L. R. 39 Mad. 853.

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instituted on behalf of the minors to obtain a declaration that the decree was not binding on them. It was further held that the avoidance of a decree in a partition suit will have the effect of re-opening the whole suit in respect of all the parties thereto, and on an application being made, the Court must proceed with the trial of the suit.

A similar view was taken by a Bench of the Bombay High Court in *Sadashivappa Gangappa* v. *Sangappa Channirappa Mahamadkoti*(1), in which it was held that the provisions of Order XXXII, rule 7, were imperative, and that where one of the parties to a suit was a minor and represented by his mother as guardian and the suit was referred to arbitration by the parties by a reference made without the sanction of the court, the award and decree passed in terms of the award were void. The case of *Nurul Anwar* v. *Sm. Golenoor Bibi*(2) is to the same effect.

There is also a decision of this Court, *Hanuman Rai* v. *Jagdis Rai*(3), which supports the contention of the appellant in this appeal. In that case it was expressly held that no next friend or guardian could compromise a case on behalf of a minor without the leave of the Court expressly recorded in the proceedings and that the action of a court in referring a case to arbitration in accordance with the compromise between the guardian of a minor and other parties to a suit was not equivalent to approving of the compromise on behalf of the minor. At page 225 Chamier, C.J., observed :

" I am not prepared to whittle away the salutary provisions of O.32, R. 7. In my opinion the compromise was not binding on the minor, inasmuch as the leave of the Court had not been obtained before his guardian thought fit to withdraw her application for that leave."

(1) (1931) A. I. R. (Bom.) 500.
(2) (1934) A. I. R. (Cal.) 845.
(3) (1916) A. I. R. (Pat.) 223.

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The importance of a guardian ad litem obtaining the leave of the court before entering into any compromise on behalf of the minor was considered by their Lordships of the Privy Council in the case of *Ganesha Row* v. *Tuljaram Row*(1). In that case a member of a joint family brought a suit for partition. Defendant no. 3 was the father of defendant no. 6 who was a minor, and the court appointed the father guardian ad litem of his son. The father entered into a compromise without obtaining the leave of the Court, and their Lordships held that such compromise and the decree passed upon it was not binding upon the minor on his attaining majority. This decision of their Lordships does not deal with the question whether an agreement to refer to arbitration is within Order XXXII, rule 7; but it does lay down that the provisions of Order XXXII, rule 7, are mandatory and that failure to comply strictly with them will render any compromise or agreement or any decree based on such voidable at the instance of the minor.

Counsel for the respondents has relied upon a Bench decision of the Calcutta High Court, *Debir-uddin* v. *Amina Bibi*(2). In that case Suhrawardy, J. did in terms hold that an agreement to refer to arbitration is not such an agreement as is contemplated by Order XXXII, rule 7, of the Code of Civil Procedure. Page, J., who was the other member of the Bench, does not appear to have taken the same view; and in my judgment the view of Suhrawardy, J. cannot be accepted in face of the large body of authority to the contrary to which I have referred.

In my judgment the agreement to refer to arbitration is such an agreement as is contemplated by Order XXXII, rule 7, of the Code of Civil Procedure. Where a minor is a party to litigation no effective reference to arbitration can be made by the parties unless the next friend or guardian ad litem first

(1) (1913) I. L. R. 36 Mad. 295, P. C.
(2) (1925) A. I. R. (Cal.) 465.

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obtains the leave of the court to agree to any such reference. Merely obtaining an order referring the matter to arbitration is not sufficient. The court must first be asked on behalf of the minor for its leave to permit the guardian to agree to a reference to arbitration and the court must expressly record its reasons for giving or refusing such permission. It is only after obtaining the leave of the court that the guardian can agree to a reference to arbitration and any agreement without such leave will render all subsequent proceedings invalid at the option of the minor. It is clear from the terms of Order XXXII, rule 7, that the minor only can challenge an award or a decree based upon it made after a reference without obtaining the court's leave. Sub-section (*2*) of Order XXXII, rule 7, of the Code of Civil Procedure, expressly provides that the minor can avoid the award or decree; but the other parties to the reference cannot. As the reference in the present case was made without the guardian of the minor first obtaining the leave of the court, the plaintiff, who was the minor defendant in the suit, can challenge the award and the decree based upon it. The other parties to the suit, namely defendants nos. 2 to 4, cannot challenge the proceedings and for that reason the appeal preferred by them has in my view been rightly withdrawn.

For the reasons which I have given, I am satisfied that the award and decree based upon it passed in the partition suit no. 89 of 1929 are not binding upon the plaintiff-appellant, and that being so, his suit in the Court below should have been decreed. I would, therefore, allow this appeal, set aside the decree of the learned Subordinate Judge and decree the plaintiff's claim as prayed. The effect of this will be that the whole suit will be re-opened in respect of all the parties from the point at which the matters were referred to arbitration and the court on application being made to it must proceed with the trial of the suit from that point. The plaintiff-appellant will have his costs in

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this Court and in the Court below. The defendant appellants in appeal no. 190 of 1937, which has been withdrawn, must pay the costs of the defendant-respondent in that appeal, which we fix at one hundred rupees.

MANOHAR LALL, J.—I agree.

Appeal no. 182 *allowed.*

Appeal no. 190 *withdrawn.*

S. A. K.

REVISIONAL CIVIL.

Before Khaja Mohamad Noor and Dhavle, JJ.

SOURENDRA MOHAN SINHA

v.

KUMAR JOGENDRA NARAIN SINHA.*

1938.

December, 7, 8, 9, 13, 14, 15.

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January, 27.

Receiver—mortgage decree—administration suit between mortgagors—appointment of Receiver—debt incurred by Receiver for purposes other than protection of estate—priority—salvage lien, rule of—application by mortgagee decree-holder for leave to execute the mortgage decree—question of priority, whether should be investigated in a summary proceeding—Court, power of, to make an order altering mortgagee's priority—leave to execute mortgage decree, whether at all necessary.

Subject to the rule of salvage lien, which is applied in India as a rule of justice, equity and good conscience, the Court, when administering the estate of the mortgagors in a suit between them inter se, has no power to destroy or curtail the rights of the mortgagees in the exercise of its discretion to grant them leave to execute their mortgage decree obtained before the estate came in custodia legis.

Likewise it has no power, while administering the estate through a Receiver, to order that the priority of a mortgage

* Civil Revision nos. 339, 442 and 443 of 1938, from an order of Babu Raghunandan Prasad, Subordinate Judge of Bhagalpur, dated the 10th June, 1938.

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already created on the estate should be altered in favour of a debt subsequently incurred, under its orders, by the Receiver for purposes other than the preservation of the estate itself.

Girdhari Lal v. *Dhirendra Kristo Mukharji*(1), distinguished.

Where a mortgagee decree-holder applied for leave to execute his decree against the properties of his mortgagors in the hands of a Receiver (appointed by the Court in an administration suit between the mortgagors inter se), and a dispute having arisen as to whether the mortgage which had been created on the estate before it came in custodia legis had priority over a certain debt subsequently incurred by the Receiver, under the orders of the Court, for purposes other than the preservation of the estate, the Court granted conditional leave to execute the decree and, holding that the debt incurred by the Receiver was a first charge on the estate, directed that the mortgagee should either pay up the debt or proceed against the mortgaged property subject to the liability created by the Receiver.

Held, in revision, (*i*) that the order granting conditional leave was improper;

(*ii*) that the dispute as to priority could not be decided in a summary proceeding for leave to execute the decree and that the proper course was to allow the creditor, who had advanced the loan to the Receiver, to proceed with his execution and face proceedings in which the question of priority could in the ordinary course be decided by an order having the force of a decree and thus subject to appeal.

Braja Bhusan Trigunait v. *Sris Chandra Tewari*(2), referred to.

Query : Whether in the circumstances of the case leave to execute the decree was at all necessary?

Application in Civil Revision no. 339 on behalf of the mortgagee decree-holders.

Application in Civil Revision no. 442 on behalf of the creditors.

(1) (1906) I. L. R. 34 Cal. 427.
(2) (1918) 4 Pat. L. J. 20.

Application in Civil Revision no. 443 on behalf of the judgment-debtors.

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

P. R. Das (with him *J. C. Sinha* and *N. C. Ganguli*), for the petitioners in C. R. no. 339.

Sir Sultan Ahmed and *S. C. Mazumdar*, for the opposite party.

D. N. Mitter and *Harians Kumar*, for the petitioners in C. R. no. 442.

P. R. Das and *J. C. Sinha*, for the opposite party.

Sir Sultan Ahmed and *S. C. Mazumdar*, for the petitioners in C. R. no. 443.

P. R. Das and *N. N. Ray*, for the opposite party.

MOHAMAD NOOR and DHAVLE, JJ.—These three applications in revision are directed against an order of the learned Subordinate Judge of Bhagalpur in an Administration Suit (no. 617 of 1928) relating to the Maheshpur Estate in the district of the Santal Parganas. The suit was originally instituted at Pakaur in the Santal Parganas but was under the orders of this Court transferred to Bhagalpur.

It appears that in about 1872 the estate was held by Maharani Janki Kumari who died on the 20th February, 1893. By a will she bequeathed it to her younger son, Indra Narain, her elder son Harendra Narain having pre-deceased her. Indra Narain died in 1896 leaving a widow, Radha Peari, and four sons, Jogendra Narain, Devendra Narain, Jyanendra Narain and Fanindra Narain. By his will he had made his widow, Radha Peari, executrix of his estate. She took out probate and administered the estate till her death. Thereafter the four sons of Indra Narain became executors of the estate under

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the terms of the will of Indra Narain. One of the sons, Devendra, died leaving a son Kali Kinker who is the plaintiff in the Administration Suit, while his uncles are defendants.

Rai Bahadur Suraj Narain Singh, the ancestor of the petitioners in Civil Revision 339 of 1938 had advanced on the 30th April, 1874, to Maharani Janki Kumari a sum of Rs. 30,000 and obtained a mortgage from her. Certain payments were made and later on the said Maharani executed a second mortgage in favour of the Rai Bahadur on the 9th May, 1881. The loans swelled up and on the 6th January, 1893, there was a third mortgage for Rs. 1,64,488-8-3 which included the amounts due under the two earlier mortgages also which had remained unpaid. There was on the same date another mortgage for one lac of rupees by the Maharani and Kumar Indra Narain in favour of the Rai Bahadur. Then again on the 10th March, 1894, Kumar Indra Narain who at that time had become the sole owner of the Maheshpur Estate executed a mortgage for two lacs of rupees in favour of the Rai Bahadur. This covered various sums advanced which need not be stated in detail. Thus the Rai Bahadur held three mortgages, two dated the 6th January, 1893, executed by the Maharani and Kumar Indra Narain, one for Rs. 1,64,481 and the other for Rs. 1,00,000 and a third, dated the 10th March, 1894, for Rs. 2,00,000 executed by Kumar Indra Narain alone.

The Rai Bahadur brought a suit to enforce the three mortgages in the Court of the Subordinate Judge of Murshidabad (Suit no. 368 of 1903). The claim was for Rs. 10,24,030. The Murshidabad Court was selected obviously to avoid the application of the special rule of interest prevailing in the Santal Parganas, viz. section 6 of Regulation III of 1872, though the bulk of the properties mortgaged was situated in that district.

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The suit was contested and decreed, and there was an appeal by the defendants to the Calcutta High Court where a compromise was effected. Its terms need not be mentioned here in detail. The decree was executed, an objection to its execution was disallowed and an appeal against the order was dismissed on the 20th December, 1915.

Two suits were, however, instituted in the Court of the Subordinate Judge of Pakaur, one in 1914 by Rani Radha Peari, the executrix of the estate of her deceased husband, Kumar Indra Narain, and another in 1916 by some other members of the family. The first suit was for redemption of the aforesaid three mortgages in favour of Rai Bahadur Suraj Narain Singh on payment of Rs. 5,58,000 or for an injunction against the execution of the compromise decree which the Rai Bahadur had obtained in the High Court, and the second was for a declaration that the mortgage decree was invalid and in the alternative for redemption on taking accounts.

The first suit was by an order of the Calcutta High Court transferred to Alipur in the 24-Parganas where a compromise was effected between all the parties concerned. It was to the effect that the amount of the decree of the Rai Bahadur be fixed at 17 lacs of rupees. This was to be paid in 22 instalments of Rs. 50,000 each and a 23rd instalment of 6 lacs of rupees. Each instalment was to be paid on the 13th April of each year (last day of Chait of the Bengali era) commencing from 1917, and the last instalment of 6 lacs of rupees was payable on the 13th April, 1939. It was provided that in case of default interest would be payable at 9 per cent. per annum on the amount not paid and in case of two successive defaults the entire decretal amount then due would be realisable at once. The instalments were paid up till April, 1934, and then there was a default; and the petitioners in Civil Revision no. 339 of 1938 who are the representatives of the Rai Bahadur want to

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execute the decree according to the terms of the compromise.

In the meantime Kali Kinker Singh instituted a suit for the administration of the estate in which his three uncles are defendants. The suit which was instituted at Pakaur was, as has been stated, transferred to Bhagalpur and there, under the circumstances which will be stated later, a Receiver was appointed under an order, dated the 1st March, 1930. After various changes which will be dealt with later the present Receiver, Rai Sahib Surendra Nath Basu has been in charge of the estate.

The decree-holders applied for leave to execute the decree referred to above against the Receiver, to which various objections were raised; and in order to appreciate them it is necessary to detail some facts leading up to the present Receiver taking charge of the estate.

It appears that in the beginning of 1930 the executors of the estate, who are defendants in the Administration Suit, were unable to pay the instalment of the decree-holders which was to fall due in April of that year. On the 1st March, 1930, the learned Subordinate Judge ordered the appointment of a Receiver. Rai Bahadur Nilmani De, a retired Deputy Collector, was willing to act as Receiver and offered to find a creditor who would advance Rs. 55,000 for the immediate needs of the estate, out of which Rs. 50,000 was to be paid as the instalment due to the decree-holders in April of that year. This was on the condition that the creditor be given the first charge on the estate for the money advanced by him. The learned Subordinate Judge was inclined to accept the terms and appoint the Rai Bahadur as the Receiver. There was an appeal, and by its order, dated the 7th March, 1930, in Miscellaneous Appeal no. 81 of 1930 this Court upheld the order to appoint a Receiver but did not approve

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of the appointment of the Rai Bahadur on the aforesaid terms. It observed as follows:—

"The question is who should be appointed Receiver of the estate. Now the learned Subordinate Judge has suggested that Rai Bahadur Nilmoni De, who is a retired officer of the Government, be appointed receiver upon his undertaking to find a creditor who will be in a position to advance Rs. 55,000. Since the order of the Subordinate Judge Mr. Nilmani De has written to him a letter, a copy of which has been given to us by Mr. Hasan Imam. This is a joint application by himself and one Surendra Nath Basu who is an advocate of Bhagalpur Court. Therein the two gentlemen intimate to the court that they are willing to advance Rs. 55,000 as a loan to the estate at an interest of 15 per cent. per annum on condition that the said loan is made a first charge over all other charges on the whole estate of Maheshpur Raj and that Rai Babadur Nilmoni De is appointed receiver by the court. The condition put forward by Rai Bahadur Nilmoni De are impossible. The loan proposed to be advanced by him cannot in law be made a first charge over the previously secured charges on the estate and it cannot be made a condition precedent that for the advance of the aforesaid loan he should be appointed as a receiver of the estate. It seems to us that in the circumstances of the case it is not desirable that a stranger should be appointed receiver of the estate."

This Court then ordered as follows:—

"We, therefore, direct that the defendants be appointed receivers of the estate in the administration suit. We further direct that the defendants will arrange to pay the next instalment due under the mortgage decree within the 31st of March, 1930, as undertaken by them when the former appeal in this court by the plaintiff was disposed of. They should try to raise this amount by making collections from the estate; and if that be not possible, they should apply to the court below in time to obtain the permission of that court to raise a loan at a reasonable rate of interest....."

The defendants were unable to raise funds by the date fixed, and the time for making arrangements for the payment of money was extended till the 12th April, 1930. The instalment was due for payment on the 13th April. But money could not be arranged even by that date and, therefore, on the 12th April the learned Subordinate Judge discharged the defendants from the receivership of the estate and Rai Bahadur Nilmani De who was ready to arrange the payment of the instalment money was appointed Receiver and was authorized to raise a loan on a handnote to be executed by him on behalf of the Court and then to execute a regular registered

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mortgage bond in favour of the creditor by hypothecating the entire estate. The loan to be raised by him was made a first charge on the estate.

The facts were reported to this Court and on this the following order was passed:—

"Considered letter no. 194, dated the 12th April, 1930, from the Subordinate Judge to the Deputy Registrar and letter, dated the 13th April, 1930, from Rai Bahadur Nilamani De to the Registrar of this Court. The court below intimates that the defendants have been discharged as receivers in view of the previous orders of this Court nos. 8 to 11. The Sub-Judge further states that the new receiver Rai Bahadur Nilamoni De has raised Rs. 50,000 with interest at 15 per cent. per annum, making it a first charge on the estate to pay the instalment which falls due on the 13th. The question as to whether the loan raised by the receiver Rai Bahadur Nilamoni De will be a first charge or not depends upon whether there are prior mortgages or not and no direction in that behalf can be made by the Court at this stage."

By this time Rs. 50,000 had already been borrowed by the Receiver from Rai Sahib Surendro Nath Basu and Dhirendro Nath Sen and paid to the decree-holder as the instalment due on the 13th April, 1930. Later on, on the 8th May, 1930, another Rs. 15,000 was required for the payment of Putni rent to the superior landlord. This was also advanced by the said two gentlemen in equal shares. The court while sanctioning this loan of Rs. 15,000 directed that it would be a first charge if permissible under the law. Later on a mortgage bond for Rs. 65,000 was executed by the Receiver on behalf of the court in favour of Rai Sahib Surendro Nath Basu and Babu Dhirendra Nath Sen.

Next July Rai Bahadur Nilmani De resigned from the receivership and the defendants were again appointed Receivers. They undertook before this Court to pay up the loans raised by the Receiver by the 31st January, 1931, and it was ordered that on their default a third party would be appointed as Receiver. They defaulted, and for some time Rai Bahadur Suresh Chandra Chakervarty was appointed Receiver; and when he was unable to raise a loan,

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Rai Sahib Surendro Nath Basu, the present Receiver was appointed on the 18th March, 1932. The new Receiver represented to the Court that Rs. 90,000 more was urgently required to meet the pressing demands on the estate, such as the payment of Putni rent, settlement cost and arrears of cesses. He was authorized on the 22nd March, 1932, to raise the money by borrowing. The money was advanced by Babu Dhirendra Nath Sen (one of the creditors in whose favour the earlier mortgage was executed), Srimati Sarala Bala Dasi and Srimati Mangalmoyee Sarkar at 12 per cent., and the Subordinate Judge ordered that this loan was to be the first charge on the estate if permissible under the law. A mortgage bond for Rs. 90,000 was thus executed by the present Receiver. It appears that the entire amount was utilised in the payment of the instalments of the decree-holders due on Chait, 1337 (1931), and Chait 1338 (1932), but it is not necessary to examine this in detail for reasons which will appear later on. Suffice it to say that there are thus outstanding two mortgages executed by the Receivers, one for Rs. 65,000 in favour of Rai Sahib Surendro Nath Basu, the present receiver, and Dhirendra Nath Sen, and a second for Rs. 90,000 in favour of Dhirendro Nath Sen and the two ladies named above.

When the representatives of Rai Bahadur Suraj Narain Singh (hereinafter called the decree-holders) applied to the Court administering the estate for executing the compromise decree of the Alipur Court, three sets of objections were raised. One was by the Receiver who was asked to and made a report, the second by the judgment-debtors of the decree who are defendants in the Administration Suit, and the third on behalf of the creditors who were holding the two mortgages from the Receiver (hereinafter called creditors).

The substance of the Receiver's objection was that leave to execute the decree could not be granted

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till the mortgages created by the Receiver under the orders of the court were discharged. It was also urged that the debts due to the late Rai Bahadur Suraj Narain Singh and his heirs from the estate had not only been paid up but there had been excess payment as under the special Regulation in force in the Santal Parganas interest could not exceed the principal and in fact 4 lacs of rupees, in excess of the principal and interest equal to it, had already been paid. In the end it was urged that if permission to execute the decree be granted, it should be conditional on the payment of the Receiver's lien by way of salaries, loans, management cost, etc., either by the decree-holder or purchaser whoever it might be before the sale took place and in any case before he could be allowed to take possession of the estate.

The objection of the creditors, who held the two mortgages executed by the Receiver, was also to the effect that leave to execute the decree could not be granted and, if granted, their mortgages should have priority over the decree sought to be executed.

The objection of the judgment-debtors of the decree was that it was not executable on various grounds, the main ground being that the debts incurred by the estate from Rai Bahadur Suraj Narain Singh had already been over-paid in view of section 6 of Regulation III of 1872.

It may be mentioned here that the decree-holders before applying for leave to execute the decree had already made an application to the Alipur court for its execution, but they explained that they had to do so as otherwise the decree would have become barred.

The learned Subordinate Judge by his order, dated the 10th June, 1938, gave conditional leave to the decree-holders to execute the decree. He held the first mortgage for Rs. 65,000 to be a first charge on the estate and directed that the decree-holders should pay up this encumbrance before proceeding against

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the mortgaged properties or, in the alternative, that they should proceed against them subject to the liability of paying Rs. 65,000 to the creditors. He was of the view that the Court in ignorance of the order of this Court had made the first loan of Rs. 50,000 a first charge on the estate and the remaining Rs. 15,000 was borrowed for the protection of the estate, i.e., the payment of Putni rent and the creditors had a salvage lien for this amount.

As has been stated above, three applications in revision were filed against this order. Civil Revision no. 339 of 1938 is on behalf of the decree-holders who ask that the condition imposed by the learned Subordinate Judge be withdrawn and the order modified accordingly. Civil Revision no. 442 of 1938 is on behalf of the creditors, Dhirendra Nath Sen and the two ladies. They ask that the second mortgage of Rs. 90,000 created by the Receiver under the orders of the Court should also have priority over the decretal dues of the decree-holders. Civil Revision no. 443 of 1938 is on behalf of the judgment-debtors, who repeat their prayer that leave should be refused inasmuch as the debt has already been overpaid and in view of certain objections raised by them the decree was inexecutable.

Civil Revisions 339 *and* 442 *of* 1938.—These two applications, one by the decree-holders and the other by the creditors, are taken up together as the point involved in them is the same, namely, whether the order giving the first charge to the mortgages created by the Receiver under the orders of the Court is permissible under the law and, if so, to what extent.

No law has been placed before us to show that a Court while administering an estate through a Receiver has power to order that the priority of the mortgages already created on the estate should be altered in favour of a debt incurred by the Receiver under its orders except in favour of salvees, viz.,

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those who advanced money for the protection of the estate itself so that the advances benefit the prior mortgagees as well; for instance, money advanced for the payment of the Government revenue or the rent due to the superior landlord which, if not paid, will entail forfeiture of the property or its sale free from encumbrances of prior mortgagees or debts incurred for the preservation of the property from destruction or annihilation If debts are incurred for these purposes, that is to say, for the preservation of the property for the benefit of all, the priority is in the inverse order, viz., the person who advances money last has priority over the one who had advanced money before him, and so on. The principle of this rule of salvage liens which is applied in India as a rule of justice, equity and good conscience is obvious. If these debts are not given priority, the property itself is in danger of being destroyed and the mortgagee himself will suffer. As the man who advances money last benefits those who had advanced money before him, he saves the property for the benefit of them also and, therefore, has priority over them. This is conceded by Mr. P. R. Das, who frankly admitted that money advanced for saving the interest of the decree-holders should have priority over the decretal debt. But apart from this salvage lien there is no right vested in the Courts to interfere with mortgages already created on the property which they are administering through a Receiver, nor is there any authority for the proposition that a Court when administering an estate of mortgagors in a suit between them *inter se* has power to destroy or curtail the rights of the mortgagees in the exercise of its discretion to grant them leave to sue on the mortgage or execute a mortgage decree already obtained. The interest of the mortgagees is not really involved in any suit between the mortgagors. The paramount right of the mortgagee is outside the scope of a suit between the mortgagors.

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A man's property is a bundle of rights in it vested in him. If the owner of a property creates a mortgage of it, he thereby transfers a part of his interest in it to the mortgagee. Under the Transfer of Property Act a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, etc., etc. Therefore after a mortgage has been created what is left in the owner of the property is his original full rights minus the right which he has already transferred in favour of the mortgagee and if thereafter the property of the owner comes under the administration of a Court and the Court administers it through a Receiver, what is being administered is not the entire interest of the owner but only what is left in him after his transfer in favour of the mortgagee. What has already been transferred is not the subject-matter of administration and is, therefore, not under the control of the Court.

There is a good deal of force in the argument of Mr. P. R. Das, appearing on behalf of the decree-holders, that his clients had a paramount right in the property which was not in the least affected by the Administration Suit. The decree-holders were no parties to it and any order passed in the suit cannot in any way affect the rights which had already been created before the property came in *custodia legis*. It is unthinkable that, when the co-sharers of a property who had already mortgaged it to third persons fight among themselves and one of them institutes a suit and for the preservation of their rights the Court takes charge of the property and administers it, it can by any order to which the mortgagee is not a party destroy or diminish the mortgage lien, either by giving the first charge to newly incurred loans or by imposing on the mortgagee conditions which will have this effect. The position is so clear that it need not be discussed in detail.

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The only exception, as has been stated, is in cases of salvage liens when the court orders a Receiver to borrow money for the preservation of the property itself. In such cases the mortgagee is also bound by this loan because if it be not incurred his own right will be destroyed.

The learned Subordinate Judge has nevertheless allowed the first mortgage of Rs. 65,000 to have priority on the ground that the Court had, however, inadvertently, ordered so in respect of Rs. 50,000 and the pledge given by the Court must be respected and Rs. 15,000 was borrowed for the protection of the property. Let us examine the two grounds separately.

Sir Sultan Ahmed has supported the order and has urged that however wrong the order of the Court in respect of Rs. 50,000 might have been, once it was passed and the creditors advanced money in reliance on the promise of the Court, that promise must be carried out at any cost and the Court must exercise all the powers which it possesses in order to see that nobody suffers on account of its wrong order. He relied upon the case of *Girdhari Lal* v. *Dhirendra Kristo Mukharji*(1). The learned Subordinate Judge has considered the case and rightly held that it does not help the creditors. The facts of the case are these. The head-note is in general terms which are rather misleading.

During the pendency of a suit for partition of a family property on the Original Side of the Calcutta High Court some members of the family borrowed money on an equitable mortgage for paying the Putni rent due from the estate. Thereafter a Receiver was appointed in the suit, and the Court ordered the Receiver to raise a loan of 2 lacs of rupees

(1) (1906) I. L. R. 34 Cal. 427.

for the preservation of the estate. It was also ordered that the loan so raised would be a first charge on the estate. The equitable mortgagee from whom some of the members had borrowed money brought a suit in the Court of the Subordinate Judge of Hoogly to enforce the mortgage. The question arose whether the mortgage of the plaintiff of the suit or the mortgage created by the Receiver should have priority. The learned Judge of the Court below gave the plaintiff a personal decree against defendants nos. 1 to 5 and 9 but refused to pass a mortgage decree. There was an appeal where there was difference between Rampini and Woodroffe, JJ. The former was of opinion that the plaintiff should have priority and that the mortgage created by the Receiver in favour of defendant no. 8 being subsequent to it must give way. Woodroffe, J. was, however, of opinion that the mortgage created by the Receiver should have priority. The case was placed before Harington, J. who upheld the view of Woodroffe, J. and held that the mortgage of defendant no. 8 created by the Receiver should have priority over the plaintiff's mortgage. The suit was, therefore, decreed accordingly.

It is to be observed that in the above case the mortgage created by the Receiver under the orders of the Court was for preserving the property, and the money was advanced by the plaintiff during the pendency of the partition suit and, therefore, was subject to any decree which might be passed in it. In fact, the principle of salvage liens was applied, about which there is no controversy before us. Woodroffe, J. observed (p. 437) as follows:—

"On the other hand, the Receiver's mortgage was ordered to be effected by the Court for the preservation of the property, and had it not been so effected there might have been no property, against which the plaintiff might proceed in this suit."

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Harington, J. who agreed with Woodroffe, J. distinctly relied upon the principle of salvage lien. His observations (page 441) are as follows:—

"The question resolves itself into a very short point, viz., had the Court power to order that the Receiver's mortgage should be a first charge on the property?

The loan, which the Receiver was authorized to make, was for the purpose of preserving the property for the benefit of all the beneficiaries—it was to save the property.

As is pointed out in Fisher on Mortgages, 4th Edition, paragraph 958, there is a notable exception to the general rule "*qui prior est tempore, potior est jure*" to be found in advances, made to save the encumbered property from loss or destruction. These advances, says the learned author, are payable in priority to all other charges of earlier date, and amongst themselves have precedence according to the inverse order of their respective dates."

This principle has already been referred to above and is well settled. The case is clearly no authority for the proposition that the Court can order any loan to have priority over the previous encumbrances without regard to the circumstances of the previous encumbrances and the purpose for which the Receiver was going to take the loan.

Sir Sultan Ahmed, however, did not rely so much upon the decision of the case as on the observations of Woodroffe and Harington, JJ. which are to be found at pages 438 and 442, respectively, of the report. Woodroffe, J. while dealing with the principle of law that if a Court authorizes a Receiver to take a loan for the preservation of a property and gives it a first charge the order of the Court must prevail observed as follows:—

"It would be to me a matter of regret, if those, who on the faith of assurances contained in orders by

this Court, have advanced money to the Receiver, were not entitled in all cases to see that those assurances are carried out."

Harington, J. observed as follows:—

"I agree with Woodroffe, J. that the consequences would be lamentable, if after money had been advanced on the strength of the order of the Court, directing that the loan should be a first charge, that order is to be treated as a nullity, although it has never been set aside."

It is true that it will be a matter of extreme regret that those who advance money on the assurance of a Court are to suffer, but it will be much more regrettable if in order to carry out its promise to a creditor the Court robs a third person of his just rights when he was no party to the proceedings in which the assurance was given and could not have resisted it.

In this case, however, the question of the Court's promise does not in fact arise. It is true that the learned Subordinate Judge by his order, dated the 12th April, 1930, authorized Rai Bahadur Nilmani De to raise loans and ordered that the loans would have priority over other mortgages, but this was in entire disregard of the orders of this Court, dated the 7th March. The learned Subordinate Judge, whose order is under revision, has observed that his predecessor who gave this assurance to Rai Bahadur Nilmani De did so perhaps in ignorance of the order of the High Court. This is inconceivable. It was by the order of this Court that the defendants were appointed receivers and a certain time given to them to make arrangements for the payment of the instalment of Rs. 50,000 payable to the decree-holders on the 13th April, 1930; and the order of the learned Subordinate Judge appointing Rai Bahadur Nilmani De Receiver was passed in continuation of the order of this Court when the defendant-receivers were

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unable to make arrangements for the payment of the instalment. It is, therefore, very difficult to imagine that the clear observations of the High Court escaped the attention of the learned Subordinate Judge. Moreover, when the matter came up here on a report from the learned Subordinate Judge, this Court observed that the question of giving priority to the loans raised by Rai Bahadur Nilmani De would be considered with due regard to the rights of those who held prior encumbrances upon the estate. One of the creditors who had advanced, first, Rs. 50,000 and later Rs. 15,000 is a lawyer. He is the present Receiver of the estate. It cannot be imagined that he was unaware of the order of the High Court or of the law in this respect. It seems clear that the creditors deliberately took the risk for which this Court was in no way responsible. Further, whatever may be said about the first loan of Rs. 50,000, the additional loan of Rs. 15,000 was taken on the clear understanding that it was to have priority if permissible under the law, and the same is true in respect of the second mortgage of Rs. 90,000 also.

However regrettable it may be that the Subordinate Judge somehow accepted the condition that the loan of Rs. 50,000 was to be a first charge and later on approved of the mortgage bond making the sum of Rs. 65,000 a first charge, we are clear that the Court will not be justified in recouping these creditors at the cost of those who would seem to have a prior right to proceed against the estate which could not be properly touched in the Administration Suit.

The next question for consideration is whether it makes any difference that the money was utilised towards the payment of the instalment of the decree-holders. It is clear that it does not. The decree-holders have credited the amount in the decree, which to that extent stands satisfied. Beyond this the loan did not benefit them and cannot be said to have saved the mortgaged properties for them; the benefit

they derived was no more than they were entitled to and has been allowed for.

The learned Subordinate Judge does not seem to have realised the effect of his conditional leave to execute the decree, viz. that it would practically deprive the decree-holders of at least Rs. 50,000 for no fault of theirs; whether the additional sum of Rs. 15,000 can be given priority on the principle of a salvage lien will be considered later. But the order that Rs. 65,000 should be paid by the decree-holders before they proceed against the mortgaged properties or that they may proceed against the properties provided they remain liable to pay this amount to the creditors overlooks the fact that the decree-holders will themselves have no means of realizing it from the judgment-debtors.

There can only be two possibilities; either the security is sufficient for the satisfaction of the claims of both the decree-holders and the creditors, or it is not. In the former case, the creditors could realize their money (as the decree-holders could realize theirs) without the former being given the first charge. But if the decree-holders be called upon to pay the money—as the lower Court has in effect done—it is difficult to see how they can recoup themselves. If, however, the security is not sufficient to satisfy both the claims, and if a first charge is given to the creditors to the extent of Rs. 65,000, this means a practical reduction of the decretal dues to that extent by a proceeding which moreover gives the decree-holders no right of appeal. It amounts to calling upon the decree-holders to refund a part of what was paid to them in satisfaction of the decree, though the decree would still stand satisfied to the extent of the refund. This appears to us to be opposed to all canons of justice, equity and good conscience; our attention has not been drawn to any provision of the law under which a portion of the decree which stands satisfied could be revived upon the decree-holders making a refund

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as required in obtaining leave to proceed against properties in the hands of the Receiver.

An attempt was made in the court below to prove that the decree-holders had consented to the order of making Rs. 50,000 as a first charge. The attempt failed and the Court has not relied upon it. There is nothing to show that the decree-holders ever knew of this order. Even if they knew, it was not their duty to appear in the Administration Suit and object, nor could they refuse to accept the payment of the instalment for which the loan was incurred.

Assuming, moreover, that the Court administering an estate for the benefit of the parties to the suit can create a first charge for loans incurred for purposes other than the preservation of the property for the benefit of all concerned (including prior creditors), the question still remains whether the creditor can enforce the charge on a decree-holder's application for leave to execute his decree against properties in the hands of a Receiver, when the order giving conditional leave is not appealable. This in substance is what will happen if the order of the lower Court were to stand. A summary proceeding for giving leave is not appropriate for settling disputed priorities and is even less so for enforcing them. The proper course would plainly be to allow the creditors to proceed with their execution and face proceedings in which the question of priority could in the ordinary course be decided by an order having the force of a decree and thus subject to appeal. The object of requiring leave to sue a Receiver is that the Court which is administering an estate should know the claims which third persons are likely to make against it so that, if on a summary enquiry, it finds that the claims are just and unanswerable, it may order the Receiver to satisfy them, and also to avoid frivolous and vexatious suits against a Receiver who is an officer of the court as they will needlessly hamper the administration of the estate by the court.

In *Braja Bhusan Trigunait* v. *Sris Chandra Tewari*(1) it was observed :—

" There is no statutory provision which requires a party to take the leave of the court to sue a Receiver. The rule has come down to us as a part of the rules of equity, binding upon all English courts of justice in this country. It is a rule based upon public policy which requires that when the court has assumed possession of a property in the interest of the litigants before it, the authority of that court is not to be obstructed by suits designed to disturb the possession of the court. The institution of such suits is in the eye of the law a contempt of the authority of the court and therefore the party contemplating such a suit is required to take the leave of the court so as to absolve himself from that charge. The grant of such leave is made not in exercise of any power conferred by statute but in exercise of the inherent power which every court possesses to prevent acts which constitute or are akin to an abuse of its authority."

Earlier in the same judgment Mullick, J. said :

" The general principle applying to cases of this kind, in which application is made to sue a Receiver in respect of properties in charge of the court is, that unless the court is satisfied that there is no question at all to try, or there is no legal foundation to the claim, leave should as a matter of course be granted. The onus is, therefore, strongly on the court to show that no foundation for any claim has been made out."

It cannot be said in this case that the decree-holders have no claim whatever to be tried in the ordinary course by a Court of competent jurisdiction.

It is true that while giving leave to sue a Receiver the Court can give directions, but we consider it very doubtful whether this power can be

(1) (1918) 4 Pat. L. J. 20.

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used to require an applicant for leave to give up a portion of his claim without any good reasons on pain of finding himself unable to prosecute his claim, however substantial it may be, in the ordinary course of justice.

It may also be doubted whether in this case leave was necessary only to execute the decree. As at present advised, we are inclined to share the view expressed in the following extract from Woodroffe's Tagore Law Lectures on Receivers (4th Edition, pages 81-82) :—

"That for a suit upon promissory notes and an equitable mortgage made by the executors of a deceased person whose estate (including the property subject to mortgage) was subsequently placed in the hands of a receiver, leave is not necessary. It might be urged that though the suit was not brought directly against the receiver, leave was necessary as the suit was against parties over whose property a receiver had been appointed, such receiver being in possession of the mortgaged premises. But it is submitted (and the Court appeared to be of such opinion) that leave was unnecessary since the receiver's possession would not be affected until a decree for sale was made and the purchaser took possession which might never occur for the executors might discharge the debt out of other assets in their hands. If, however, a decree for sale was made, an application might subsequently be made for leave to take possession."

The reference is to the case of *Chartered Bank of India* v. *Hurish Chander Neogy*(1).

It is, however, not necessary to pronounce definitely on this aspect of the matter. For, assuming that leave is necessary even to execute the decree, the Court is beyond question entitled to

(1) (1900) 5 Cal. W. N. XV.

examine the facts before granting leave. The applicants have a decree in their favour and no Court has held that it is incapable of execution on the grounds which have been raised by the judgment-debtors, and which we will deal with later. In these circumstances it seems clear that leave to execute ought to have been granted as a matter of course and that the restriction imposed upon the decree-holders is improper. The question of priority, to say the least, is controversial and ought to be decided in the ordinary way and not in a summary proceeding for leave under the inherent powers of a Court.

The next question for consideration is as to the sum of Rs. 15,000 which is a part of the first mortgage executed by Rai Bahadur Nilmani De under the orders of the Court. The lower Court has directed the payment of this amount by the decree-holders on the ground that the creditors have a salvage lien in respect of it. Mr. Das, on the other hand, has urged that it has not been established that the money was in fact used for saving the property from sale on account of default in the payment of the Putni rents. The expenditure of Rs. 15,000 as given by the Receiver in his report is as follows:—

	Rs.	as.	p.
Advance made to Babu Surendra Nath for payment of Putni rent of Kankjole in the "Astham" procedure	6,070	12	0
Advance made to Upendra Nath Roy to pay rents to Nashipur Raj	7,240	6	3
Deposited with the Imperial Bank ...	1,688	13	9
	15,000	0	0

Mr. P. R. Das argued that the payment of Putni rent of Kankjole was not for the preservation of the properties mortgaged to the decree-holders. It is conceded before us that the decree-holders were not at all interested in Kankjole, nor can the amount deposited in the Imperial Bank be held to carry a salvage lien in any case. No priority can, therefore, be allowed in respect of the two items which amount

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to over Rs. 7,700. Mr. Das, while conceding that the amount of Rs. 7,240-6-3 if paid to the Nashipur Raj as rent could legitimately carry a salvage lien on the mortgaged properties, has contended that the account books have not been produced to show that there was no money available in the hands of the Receiver to pay this amount.

It is, however, not necessary to pursue this matter further as out of the mortgage bond of Rs. 65,000 a very large amount has been satisfied and, therefore, to the extent to which the loan could properly be given priority on the principle of a salvage lien, it has already been satisfied, as will be presently shown. But it must be conceded that whatever the reason, the Subordinate Judge did give a first charge in respect of Rs. 50,000, and that the creditors may have believed that the remaining Rs. 15,000 was being taken for purposes which would entitle them to a salvage lien on the property. Though in respect of Rs. 90,000 these considerations do not arise, nevertheless this amount also was borrowed under the orders of the Court. It is, therefore, the duty of the Court to see that, without causing harm to the decree-holders, the creditors are not put to loss, as far as it may be practicable to do so. At one time we thought of ordering that certain properties be sold in order to satisfy the claim of the creditors, but an examination of the figures showed that this course is not really necessary. From the accounts given by the Receiver it appears that the present position is as follows :—

	Rs.
Debts due to S. N. Basu and D. N. Sen on mortgage bond, dated 21st June, 1930, after part payment on 6th February, 1931 ...	52,800
Interest for six years and eight months due up to 6th October, 1937	52,800
	1,05,600
Less paid up to 5th December, 1938 ...	25,000
Balance ...	80,600

	Rs.
Debt due to Sm. Sarala Sundari Debi and others on mortgage bond, dated 23rd April, 1932, at 12 per cent.	90,000
Interest due from 8th April, 1932, to 8th August, 1940	90,000
	1,80,000
Less paid up to 5th December, 1938 (approximately)	33,000
Balance ...	1,47,000
Grand Total ...	2,27,600
Average payment per year	56,900

There is no question of any future interest as in each case the interest has already reached the amount of principal and under the Santal Parganas Regulation it cannot be more. Therefore, in about four years' time the entire debt under the two mortgages can be wiped off and as, it will be presently shown, there is going to be strenuous opposition on behalf of the judgment-debtors against the execution of the decree, there is no chance of the properties being sold, and the auction-purchaser being in a position to obtain possession of the properties, in less than four years' time. There will thus be no harm in fact if the decree-holders are allowed to execute the decree unconditionally with a provision that the Receiver should not be dispossessed of the mortgage properties before the end of four years or before the satisfaction of the two mortgages, whichever event happens earlier.

Civil Revision no. 443 *of* 1938.—As has been stated before, this is an application by the judgment-debtors, whose objection against giving leave to the decree-holders to execute the mortgage decree of the Alipur Court on the ground that the decree had already been satisfied, rather there had been over-payment, was overruled by the learned Subordinate Judge. It was also contended that the decree passed

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by the Alipur Court was void for various reasons. The details of the objection need not be stated. The learned Subordinate Judge has examined them and has overruled them. The question is, however, too elaborate to be considered in a summary proceeding for giving leave to the decree-holders to execute the decree. The matter can be gone into by the executing Court in the course of the execution proceeding or in such other proceeding as may be taken by the judgment-debtors. It has already been indicated that though at the time of giving leave to sue a Receiver or to execute a decree against a Receiver, the Court is entitled to examine the facts of the case and to give directions, when there is a controversial question of law and fact to be decided the best course is to give the party who applies for leave to proceed in regular Courts of law. This is not a case in which it may be said that the decree-holders have no legal foundation for their claim to execute the decree. However strong the objections of the judgment-debtors may be, it is clear that those objections should not be gone into at this stage, and we therefore express no opinion in respect to them. The findings of the learned Subordinate Judge in this connection which are somewhat against the judgment-debtors will have no binding effect and are set aside.

Sir Sultan Ahmed, however, asked us to direct the decree-holders to bring the decree to Pakaur for execution. It was conceded before us that the decree could not be executed by the Alipur court as no portion of the mortgaged properties is situated within its jurisdiction. Mr. P. R. Das on behalf of the decree-holders intimated to us that steps would be taken to bring the decree for execution either to Murshidabad or to Suri (Birbhum) where some of the mortgaged properties are situated. We, however, do not think fit to give any directions in connection with a matter which is in the discretion of the Alipur Court subject to the revising power of the Calcutta High Court. When the decree-holders apply for

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transfer of the decree either to Suri (Birbhum) or to Murshidabad, it will be open to the judgment-debtors to represent the matter to the Alipur Court and if necessary take it to the Calcutta High Court. The judgment-debtors are anxious to have the execution proceeding in the Santal Parganas as Regulation III of 1872 is in force there. The decree-holders want to avoid that district. It has, however, been settled by the Privy Council that all Courts exercising jurisdiction in the Santal Parganas are bound by its provisions.

The revision applications are, therefore, allowed in these terms: The condition imposed by the learned Subordinate Judge in giving leave to the decree-holders for executing the decree is set aside, and in lieu thereof it is ordered that the decree-holders when advertising the mortgaged properties for sale, do indicate in the sale proclamation that the auction-purchaser will not be entitled to take delivery of possession of the properties purchased by him within four years from to-day or till the two mortgages executed by the Receiver, one dated the 21st June, 1930, and the other dated the 23rd April, 1932, are satisfied, whichever event happens earlier, and that he will not be entitled to any compensation or mesne profits for being kept out of possession. The finding of the learned Subordinate Judge about the objections of the judgment-debtors is set aside, and the questions of the validity of the decree and of its executability are left open for determination by a proper Court either in the execution proceeding or in such other proceeding as the judgment-debtors may be advised to take. The learned Subordinate Judge is directed to give all facilities and help to the Receiver to pay up the two mortgages, and the Receiver should be impressed with the importance of such payment. There will be no order for costs.

Applications allowed in part.

S. A. K.

APPELLATE CIVIL.

Before Harries, C. J. and Manohar Lall, J.

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January, 27, 30.

SITAL PRASAD SINGH

v.

AJABLAL MANDER.*

Hindu Law—legal necessity—powers of karta to charge ancestral property—expression "benefit of the estate", whether limited to transactions of a purely defensive nature.

A manager of a joint Hindu family has power to charge ancestral property by loan or mortgage in case of need or for the benefit of the estate. The test in each case is whether the transaction was one into which a prudent owner would enter in the ordinary course of management in order to benefit the estate.

The expression "benefit of the estate" has a wider meaning than mere compelling necessity, and is not limited to transactions of a purely defensive nature.

Sheikh Jan Mohammad v. *Bikoo Mahton*(1), *Baijnath Prasad* v. *Binda Prasad Singh*(2), *Jagat Narain* v. *Mathura Das* (3), *Ram Nath* v. *Chiranji Lal*(4) and *Amrej Singh* v. *Shambhu Singh*(5), followed.

Ramkaran Thakur v. *Baldeo Thakur*(6) [judgment of Wort, J.], not followed.

Rambilas Singh v. *Ramyad Singh*(7), distinguished.

Benares Bank, Limited, v. *Hari Narayan*(8), referred to.

Appeal by the defendants.

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

*Appeal from Original Decree no. 33 of 1936, from a decision of Babu Kshetra Mohan Kunar, Subordinate Judge, Bhagalpur, dated the 30th July, 1935.

(1) (1928) I. L. R. 7 Pat. 798.
(2) (1938) I. L. R. 17 Pat. 549.
(3) (1928) I. L. R. 50 All. 969, F. B.
(4) (1934) I. L. R. 57 All. 605, F. B.
(5) (1932) I. L. R. 55 All. 1, F. B.
(6) (1938) I. L. R. 17 Pat. 168.
(7) (1920) 5 Pat. L. J. 622.
(8) (1932) I. L. R. 54 All. 564, P. C.

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K. N. Moitra, for the appellants.

L. K. Jha and *K. N. Lal*, for the respondents.

HARRIES, C. J.—This is a defendants' appeal from a decree of the learned Subordinate Judge of Bhagalpur decreeing the plaintiffs' claim in a mortgage suit.

The plaintiffs brought the suit out of which this appeal arises to enforce a simple mortgage, dated the 21st of February, 1921, which had been executed by defendant no. 1 for himself and as guardian of his minor sons, defendants nos. 4 to 7, by defendant no. 2 for himself and as guardian of his minor son, defendant no. 8 and by Deo Narain Singh, since deceased, for himself and as guardian of his minor sons Anant Lal Singh and Sital Prasad Singh, defendant no. 3. The mortgage was for a sum of Rs. 2,000 which was to carry interest at the rate of twelve per cent. per annum compoundable yearly. The mortgagee was Saukhi Mandar, deceased father of plaintiff no. 1 and grandfather of plaintiff no. 2 and great-grandfather of plaintiffs nos. 3 and 4.

The consideration for this mortgage, namely Rs. 2,000, was required for the payment of part of the purchase price of certain property purchased on behalf of the defendant family and to pay an antecedent debt and household expenses.

Certain payments were made from time to time and the suit was brought to recover Rs. 6,838-12-0 being the amount of principal and interest then due. The learned Subordinate Judge held that the plaintiffs were entitled to a mortgage decree, but he was of opinion that the rate of interest, namely twelve per cent. per annum compoundable yearly, was excessive. He allowed simple interest at twelve per cent. per annum and accordingly decreed the claim for Rs. 4,402. Against this decree the defendants other than the executants of the mortgage bond have preferred the present appeal.

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The defendants form a joint Hindu family and by way of defence it was pleaded by the minor members of the family that the mortgage bond in suit was not for legal necessity and such has been the contention before us to-day.

In the first place, it was argued that the part of the consideration for this mortgage, viz., Rs. 1,425, which was applied towards the payment of the purchase price of property bought by the family, could not possibly be regarded as money borrowed for legal necessity. It appears that on the day before this mortgage was executed, i.e., the 20th of February, 1921, the three adult members of the family, who executed the mortgage deed, purchased certain property from Pareyag Kapri in mauza Kenuar and Rs. 1,425 part of the money borrowed from the plaintiffs was applied in paying Pareyag Kapri for this property. Both the sale-deed and the mortgage were registered on the same day, namely, the 23rd of February, 1921.

It has been urged on behalf of the defendant-appellants that the plaintiffs wholly failed to prove that there was any need whatsoever for the family to purchase this property and that mortgaging the ancestral property in order to pay the purchase price was a speculative and risky transaction. The learned Subordinate Judge held that it was a transaction beneficial to the estate and family and such as a reasonably prudent manager of an estate would enter into. Before us it has been contended that there is no evidence whatsoever to support this finding.

The plaintiff no. 1 himself gave evidence and stated that the holding purchased by the defendant family was a productive holding and yielded more paddy than did the plaintiffs' own holding which was contiguous to it. According to the plaintiffs, their own land yielded 4 to 5 maunds of paddy per bigha. If the purchased property was more productive, then it is clear that it would yield some maunds of paddy

at the rate of about 6 maunds per bigha, the purchased property being 15 bighas odd. If 90 maunds of paddy could be raised from the purchased land, then it would yield approximately a profit of about Rs. 180. Such would be more than sufficient to cover the interest at the rate allowed by the Subordinate Judge. Counsel for the appellants argued strenuously that the court should not rely upon a general statement such as that made by the plaintiffs in this case. He has argued that the plaintiffs should adduce definite evidence of the actual amount of produce raised by the defendants yearly from the land in suit. Clearly the plaintiffs can never be in a position to give such evidence. All the plaintiffs can do is to produce the best evidence they can to show that the purchase of property by the defendant family was a transaction which at the time it was entered into was beneficial to the estate.

In the present case they have shown that the produce of the land is more than sufficient to pay the interest; but that is not all. The transaction was entered into by the three adult members of the family, and a court may safely assume that these three members would not act unreasonably. Clearly they must have thought at the time that the transaction was for the benefit of the family, and it appears to me that subsequent events have abundantly established this. The family has retained this property and actually owns it to-day. In these circumstances, it is very difficult for any court to hold that the transaction was not for the benefit of the estate. Further, the defendants held land in this village and at the time they entered into the transaction under discussion they also purchased shares in the village from other persons. In short, the defendants were increasing their holding in this village, presumably, with a view to making it more productive and economic. In those circumstances, the learned Judge accepted the plaintiffs' contention that this transaction was for the benefit of the family. The only evidence adduced by

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the defendants is hardly worthy of notice. One so-called independent witness was called to state that the purchased property was not productive. The witness held property near by, and when he was asked how many maunds of paddy he raised per bigha, he wanted the court to believe that he did not know. When a witness of that kind is put forward, it is impossible to say that the learned Judge was wrong in rejecting the defendants' evidence.

Reliance has been placed by Counsel for the appellants upon a case of this Court, *Ram Bilas Singh* v. *Ramyad Singh*(1). In that case it was held that actual compelling necessity was not the sole test of the validity of an alienation by a manager acting without the express consent of the other members and a Bench laid down that when it could be shown that the transaction was one which was clearly beneficial to the interests of the family as a whole, such was valid, and the consent of the other members would be implied though not expressly given. In this particular case it was eventually held that a purchase of property was not beneficial to the estate and that money borrowed to finance the purchase was not borrowed for legal necessity. Certain observations of Dawson Miller, C. J. have been relied on by the appellants; but in my view those observations must be confined to the particular facts of the case. At page 627 the learned Chief Justice observed :—

"It is not desirable to lay down any general proposition which would limit and define the various cases which might be classed under the term beneficial as above used. It is clear, however, that all transactions of a purely speculative nature would properly be excluded".

The Court appears to have thought upon the evidence that the transaction was a risky and speculative one and nowhere does the learned Chief Justice

(1) (1920) 5 Pat. L. J. 622.

lay down that facts such as established in this case do not prove that the transaction was beneficial to the estate and the family as a whole.

This case to which I have referred was cited in the case of *Shaikh Jan Mohammad* v. *Bikoo Mahto*(1) where a Bench of this Court held that a manager of a joint Hindu family has power to charge ancestral property by loan or mortgage in case of need or for the benefit of the estate. The test in each case is whether it was a transaction into which a prudent owner would enter in the ordinary course of management in order to benefit the estate. In this case the case of *Rambilas Singh* v. *Ramyad Singh*(2) was closely considered and the effect of the decision discussed. It is pointed out that the earlier case laid down no general proposition and was a decision upon the facts of that particular case.

The question has been very recently considered by this Court in the case of *Baijnath Prasad* v. *Binda Prasad Singh*(3) in which it was held that the karta of a joint Hindu family being merely a manager and not an absolute owner, the Hindu Law has, like other systems of law, placed certain limitations upon his power to alienate property which is owned by the joint family. The Hindu law-givers, however, could not have intended to impose any such restriction on his power as would virtually disqualify him from doing anything to improve the conditions of the family. The only reasonable limitation which can be imposed on the karta is that he must act with prudence, and prudence implies caution as well as foresight and excludes hasty, reckless and arbitrary conduct. The manager is not allowed to enter into any transaction which is speculative or fraught with risks or which may involve a possibility of loss to the family and the court will not encourage him either to

(1) (1928) I. L. R. 7 Pat. 798.
(2) (1920) 5 Pat. L. J. 622.
(3) (1938) I. L. R. 17 Pat. 549.

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part with the joint family property or to encumber it merely in order to increase the immediate income of the property, because a prudent person will not sacrifice a certain and stable income in favour of the mere prospect of a better income. In exceptional circumstances, however, the court will uphold the alienation of a part of the joint family property by a karta for the acquisition of new property as, for example, where all the adult members of the joint family with the knowledge available to them and possessing all the necessary information about the means and requirement of the family are convinced that the proposed purchase of the new property is for the benefit of the estate.

These authorities make it abundantly clear that this Court does not confine legal necessity to transactions of a purely defensive nature. If transactions are entered into which benefit the family and the estate and are such as a reasonably prudent man would enter into, such can be said to be supported by legal necessity.

The view taken by this Court has been consistently held of late by the Allahabad High Court—*see* the Full Bench decisions in *Jagat Narain* v. *Mathura Das*(1) and *Amrej Singh* v. *Shambu Singh*(2). These two cases were later considered in the Full Bench case, *Ram Nath* v. *Chiranji Lal*(3), in which it was especially laid down that the expression " for the sake of the family " occurring in the text of the Mitakshara or the expression " benefit of the estate " has a wider meaning than mere compelling necessity, and is not limited to transactions of a purely defensive nature. The Full Bench further held that the authority of the case of *Jagat Narain* v. *Mathura Das*(1) had not

(1) (1928) I. L. R. 50 All. 969, F. B.
(2) (1932) I. L. R. 55 All. 1, F. B.
(3) (1934) I. L. R. 57, All. 605, F. B.

been overruled or shaken by the Privy Council decision in *Benares Bank, Limited*, v. *Hari Narayan*(1). In this latter case their Lordships of the Privy Council held that a mortgage securing a loan to finance a business which was not ancestral was not binding on the minor members of the joint family and Mukerji, J. in his judgment in *Amrej Singh* v. *Shambhu Singh*(2) was of opinion that this decision of their Lordships overruled the earlier Allahabad case *Jagat Narain* v. *Mathura Das*(3). Sulaiman, C. J. and King, J. took a contrary view and this latter view was accepted in the most recent Full Bench case, *Ram Nath* v. *Chiranji Lal*(4).

A contrary view appears to have been taken by Wort, J. in *Ramkaran Thakur* v. *Baldeo Thakur*(5). He held that although no precise definition of what is a benefit to the joint family estate can be given, it is well established that jeopardising a property, which is already the property of the joint Hindu family, for the purpose of purchasing another property can never, under any circumstance, be considered a benefit to the estate. Rowland, J., who was also a member of the Bench, did not agree with the proposition laid down by Wort, J. In that particular case the transaction was such as no reasonably prudent man would have entered into, and Rowland, J. held upon that ground that the transaction was not supported by legal necessity. In my judgment the observations of Wort, J. are not in accordance with the authorities of this Court supported as they are by the decisions of the Allahabad High Court to which I have referred, which have laid down that an alienation of family property may be supported by legal necessity if the transaction was at the time when it was entered into for the benefit of the family and was such as a reasonably prudent man would enter into at that time.

(1) (1932) I. L. R. 54 All. 564, P. C.
(2) (1932) I. L. R. 55 All. 1, 5, F. B.
(3) (1928) I. L. R. 50 All. 969, F. B.
(4) (1934) I. L. R. 57 All. 605, F. B.
(5) (1938) I. L. R. 17 Pat. 168.

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In the present case, as I have stated, all the adult members joined in this transaction. The property purchased was in the village in which the family already owned property, and from the evidence of the plaintiff coupled with the fact that this property has been retained, it is clear that the purchase was from the financial point of view a profitable transaction. It was a transaction for the benefit of the estate and family and eminently one which a reasonably prudent manager would enter into. In these circumstances, the adult members of the defendants' family were entitled to raise money and to charge the family property with the repayment of that money. That being so, the learned Judge was right in holding that legal necessity had been established for this item.

I have some doubt whether the plaintiffs were bound to prove legal necessity with regard to the item which I have discussed. The adult members of the family negotiated with Pareyag Kapri for the purchase of his property, and on the 18th of February, 1921, had made a contract with him and paid a certain sum as earnest-money. The sale-deed was executed on the 20th of February, 1921, and on that day the family owned Pareyag Kapri a sum of Rs. 1,425. On the following day this money was borrowed from the plaintiffs and the mortgage executed. It may be argued that this mortgage was entered into in order to obtain money to pay an antecedent debt, and if that be the true view of the transaction no question of family necessity arises. On behalf of the appellants, however, it could be contended that the borrowing was in fact a part of the transaction of purchasing this property. This aspect of the case, however, was not pressed before us. The matter is not of great importance, because however the borrowing is regarded, the mortgage, in my view, was a valid one which was binding on the property. If the money was borrowed to pay an antecedent debt, clearly the mortgage bound the

property. On the other hand, if the borrowing was part of the transaction of purchasing the property, then the mortgage is a valid one for legal necessity by reason of the fact that the transaction was one which was beneficial to the estate and the family and was one which a prudent manager would have entered into.

No argument has been addressed to us upon the evidence as to the other item which goes to make up the total sum of money advanced. The learned Judge held that legal necessity was established for this item and with that view I agree.

The interest given in the decree exceeds the principal sum by Rs. 402. It has been contended by the appellants that sections 9, 10 and 11 of the Bihar Money-Lenders Act applies to this case; but this Bench is bound by the Full Bench decision in *Sadanand Jha* v. *Aman Khan*(1). This point involves a construction of various sections of the Government of India Act, and that being so, it appears to me to be a fit case in which a certificate should be granted under section 205 of that Act.

MANOHAR LALL, J.—I agree. The very nature of the question, which requires to be answered in the present case, namely, whether the mortgage of the ancestral property of the defendants in order to pay the purchase price of Pareyag Kapri's land was a speculative and risky transaction, indicates to my mind that this is eminently a question of fact and must be answered on the findings of facts and circumstances of this particular case. This view is in accord with the quotations from several judgments of this Court given by my Lord the Chief Justice in the judgment just delivered. But the learned Advocate for the appellants relied strongly on the observations

(1) (1938) I. L. R. 18 Pat. 13, F. B.

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MANOHAR LALL, J.

of Wort, J. in the case of *Ramkaran Thakur* v. *Baldeo Thakur*(1) where the learned Judge states at page 172: "I have no hesitation in going so far as to say that jeopardising a property, which is already the property of the joint Hindu family, for the purpose of purchasing another property can never, under any circumstance, be considered a benefit to the estate". The facts found in that case were that the money was taken by a joint family on the security of a mortgage bond in order to obtain a usufructuary mortgage of certain property. The final court of fact had found that the income of the property which the ancestors of the defendants took in usufructuary mortgage from the plaintiffs was Rs. 60 per annum only out of which Rs. 9 was payable as Government revenue with the result that the profit was only Rs. 51 a year excluding the collection charges; but the interest payable to the mortgagees was about Rs. 75 a year calculating at a simple rate although interest in arrears was agreed to be compounded. The learned Subordinate Judge put the question to be answered in this form

> "The question is whether on these facts the transaction was for the benefit of the joint family".

He after a review of the entire evidence in the case came to the conclusion that the transaction appeared on the face of it to be of a speculative character and disadvantageous to the interest of the joint family. I am of opinion, therefore, that it was not necessary for Wort, J. to lay down the proposition in the broad form which is enunciated in the quotation referred to, because the finding of fact was quite sufficient to dispose of the appeal. But as the observation in quotation is couched in a general form I with great respect give my reasons why I do not agree with it.

In the very decision of the Judicial Committee referred to by the learned Judge at page 171

(1) (1938) I. L. R. 17 Pat. 168.

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[*Palaniappa Chetty* v. *Deivasikamony Pandara*(1)] it is stated that in their Lordships' view it is impossible to give a precise definition of it (benefit to the estate) applicable to all cases. In the case of *Rambilas Singh* v. *Ramyad Singh*(2) also referred to by Wort, J., the learned Chief Justice at page 627 states: "It is not desirable to lay down any general proposition which would limit and define the various cases which might be classed under the term beneficial as above used. It is clear, however, that all transactions of a purely speculative nature would properly be excluded".

In my opinion these two authorities amply justify the view that it is impossible to lay down any hard and fast rule as to what should be and what should not be regarded as a purely speculative transaction in a particular case. In every case the court of fact will consider prominently and accurately whether the transaction which is sought to be enforced in a particular case was for the benefit of the estate and this must be decided not from any *a priori* arguments but upon the facts of each case. I agree with the doubting opinion expressed by Rowland, J. that it is impossible to endorse the proposition that it can never be beneficial to an estate to acquire a fresh property by hypothecating ancestral property for the purpose. It is to be noticed that Rowland, J. was able to dispose of the case upon the clear findings of facts in the case which were that the transactions in question were not such as a prudent manager would or should have entered into on behalf of the family estate.

S.A.K.

Appeal dismissed.

(1) (1917) L. R. 44 Ind. App. 147.

(2) (1920) 5 Pat. L. J. 622.

APPELLATE CIVIL.

1939.

January, 27, 30.

Before James and Rowland, JJ.

RANBAHADUR SINGH THAKUR

v.

AWADHBEHARI PRASAD SINGH.*

Execution—person appearing on the face of the decree as decree-holder or his transferee or successor, whether alone entitled to execute—plea as to decree-holder being benamidar, whether can be taken by judgment-debtor in execution proceeding—Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 2—*entry of satisfaction, when can be claimed—payment must be to decree-holder or his agent.*

The person appearing on the face of the decree as the decree-holder is entitled to execute the decree, unless some other person can show that he has taken the decree-holder's place by an assignment of the decree or by operation of law, that is, by death or succession or in some similar manner.

In execution proceedings it is not open to the judgment-debtor to assert that the real holder of the decree is any person other than the person named as decree-holder in the decree unless there has been a valid assignment or devolution by process of law.

Under Order XXI, rule 2, Code of Civil Procedure, 1908, the judgment-debtor can only claim entry of satisfaction of the decree where payment has been made either to the decree-holder or to some other person definitely held out by the decree-holder as his agent for the purpose of payment.

Jasoda Deye v. *Kirtibash Das* (1) and *Palaniappa Chettiar* v. *Subramania Chettiar*(2), folowed.

Nil Kanta Ghosal v. *Ram Charan Roy*(3), not followed.

Per Rowland, J.—An adjustment to which the decree-holder is not a party cannot be recognised by the executing court.

* Appeal from Appellate Order no. 225 of 1938, from an order of B. P. Jamuar, Esq., District Judge of Monghyr, dated the 14th May, 1396, confirming an order of Babu Tekanath Jha, Subordinate Judge at Monghyr, dated the 21st February, 1938.

(1) (1891) I. L. R. 18 Cal. 639.

(2) (1924) I. L. R. 48 Mad. 553.

(3) (1928) 55 Cal. L. J. 82.

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RAMBAHADUR SINGH THAKUR v. AWADHBEHARI PRASAD SINGH.

Appeal by the decree-holder.

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

S. N. Bose and *D. C. Varma*, for the appellant.

S. K. Mitter, for the respondents.

JAMES, J.—Ramsarup held a mortgage decree the dues under which including costs amounted to nearly twelve thousand rupees against Awadhbehari Prasad Singh. A maternal uncle of Ramsarup named Ramkhelawan held two money decrees against Awadhbehari, one in Begusarai and the other in Monghyr. Ramsarup and Awadhbehari agreed between themselves that the question of how Awadhbehari should settle these decrees should be referred to arbitration. This was apparently done on the assumption that Ramsarup was the real creditor in respect of the debts for which the money decrees had been obtained; but Ramkhelawan was not party to the reference to arbitration. The arbitrators decided that all the three decrees should be settled by the payment of Rs. 17,500 which meant practically that one of the decrees standing in the name of Ramkhelawan would be abandoned. This was to be effected by the conveyance of Awadhbehari's share in certain zamindari property to the value of Rs. 17,500. Certain property was conveyed to Ramsarup by a deed which stated the consideration to be Rs. 12,000 which was met by writing off the dues under the mortgage decree. After this conveyance had been executed, Ramkhelawan certified satisfaction of his decree at Begusarai. Awadhbehari applied under Order XXI, rule 2, that satisfaction should be recorded of Ramkhelawan's decree in Monghyr which after contest on the part of Rambahadur, Ramkhelawan's son, was allowed by the Subordinate Judge; and an appeal from that order was dismissed by the District Judge. That decree-holder has come in second appeal from that decision.

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JAMES, J.

Mr. S. N. Bose on behalf of the appellant argues that since he was no party to the agreement to refer his decrees to arbitration, he cannot be treated as bound by the proceedings of the arbitrators and by those of Ramsarup and the judgement-debtor between themselves. The conveyance recites that the property is transferred for consideration of Rs. 12,000 which is met by satisfaction of the mortgage decree. Mr. Bose argues that the provisions of section 92 of the Indian Evidence Act prohibit us from taking evidence of any oral agreement which would vary the terms set out in the document. I do not know that the second proviso to section 92 would not apply in this case. The parties would not be prevented from proving the existence of a separate oral agreement to the effect that the vendee would proceed no further in the prosecution of his claim for certain money debts not specified in the deed; and I do not consider that the judgment-debtor can be prevented from attempting to prove that there was such an agreement. Mr. Bose is apparently on stronger ground when he argues that the decree-holder must be held entitled to execute his decree unless it is proved that he has himself received payment or that some other person definitely held out by him as his agent for the satisfaction of the decree has received payment from the judgment-debtor. The courts below have come to the conclusion that Ramsarup was the real decree-holder and that Ramkhelawan was merely a benamidar. The judgment of the learned District Judge suggests that he bases his decision that Ramsarup was the real holder of the three decrees on the evidence of the arbitrators Ramcharitar Singh and Baleshwar Prasad. These men merely asserted that Ramsarup said that he was the decree-holder, a statement which would be inadmissible in evidence as proof of the fact that Ramsarup was the real owner. Awadhbehari said that Ramkhelawan was a farzidar; so he or his son Rambahadur took no step in the matter of the arbitration. Mr. Bose argues that even if

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JAMES, J.

Ramkhelawan were a benamidar, it would be necessary before he could be prevented from executing his decree to show that he had either assigned the decree to somebody else or that he had been satisfied by some body whom he held out as his agent. Mr. Mitter on behalf of Awadhbehari relies on the decision in *Nil Kanta Ghosal* v. *Ram Charan Roy*(1) for his contention that the question of whether the person seeking execution is the true owner of the decree or not could be decided in execution proceedings under section 47 of the Code of Civil Procedure. This is contrary to the view which was taken in *Jasoda Deye* v. *Kirtibash Das*(2) and in earlier cases in the Calcutta High Court, wherein it was held that the person appearing on the face of the decree as the decree-holder is entitled to execution, unless some other person can show that he has taken the decree-holder's place by an assignment of the decree or by operation of law, that is, by death or succession or in some similar manner. In *Palaniappa Chettiar* v. *Subramania Chettiar* (3) it was held that where a decree had been transferred by an instrument in writing, no person other than the transferee named in the document could claim the benefit on the ground that the transferee was a mere benamidar. It must be held that in execution proceedings it is not open to the judgment-debtor to assert that the real holder of the decree is any person other than the person named as decree-holder in the decree unless there has been a valid assignment or devolution by process of law; and that under Order XXI, rule 2, he can only claim entry of satisfaction of the decree where payment has been made either to the decree-holder or to some other person definitely held out by the decree-holder as his agent for the purpose of payment. The decree-holder in the present case said that he accepted the arbitration to this extent that he accepted the decision that the dues under the three decrees—under the

(1) (1928) 55 Cal. L. J. 82.
(2) (1891) I. L. R. 18 Cal. 630.
(3) (1924) I. L. R. 48 Mad. 553.

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decree held by his uncle and the two held by him—should be limited to Rs. 17,500; but he did not admit that the arbitration was made at his instance or that he took any part in the reference; and there is no evidence to that effect on the record of these proceedings. The decree-holder did not accept the award so far as it decided that the conveyance of this property valued at Rs. 12,000 should be treated as a payment to him of his share of Rs. 17,500 represented by the two decrees. He had entered satisfaction for his decree at Begusarai and the learned District Judge inferred from this that he had been a party to the proceedings in arbitration; but the decree-holder said that he had done this on Ramsarup's telling him that Awadhbehari would pay up his decree which he held in Monghyr. There is no evidence to show that he authorised Ramsarup to treat satisfaction of the mortgage decree as satisfaction of his own decree in Monghyr or that he held out Ramsarup to the decree-holder as his agent with general powers for adjustment of his dues under the two decrees. I consider that in the circumstances it must be held that there was no evidence on which the courts below could hold that Rambahadur's decree in Monghyr had been satisfied, and that the petition of Awadhbehari under Order XXI, rule 2, ought to have been dismissed.

I would accordingly allow this appeal with costs, set aside the orders of the courts below and dismiss the petition of Awadhbehari Prasad Singh under Order XXI, rule 2. The appellant is entitled to his costs throughout.

ROWLAND, J.—I agree. An adjustment to which the decree-holder is not a party cannot be recognised by the executing court. The contrary position seems inconsistent with the provisions of the Code. Section 2, clause (*3*), defines "decree-holder" as the person in whose favour a decree has been passed or order capable of execution has been

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ROWLAND, J.

made by a court and this must mean the person named in the decree. Then we have Order XXI, rule 1, directing that all money payable under a decree is to be paid either into the court or out of court to the decree-holder or otherwise as the court may direct. Then Order XXI, rule 2, refers to payment out of court or adjustment of the decree "to the satisfaction of the decree-holder" and does not recognise any payment or adjustment to the satisfaction of some third party. And rule 2, clause (*3*), lays down that a payment or adjustment which has not been certified or recorded as aforesaid shall not be recognised by any court executing the decree. The facts put in issue in this case were matters between the judgment-debtor and Ramsarup, a stranger to the suit, rather than between the judgment-debtor and the decree-holder named in the decree. The proper place for the disputes between the judgment-debtor and Ramsarup to be settled is not in the executing court but in separate and appropriate proceedings. I also agree with the reasoning of my learned brother and I concur in the order proposed to be passed.

S.A.K.

Appeal allowed.

APPELLATE CIVIL.

Before James and Rowland, JJ.

1939.

January, 30.

GORAKH SAHU

v.

SHEO NANDAN SINGH.*

Court-Fees Act, 1870 (*Act VII of* 1870), *Schedule II, article* 17(*1*)—*Code of Civil Procedure*, 1908 (*Act V of* 1908),

*Appeal from Appellate Decree no. 78 of 1936, from a decision of T. Luby, Esq., I.C.S., District Judge of Muzaffarpur, dated the 13th February, 1935, confirming a decision of Babu Kshetra Nath Singh, Subordinate Judge at Muzaffarpur, dated the 28th July, 1934.

1939.

GORAKH SAHU v. SHEO NANDAN SINGH.

Order XXI, rule 63, suit under—prayer for injunction—Article 17(1), whether still applicable—plaint rejected for non-payment of court-fee—appeal—court-fee payable on memorandum of appeal—appeal, value of.

The plaintiffs instituted a suit under Order XXI, rule 63, Code of Civil Procedure, 1908, and also made a prayer for an injunction. The plaint bore a stamp of Rs. 15 but the trial court called upon the plaintiffs to pay ad valorem court-fee. The plaintiffs having refused to pay, the plaint was rejected. The plaintiffs appealed from the order of rejection paying a court-fee of Re. 1. The District Judge demanded ad valorem court-fee which was not paid and the memorandum of appeal was rejected. The plaintiffs then appealed to the High Court.

Held, (*i*) that the memorandum of appeal against the order rejecting the plaint must be stamped ad valorem and the value of the appeal for that purpose should be taken to be the difference between the value of the stamp on the plaint and the value of the stamp demanded by the trial court.

Munshi Mahto v. *Lachman Lal*(1) and *Durga Prasad* v. *Raghubar Dial*(2), followed.

(*ii*) that the prayer for an injunction cannot be treated as taking the plaint out of the operation of article 17(*1*) of the second schedule of the Court-Fees Act, 1870.

Phul Kumari v. *Ghanshyam Misra*(3), relied on.

Appeal by the plaintiffs.

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

S. K. Mitter and *Sambhu Barmeshwar Prasad*, for the appellants.

A. K. Mitter, for the respondents.

Government Pleader, for the Crown.

JAMES AND ROWLAND, JJ.—This second appeal arises out of a suit which was instituted under Order

(1) (1929) 10 Pat. L. T. 545.
(2) (1882) 2 All. W. N. 244.
(3) (1907) I. L. R. 35 Cal. 202, P. C.

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XXI, rule 63, of the Code of Civil Procedure. The plaint bore a stamp of Rs. 15; but the Subordinate Judge called upon the plaintiffs to pay a court-fee ad valorem on the value of the property. The plaintiffs did not pay and the plaint was rejected. The plaintiffs appealed to the District Judge stamping their memorandum of appeal as for an appeal against an order; but the learned District Judge required them to stamp his memorandum with a court-fee stamp of the value of Rs. 15 granting them time for the purpose. Later on the same day the District Judge cancelled this order and required the plaintiff to pay court-fee ad valorem on the value of the property. The plaintiffs failed to pay and their memorandum of appeal was rejected. When the second appeal came before the High Court the Taxing Officer referred to the Taxing Judge the question of what court-fee should be demanded from the appellants. It was held by the Taxing Judge that court-fee should be paid ad valorem on the difference between the value of the stamp on the plaint and the amount of court-fee demanded by the Subordinate Judge.

Mr. S. K. Mitter on behalf of the appellants points out that after the decision of the Judicial Committee in *Phul Kumari* v. *Ghanshyam Misra*(1), it cannot be argued that a plaint under Order XXI, rule 63, requires a higher court-fee stamp than Rs. 15. In the case before the Judicial Committee the plaintiff had prayed for an injunction which had been granted and he paid court-fee separately for the declaration and for the injunction; but the Pricy Council pointed out that a single court-fee was sufficient under Article 17(*1*) of the second schedule of the Court-Fees Act. In the present case the Subordinate Judge demanded ad valorem court-fee because the plaintiffs prayed for an injunction; but the prayer

(1) (1907) I. L. R. 35 Cal. 202, P. C.

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for an injunction cannot after the decision in *Phul Kumari's* case(1) be treated as taking the plaint out of the operation of Article 17(*1*).

On the question of what was the proper stamp for the memorandum of appeal, the learned Government Pleader argues that this should be the same as the stamp on the plaint; and the learned Advocate for the respondents suggests that this should be ad valorem on the value of the property. The memorandum bore a stamp of one rupee; but the appellants' pleader in the court of the District Judge accepted the view that stamp of Rs. 15 was payable. In *Munshi Mahto* v. *Lachman Lal*(2) it was held that a memorandum of appeal of this kind must be stamped ad valorem and it appears to have been assumed that this necessarily meant ad valorem on the value of the suit. That decision would be applicable to this case if any attempt had been made to defend the treating of the appeal to the District Judge as an appeal from an order; but the question remains of what we should take to be the value of the appeal in the District Judge's court for the purposes of assessment of court-fee. In the High Court the value for that purpose has been taken to be the difference between the value of the stamp on the plaint and the value of the stamp demanded by the Subordinate Judge. That appears to us to be a reasonable method of assessing valuation of court-fee in cases where the only point raised is the question of whether the plaint or the memorandum of appeal was sufficiently stamped. This was the view taken by Straight and Oldfield, JJ. in *Durga Prasad* v. *Raghubar Dial*(3). The appellants must make good the deficit of Rs. 36/8 on the memorandum of appeal in the District Judge's Court within fourteen days. If he does this within time this appeal will be allowed with costs payable by the defendant-respondents for this Court and the Court below.

(1) (1907) I. L. R. 35 Cal. 202, P. C.
(2) (1929) 10 Pat. L. T. 545.
(3) (1882) 2 All. W. N. 244.

If they fail to make good the deficit within the time allowed, the memorandum of appeal to the District Judge will stand rejected, and the appeal to this Court will stand dismissed.

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JAMES AND ROWLAND, JJ.

S. A. K.

Order accordingly.

FULL BENCH.

Before Harries, C.J., Wort, James, Agarwala and Manohar Lall, JJ.

1939.

February, 6. March, 29.

BRIJ BEHARI LAL

v.

FIRM SRINIVAS RAM KUMAR.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 90(*1*), *proviso* (*i*)(*b*)—*deposit of security, whether must be made within thirty days of the sale—proviso, meaning of—amendment of rule* 90, *whether is ultra vires the rule-making powers of the High Court.*

All that the substituted proviso (*i*)(*b*) to sub-rule (*1*) of Order XXI, rule 90, of the Code of Civil Procedure, 1908, requires is that before the *admission* of an application to set aside the sale the necessary sum of money or security, unless dispensed with, must be deposited. The applicant can then be said to have deposited "with his application" such deposit or security within the meaning of the proviso.

The Limitation Act only requires that the application be made within thirty days of the sale, and there is nothing in the substituted proviso to suggest that the money or other security must be deposited within limitation.

Where, therefore, no deposit accompanies an application to set aside a sale, the Court has no power to reject such application forthwith. On the other hand, it must give the applicant an opportunity to urge that the deposit should be

*Civil Revision no. 649 of 1937, from an order of N. C. Chandra, Esq., Additional District Judge of Shahabad, dated the 17th September, 1937, affirming an order of Maulavi Ali Hasan, Second Munsif, Sasaram, dated he 25th May, 1937.

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BRIJ BEHARI LAL v. FIRM SRINIVAS RAM KUMAR.

dispensed with or to deposit the full or lesser amount or other security before some date fixed for admission. If the orders of the Court are complied with, the application must be admitted and heard on the merits provided that it complies also with proviso (*i*)(*a*).

Query: Whether the amendment made by the Patna High Court to Order XXI, rule 90, of the Code of Civil Procedure, 1908, is ultra vires the rule-making powers of the High Court?

O. N. R. M. M. Chettyar Firm v. *The Central Bank of India, Ltd.*(1), referred to.

Application in revision by the judgment-debtor.

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

The case was first heard by Wort, J. who referred it to a Division Bench by the following order.

WORT, J.—The only point of substance in this application is that the amended Order XXI, rule 90, making it a condition precedent to deposit 12½ per cent. of the sum realized by the sale is ultra vires of the rule-making authority of the High Court. As there is no appeal from my decision, and as this is a matter of some importance and as the learned Judges of the Rangoon High Court in a similar case have held that such a rule is ultra vires, I propose to refer the case to a Division Bench for decision.

The case then came on for hearing before James and Agarwala, JJ. who ordered as follows:

"We consider that it is desirable that this case should be heard by a larger Bench. Let the case be placed before the Chief Justice for orders."

The application was then put up for hearing before James, Agarwala and Varma, JJ. who referred it to a larger Bench.

On this reference

Mahabir Prasad (with him *T. K. Prasad*), for the petitioner: The Court had no jurisdiction to dismiss the application under Order XXI, rule 90, Code of Civil Procedure, on the ground that the

(1) I. L. R. [1937] Rang. 268, F. B.

security was not furnished within the period of limitation. The application itself was filed within time and there is no provision in the Code which enjoins the petitioner to deposit the requisite sum or furnish security within limitation.

Secondly, the Court in passing the chalan after ninety days in effect extended the time and exempted the petitioner from furnishing security along with the application.

[MANOHAR LALL, J.—Can the Court do it in the absence of the opposite party?]

I submit it can.

[MANOHAR LALL, J.—Under what provision has the Court jurisdiction to do it?]

Under section 148 of the Code of Civil Procedure.

[CHIEF JUSTICE—Section 148 applies to a case where any period of time is prescribed by the Code and not where it is fixed by the Limitation Act.]

My next submission is that the amendment made by the High Court to rule 90 of Order XXI is ultra vires. (Refers to section 122 of the Code which gives powers to the rule-making Committee in this behalf.)

The alteration and addition must relate to the regulation of procedure of the High Court and the Subordinate Courts: it cannot go beyond this so as to take away a common law right of a litigant.

[CHIEF JUSTICE—Why cannot the Court, in order to regulate the procedure, amend the rule which only lays down a procedure for setting aside an execution sale?]

But an amendment which imposes a restriction on the rights of a party goes beyond the matter of procedure.

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BRIJ BEHARI LAL v. FIRM SRINIVAS RAM KUMAR.

[CHIEF JUSTICE—But every rule of procedure places some sort of obstacle. We have powers to put restrictions on a rule of procedure.]

The amendment takes away the right given by rule 90 in a limited sense. The Court cannot say that it will not *admit* the application unless security is furnished as a condition precedent. It may, in the exercise of jurisdiction, impose certain terms but it cannot refuse to entertain the application.

I rely on the Full Bench decision in *O. N. R. M. M. Chettyar Firm* v. *The Central Bank of India, Ltd.*(1). As the amended rule purports to shut out the applicant, it goes beyond the matter of procedure.

[CHIEF JUSTICE—There are plenty of rules of procedure which prevent an application from being admitted or heard unless they are first complied with. The party may be deprived of its right without being heard in such cases.]

The objectionable words in the amended rule are "no application.....shall be admitted". They completely shut out the petitioner.

[JAMES, J.—For all practical purposes the application is admitted and the petitioner is heard on the question of security.]

But this was not done in the present case.

[MANOHAR LALL, J.—There are several rules in the various Orders which are not merely rules of procedure, but substantive rights are vested by these rules.]

Yes, and they cannot be altered; only rules of procedure can be amended.

[MANOHAR LALL, J.—A rule requiring a party to file an affidavit along with an application is a rule of procedure.]

Yes.

(1) I. L. R. [1937] Rang. 268, F. B.

[CHIEF JUSTICE—Therefore if certain rules direct that you have to do something or you have to make the application in a certain manner or with certain formalities or along with certain sum, they must all be rules of procedure.]

But the amendment must not completely take away a litigant's right.

Sir Sultan Ahmed (with him *B. N. Rai*), for the opposite party. If rule 90 is a rule governing procedure, the High Court has powers to amend it. There was no right in rule 90 which has been taken away by the amendment. If the applicant had a right to be heard, he has still such a right. Your Lordships can annul the rule altogether.

[MANOHAR LALL, J.—How can that be done? The rule gives a statutory right to apply to have the sale set aside.]

But if it is only a rule of procedure, it can be done.

[CHIEF JUSTICE—Speaking for myself, I think it is a rule of procedure.]

The fact that the amended rule deprives somebody of his rights does not make it any the less a rule of procedure.

[CHIEF JUSTICE—And it makes no difference if the obstacle is placed before or after the admission.]

Yes. The rule in the Rangoon High Court required a deposit of the whole amount leaving no discretion in the Court. Therefore the Full Bench decision has no application here.

The rule, properly interpreted, implies that the application for setting aside a sale must be filed either along with the security or with an application for dispensing with the security.

[CHIEF JUSTICE—The words "shall not be admitted" only mean that the Court will not proceed

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to hear the application unless the security is furnished. The Limitation Act does not contemplate "admission" of an application.]

[MANOHAR LALL, J.—Proviso (*i*)(*a*) regarding the applicant's disability to impugn the sale upon a ground which he could have taken before the sale, will clarify the situation. This cannot be determined unless the Court hears the matter before admission.]

But I submit that it was necessary for the applicant to make an application for dispensing with, or fixing the amount of, the security within the period of limitation.

If this be not the correct interpretation then the other question does not arise.

Mahabir Prasad, in reply.

S. A. K.

Cur. adv. vult.

HARRIES, C.J.—This is a petition for revision of an order of the learned District Judge of Shahabad affirming an order of the learned Munsif of Sasaram dismissing the petitioner's application to set aside a certain auction sale which was held on the 4th of August, 1936.

The petition came in the first place before Wort, J. who referred it to a larger Bench. James and Agarwala, JJ., being of opinion that the points involved were of considerable importance, referred the matter for the constitution of a larger Bench. Accordingly the petition was heard by this Full Bench of five Judges.

The application to set aside the sale, which is dated the 2nd of September, 1936, was made by Brij Behari Lal who was a person entitled to share in a rateable distribution of the sale proceeds and was an application under Order XXI, rule 90, of the Code of Civil Procedure. The application was registered in

the court of the learned Munsif as a miscellaneous case, and notices were served on the opposite party. On the 14th of October, 1936, the petitioner Brij Behari Lal deposited in court a sum amounting to 12½ per cent. of the sale proceeds, and on the 25th of May, 1937, the application came on for hearing before the learned Munsif. The opposite parties took a preliminary objection that as no sum was deposited with the application to set aside the sale as required by the rule within thirty days from the date of the sale the application was barred by time. The learned Munsif upheld this preliminary objection and on appeal the learned District Judge affirmed the decision of the Court below and dismissed the application.

It has been contended before this Court that in dismissing the application the Courts below were clearly wrong and that this is a case in which revision lies.

As I have stated, the application to set aside the sale was one under Order XXI, rule 90, of the Code of Civil Procedure. This rule has been amended by this Court, and the amended rule, under which the application was made, is in these terms :—

" (1) Where any immoveable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:

(*i*) Provided that no application to set aside a sale shall be admitted unless—

(*a*) it discloses a ground which could not have been put forward by the applicant before the sale was concluded, and

(*b*) the applicant deposits with his application such amount not exceeding 12½ per cent. of the sum realised by the sale or such other security as the Court may in its discretion fix, unless the Court, for reasons to be recorded, dispenses with the deposit.

(*ii*) Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

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(2) In case the application is unsuccessful the costs of the opposite party shall be a first charge upon the deposit referred to in proviso (*i*) (*b*), if any."

The present provisos have been substituted by this Court for the original proviso to the rule.

It will be seen that by reason of proviso (*i*)(*b*) no application to set aside a sale is to be admitted unless the applicant deposits with his application, such an amount not exceeding 12½ per cent. of the proceeds of the sale or such other security as the Court in its discretion may fix unless the Court dispenses with the deposit altogether. In the present case the petitioner deposited neither a sum of money nor gave any security nor did he on or before making the application apply to the Court to dispense with the deposit. On the 10th of October, 1936, however, the petitioner applied to the Court to accept a deposit of 12½ per cent. of the sum realised by the sale, and upon this application the Court made an order to issue a chalan. On the 14th of October, 1936, the sum was actually deposited in Court.

An application to set aside a sale must be made within thirty days from the date of the sale: *see* Limitation Act, 1908, schedule I, article 166. The sale took place on the 4th of August, 1936, and as the application to set aside the sale was made on the 2nd of September, 1936, it was within thirty days of the sale. The deposit, however, was not made until the 14th of October, 1936, which was long after the expiry of the period of thirty days from the date of sale.

It was urged by the opposite parties in the Courts below that where the deposit had not been dispensed with by the Court an application accompanied by no deposit was no application at all within amended Order XXI, rule 90, and that the defect in the application could not be cured by a deposit made on the 14th of October, 1936, because an application on that date was clearly barred by limitation. As I have stated, the Courts below accepted this contention and dismissed the application.

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Counsel for the petitioner has contended before us that the application to set aside the sale in this case was within time and should have been decided on the merits. Alternatively he has contended that the amendment made by this Court to Order XXI, rule 90, of the Code of Civil Procedure requiring a deposit is ultra vires the rule-making power of the Court, and therefore, void. If proviso (*i*)(*b*) which is part of the amendment made by this Court is void, then clearly the application was within time as the rule as it originally stood required no deposit to be made with the application.

In the first place, I shall deal with the contention that the present application complied with the provisions of amended Order XXI, rule 90, of the Code of Civil Procedure, and was within limitation. At the outset it must be observed that the substituted proviso (*i*) to sub-rule (*1*) of Order XXI, rule 90, of the Code of Civil Procedure, places conditions not upon the presentation of an application to set aside a sale but upon its admission. The words of the substituted proviso are—

"Provided that no application to set aside a sale shall be *admitted* unless....."

Admission of the application presumably means the stage when the Court decides to issue notice upon such application to the opposite parties concerned. By the terms of the substituted proviso such application cannot be admitted unless the provisions of sub-clauses (*a*) and (*b*) of proviso (*i*) are complied with. In my view this substituted proviso contemplates that after an application to set aside a sale has been presented an inquiry must be made by the Court, because the proviso directs that (*a*) no such application shall be admitted unless it discloses a ground which could not have been put forward by the applicant before the sale and (*b*) the application must be accompanied with a deposit of 12½ per cent. or such less sum or other security as the Court may

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direct, unless, for reasons to be recorded, the Court has dispensed with security. It appears to me that an application cannot, therefore, be admitted until some inquiry, no matter how perfunctory, has been made by the Court. If a deposit of 12½ per cent. has been made at the time of presentation of the application, the Court must admit the application provided proviso (*i*)(*a*) has been complied with. If, on the other hand, the application has not been accompanied by any deposit, must the Court refuse forthwith to admit it and accordingly reject it, or should the Court direct, unless it dispenses with the security altogether, a deposit to be made or security to be given before a date fixed for admission? In my view the Court must follow this latter course.

Substituted proviso (*i*) (*b*) requires that no application shall be admitted unless the applicant *deposits with his application* such amount not exceeding 12½ per cent. of the proceeds of the sale or such other security as the Court may fix unless the Court dispenses altogether with any such deposit. Do the words unless

"the applicant deposits with his application such amount....."

mean that the applicant must deposit the amount at the time he makes his application or do they mean that at some stage or another, unless the Court dispenses with the deposit, a sum must be deposited with the application which has already been made?

The learned District Judge appears to have thought that proviso (*i*) (*b*) is very similar to the provisions of the proviso to the amended section 17(*1*) of the Provincial Small Cause Courts Act. That proviso is in these terms:—

"Provided that an applicant for an order to set aside a decree passed ex parte, or for a review of judgment, shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give such security for the performance of the decree or compliance with the judgment as the Court may, on a previous application made by him in this behalf, have directed."

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By the terms of this proviso it is clear that the deposit must be made at the time the application is presented, because it is expressly stated that such must be the case. Further, it is expressly provided that if the applicant wishes to give security instead of depositing money a previous application must be made to the Court in this behalf and the applicant must deposit such security as the Court directs when presenting his application. It is to be observed that no such express words appear in the substituted proviso (*i*) (*b*) to Order XXI, rule 90, of the Code of Civil Procedure. It has been contended that the wording of this substituted proviso (*i*) (*b*) contemplates a deposit of 12½ per cent. of the sale proceeds with the application unless the Court has directed on a previous application that a deposit be dispensed with or that a smaller deposit or some other security be given. The terms of the substituted proviso, however, do not make it clear that an application to dispense with the deposit or for leave to deposit less than 12½ per cent. of the sale proceeds or to give some other security must be made before the application to set aside the sale is made. It must be inferred, if such contention be sound, that the words

"unless the applicant deposits with his application such amount, etc."

mean unless the applicant deposits at the time he makes his application 12½ per cent. of the sale proceeds or such other sum or such other security as the Court has previously directed. I am not prepared to place such a construction upon these words. In my view the applicant can be said to deposit with his application a sum of money or other security even if he does it after he has presented the application. In my judgment if a sum of money or other security is deposited with a view to ensuring the admission of an application, such can be said to be deposited with the application provided such deposit is made before the date of admission.

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The learned Munsif appears to have thought that the deposit need not be made at the time the application is presented. In his view if no deposit is made at the time of presentation of the application to set aside the sale, then a further application to dispense with the deposit or for leave to deposit a smaller sum or other security should accompany the application to set aside the sale. Further, he was clearly of opinion that an application to set aside a sale unaccompanied by a deposit was a defective application and that such defect could not be cured unless a deposit was made within thirty days of the sale. In his view admission of the application was bound to take place within the period of limitation.

In my judgment there is no justification for this view as there is nothing in the rule to suggest that admission must take place within the period of limitation. Further, the wording of the substituted proviso in no way suggests that in the event of no deposit being made at the time the application is presented, the application should be accompanied by a further one to dispense with the deposit or for leave to deposit a lesser sum or other security.

The view of the learned Munsif that admission must take place within the period of limitation is further open to a very grave objection. The point of time when the application is admitted depends upon the Court, and if admission must be within limitation an applicant might find his application dismissed by reason of the failure of the Court to deal with it within thirty days of the sale. Such can never have been the intention of the framers of this rule.

The learned District Judge appears to have thought that the substituted proviso contemplated a deposit of 12½ per cent. in every case at the time when the application to set aside the sale was presented. In his view if the applicant desired that the deposit should be dispensed with or that he should be permitted to deposit a lesser sum or other security an

application should be made to the Court to that effect. In other words, the learned District Judge appears to have thought that 12½ per cent. of the proceeds must first be deposited and then an application made for leave to dispense entirely with the deposit or to reduce the amount of such deposit or to substitute some other security for it. In my judgment this view also cannot be sustained. Obviously the framers of the substituted proviso contemplated that nothing need be deposited in cases in which the Court thought that no deposit was necessary and that a lessor sum or other security could be deposited when the circumstances warranted the Court taking that view. Clearly the framers of the rule never contemplated that in every case a deposit of 12½ per cent. should first be made and then steps should be taken to have such deposit dispensed with or reduced.

Unless the view which I have expressed of the meaning of the words "deposits with his application" is accepted, extraordinary results might ensue. If the substituted proviso means that the applicant must in every case deposit at the time he makes his application 12½ per cent. of the proceeds or such other sum or security as the Court may direct, then if an application is made without any deposit and a deposit of 12½ per cent. is subsequently made within thirty days of the sale and before admission, such application would have to be rejected because the deposit was not made at the time the application was presented. In my view if a deposit of 12½ per cent. is made after the application is filed but within thirty days of the sale, such would clearly be a deposit made with the application. Why, therefore, should not a deposit made after thirty days of the sale but before admission be a deposit made with the application. In my judgment all that this substituted proviso requires is that before admission the necessary sum of money or security, unless dispensed with, must be deposited. The applicant can then be said to have deposited with his application such deposit or

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security within the meaning of the substituted proviso. The Limitation Act only requires that the application be made within thirty days of the sale, and in my view there is nothing in the substituted proviso to suggest that the money or other security must be deposited within limitation. The substituted proviso is complied if such is made before actual admission and the date of admission cannot be governed by the Limitation Act.

As I have stated earlier in this judgment, this application was registered as a miscellaneous case immediately upon presentation, and it has been argued that rightly or wrongly the application was admitted and that it was not open to the learned Munsif at a later stage to question his own order. There is some force in this contention; but it is unnecessary to decide the point because at a later stage the trial Court actually accepted a deposit of 12½ per cent. On the 10th of October, 1936, the present petitioner applied for leave to deposit a sum equal to 12½ per cent. of the sale proceeds and the Court issued a chalan and the money was actually deposited. Even if the original admission of this application could not be justified, the acceptance of this deposit and the subsequent proceedings clearly show that the application was properly admitted at the date of the deposit and the Court was bound thereafter to adjudicate upon it.

For the reason which I have given, I am satisfied that where no deposit accompanies an application to set aside the sale the Court has no power to reject such application forthwith. On the other hand, it must give the applicant an opportunity to urge that the deposit should be dispensed with or to deposit the full or lesser amount or other security before some date fixed for admission. If the orders of the Court are complied with, the application must be admitted and heard upon the merits provided that it complies also with the substituted proviso (*i*) (*a*). In the

present case the Courts below should have exercised the jurisdiction vested in them and heard this application upon its merits.

Having regard to the view which I have taken, it is unnecessary for me to consider the second contention of the petitioner, namely, that the amendment made by this Court to Order XXI, rule 90, of the Code of Civil Procedure, is ultra vires the rule-making powers of this Court as the question does not arise. Counsel for the petitioner relied upon a Full Bench case of the Rangoon High Court in *O. N. R. M. M. Chettyar* v. *The Central Bank of India*(1). For the reasons which I have given, I prefer to leave the consideration of this question open and to decide the matter in a case where the decision of such point is essential.

The result, therefore, is that I would allow this petition, set aside the orders of the Courts below and remand the case to the Court of the learned Munsif through the Court of the District Judge with a direction that the application should be heard and determined on the merits according to law.

WORT, J.—I agree.

JAMES, J.—I agree.

AGARWALA, J.—I agree.

MANOHAR LALL, J.—I agree.

S. A. K.

Rule made absolute.

(1) I. L. R. [1937] Rang. 268, F. B.

APPELLATE CIVIL.

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September, 27, 28. November, 16.

Before Khaja Mohamad Noor and Chatterji, JJ.

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Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 92—*Transfer of Property (Amendment) Act*, 1929 (*Act XX of* 1929)—*subrogation, suit to enforce claim of—cause of action, when arises—limitation—redemption of prior mortgage by more than one person—right of subrogation, whether can be claimed by all proportionately.*

Although a subrogee acquires the rights and powers of the incumbrancer whom he has paid off, yet it does not follow that the remedies for enforcing those rights are the same as those that were available to the prior incumbrancer.

Gopi Narain Khanna v. *Bansidhar*(1), followed.

Where, under a new contract of mortgage, a person advances money to the mortgagor for the express purpose of paying off a prior mortgage decree, he acquires a right of subrogation under a contract and the cause of action for a suit to enforce this right of subrogation arises (even under the old law as it stood before the Amending Act XX of 1929) from the date when the mortgage decree is paid off. Limitation does not run from the accrual of the cause of action on the original mortgage.

Alam Ali v. *Beni Charan*(2), followed.

Mamillapalli Kotappa v. Pamidipati Raghavayya(3), dissented from.

Mahomed Ibrahim Hossain Khan v. *Ambika Pershad Singh*(4) and *Sibanand Misra* v. *Jagmohan Lall*(5), distinguished.

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* Appeal from Original Decree no. 56 of 1936, from a decision of Rai Bahadur Bhubaneshwar Prashad Pando, Subordinate Judge of Shahabad, dated the 16th August, 1935.

(1) (1905) I. L. R. 27 All. 325, P. C.
(2) (1935) I. L. R. 58 All. 602, F. B.
(3) (1926) I. L. R. 50 Mad. 626.
(4) (1912) I. L. R. 39 Cal. 527, P. C.
(5) (1922) I. L. R. 1 Pat. 780.

In order to give rise to a right of subrogation it is not necessary that the redemption must be effected entirely by the particular person who claims subrogation: all that is necessary is that the mortgage dues must have been fully satisfied.

Where, therefore, more than one person advance money with which a prior mortgage is redeemed in full, they are entitled to claim subrogation in proportion to the amounts they have respectively paid.

Hira Singh v. *Jai Singh*(1), followed.

Appeal by the plaintiff.

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

Khursaid Husnain (with him *D. N. Varma* and *Kanhaiyaji*), for the appellant.

Mahabir Prashad (with him *M. N. Pal*, *Harians Kumar*, *Brahmadeva Narayan*, *A. B. N. Sinha* and *Harinandan Singh*), for the respondents.

CHATTERJI, J.—This is an appeal by the plaintiff who brought a suit to enforce a simple mortgage, dated the 12th February, 1930, executed by defendants nos. 1 to 5 and 10 for Rs. 5,000 carrying compound interest at 1 per cent. per mensem with yearly rests. The defendants nos. 1 to 10 constitute a joint Mitakshara family of which defendant no. 1 is the karta. The properties covered by the mortgage bond in suit are (*1*) sixteen annas share of mauza Sahiara, Tauzi no. 4690; (*2*) five annas four pies share out of sixteen annas of mauza Sahiara, Tauzi no. 9522 and (*3*) sixteen annas share of mauza Moap Khurd, Tauzi no. 11828. These three together with some other properties had been hypothecated under two earlier simple mortgage bonds, dated the 25th May, 1913, and 18th August, 1914, in favour of one Sakhi Chand. He sued on those two mortgage bonds and obtained a preliminary decree for

(1) I. L. R. [1937] All. 880, F. B.

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Rs. 9,000 on the 16th February, 1928, which was made final on the 27th September, 1928. The decree was put to execution and the mortgaged properties were sold. It was to set aside that sale that the loan on the mortgage bond in suit was taken. The mortgagors raised further sums by loan and it is not disputed that those sums with the Rs. 5,000 borrowed under the bond in suit were deposited in the execution case of Sakhi Chand with the result that his mortgage decree was satisfied and the execution sale was set aside. In the mortgage suit of Sakhi Chand the present defendant no. 13 who held a subsequent mortgage, dated the 1st June, 1916, was impleaded as a defendant and he was a party to the mortgage decree and the execution case that followed. His mortgage, dated the 1st June, 1916, comprised two out of the three properties mortgaged under the bond in suit, namely, (*1*) sixteen annas share in mauza Sahiara, Tauzi no. 4690, and (*2*) sixteen annas share in mauza Moap Khurd, Tauzi no. 11828.

The defendant no. 13 brought a suit (no. 6/125 of 1930) in the First Court of Munsif at Arrah to enforce his mortgage, impleading, besides the mortgagors, the present plaintiff as a subsequent transferee. In that suit the plaintiff did not appear and an ex parte preliminary decree was passed on the 27th February, 1933. The plaintiff made an application under Order IX, rule 13, for setting aside the ex parte decree but it was dismissed and the order of dismissal was upheld on appeal. The final decree was passed on the 7th of April, 1934.

The present suit was filed on the 6th September, 1934. The plaintiff has asked for a mortgage decree, claiming a right of subrogation as against the defendant no. 13 in respect of the prior mortgagee Sakhi Chand's decree of 1928. The plaintiff has further asked for a declaration that the mortgage decree obtained by the defendant no. 13 in his suit no. 6/125 of 1930 in the Court of First Munsif at Arrah is ultra vires and inoperative.

The defendants nos. 11, 12, 14 and 16 have been impleaded as subsequent transferees. The defendant no. 15 has been impleaded as he is a benamidar for the mortgagors in respect of some of the mortgaged properties.

The defendants nos. 2 to 5 and 10 filed written statements but they did not contest the suit at the final hearing. One of the objections raised by them is that the rate of interest is hard and unconscionable. The suit was contested by defendant no. 13 only on the grounds, inter alia, that his decree in suit no. 6/125 of 1930 operates as res judicata, that the plaintiff's claim for subrogation is not tenable and is also barred by limitation.

The learned Subordinate Judge has accepted the plea of res judicata and dismissed the suit as against defendant no. 13. He has, however, overruled the other defences raised by that defendant. He has passed a mortgage decree against all the remaining defendants. He has ordered that out of the three properties in suit only one, namely, five annas four pies share out of sixteen annas of mauza Sahiara, Tauzi no. 9522, shall be sold free from incumbrance while the remaining two properties shall be sold subject to the prior incumbrance of defendant no. 13 under his mortgage decree in suit no. 6/125 of 1930. The plaintiff has preferred this appeal.

The only point raised on behalf of the appellant is that the claim for subrogation is not barred by res judicata. It is pointed out that the decree of the defendant no. 13 in suit no. 6/125 of 1930 was passed by the Court of Munsif at Arrah whereas the present suit which is valued at Rs. 8,625 was filed in the Subordinate Judge's Court at Arrah. Obviously the Munsif's Court which passed the decree in favour of defendant no. 13 in suit no. 6/125 of 1930 was not competent to try the present suit. For the bar of res judicata under section 11 of the Civil Procedure Code to apply one of the essential conditions is that

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the Court which decided the former suit must be competent to try the subsequent suit. Consequently the present suit cannot be barred by res judicata by reason of the decision in the previous suit no. 6/125 of 1930 of the Munsif's Court at Arrah. The learned Subordinate Judge has altogether overlooked this aspect of the case and his decision on the question of res judicata must be set aside. It has been contended on behalf of the respondent that the question of competency of the former Court to try the subsequent suit must be decided with reference to the point of time when the decree in the former suit was passed. Even then the plaintiff's claim for subrogation would exceed Rs. 5,000 at the time when the decree in the suit of defendant no. 13 was passed. This contention, therefore, is of no avail to the respondent.

Mr. Mahabir Prashad, the learned Counsel appearing for the respondent, has attempted to support the decree of the learned Subordinate Judge on the ground that the plaintiff's claim for subrogation is barred by limitation. His contention is that by subrogation the plaintiff merely acquired the rights under the prior mortgages, dated the 25th May, 1913, and 18th August, 1914, and the suit to enforce the claim for subrogation should have been brought within 12 years from the accrual of the causes of action on those two mortgages and the present suit, having been brought on the 6th of September, 1934, is barred by limitation. In the first place, there are no materials on the record to show when the causes of action on the two prior mortgages in question arose. In the second place, the argument proceeds on a misconception of the rights and powers acquired by subrogation. Subrogation, of course, means substitution, for the person redeeming is substituted for the incumbrancer whom he has paid off. The incumbrance that is paid off is treated as assigned to the subrogee who is regarded as an assignee in equity. The supposed assignment,

however, does not necessarily carry with it all the consequences that would flow from a legal assignment.

In the Transfer of Property Act, as it stood before the amending Act XX of 1929, the term "subrogation" was nowhere used but the principle of subrogation was imperfectly expressed in sections 74 and 75 of the Act which have been repealed by the amending Act XX of 1929. The new section 92 which has been introduced by the amending Act XX of 1929 expressly deals with subrogation. However, even under the old law though section 74 was by its terms limited to any second, or other subsequent mortgagee paying off the next prior mortgagee, it was consistently held that the right of subrogation could be claimed by persons and under conditions other than those mentioned in section 74. In the cases of *Gokaldas Gopaldas* v. *Purnamal Premsukhdas*(1) and *Gobind Lal Roy* v. *Ramjanam Misser*(2) their Lordships of the Judicial Committee upheld the rights of subrogation even in favour of purchasers. In the case of *Gopi Narain Khauna* v. *Bansidhar*(3) decided by the Judicial Committee the right of subrogation was allowed in favour of a subsequent incumbrancer paying off a decree on a prior mortgage. Again in the case of *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh*(4) their Lordships of the Judicial Committee held that the subsequent mortgagee who advanced money with which a prior mortgage was paid off was entitled to subrogation against an intermediate mortgagee. The law as laid down by these and other judicial decisions has now been enacted and clearly expressed in the new section 92 of the Transfer of Property Act. In the present case the transactions in question took place before the new section 92 came into force. There is some

(1) (1884) I. L. R. 10 Cal. 1035, P. C.
(2) (1893) I. L. R. 21 Cal. 70, P. C.
(3) (1905) I. L. R. 27 All. 325, P. C.
(4) (1912) I. L. R. 39 Cal. 527, P. C.

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controversy as to whether section 92 is retrospective in its operation. But without going into that controversy I shall deal with the case as if it is governed by the law as it stood before the new section 92 came into force. It is not disputed that even under the old law a person in the position of the present plaintiff would acquire a right of subrogation.

Now the question is, how is this right to be enforced? The subrogee, no doubt, acquires the rights and powers of the incumbrancer whom he has paid off. He cannot acquire any higher rights. But it does not follow that the remedies for enforcing those rights are the same as those that were available to the prior incumbrancer. The decision of the Judicial Committee in *Gopi Narain Khauna* v. *Bansidhar*(1), which I have already referred to, furnishes a clear example. In that case a prior mortgage decree was paid off by the subsequent mortgagee who was a party to the decree and by virtue of his right of subrogation thereby acquired he wanted to be substituted in the place of the decree-holder and to continue the proceeding but he was not permitted to do so on the ground that the decree was satisfied and the proceeding came to an end. He then brought a suit to enforce his right of subrogation which was decreed and the decree was upheld by their Lordships. The decision is completely destructive of the idea that the position of a subrogee is exactly that of an assignee of the prior incumbrance. Of course there the question of limitation did not arise but the effect of the decision is that though the rights acquired by subrogation may be the same as those of the original creditor the remedies for enforcing such rights may be different. In other words, the remedies of a subrogee are not co-extensive with those of the original creditor. The remedies for enforcing the right of subrogation will depend on the equities of each particular case. In

(1) (1905) I. L. R. 27 All. 325, P. C.

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the present case, as in the case of *Gopi Narain Khauna* v. *Bansidhar*(1) the remedy to enforce the right of subrogation would be by way of suit and not by execution after substitution in the place of the original decree-holder. That being so, the question is, when would the cause of action for such suit arise? To hold that the cause of action would arise from the date when the right to sue on the original mortgage accrued would amount to a denial of the very right of subrogation that was unquestionably acquired upon payment of the mortgage decree, because a suit on the original mortgage might have already become barred when the decree was paid off or even when the decree was passed. The result would be that though the original creditor could execute his mortgage decree the subrogee would be in the position of bringing a suit on the original mortgage which had already become barred by lapse of time. Again, when a mortgage has ripened into a decree the mortgagee's rights are determined by the decree and he can no longer lay any claim on the basis of his original mortgage and consequently the subrogee who has paid off his decree cannot put forward any claim on the basis of the original mortgage; his claim must be limited by the decree. He can only claim to recover the amount of the decree he has paid off with such interest as was allowed by the decree. Thus the position would be quite inconsistent if we were to hold that the remedy of a subrogee who has paid off a mortgage decree is to bring a suit on the original mortgage. His cause of action for a suit to enforce the right of subrogation would arise from the date when the mortgage decree was paid off. To hold otherwise would be, in my opinion, opposed to justice, equity and good conscience. In the present case, the defendant no. 13 was a party to the mortgage decree of Sakhi Chand and was liable to pay the decree. The decree was, however, satisfied partly out of the money advanced by the plaintiff and

(1) (1905) I. L. R. 27 All. 325, P. C.

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partly out of funds raised by the mortgagor himself. So by the plaintiff's payment the defendant no. 13's property has been saved and it would be most inequitable to hold that the plaintiff by his payment acquired no rights at all. I am supported in this view by the Full Bench decision of the Allahabad High Court in *Alam Ali* v. *Beni Charan*(1).

Mr. Mahabir Prashad has referred to the cases of *Mahomed Ibrahim Hossain Khan* v. *Ambika Prashad Singh*(2), *Sibanand Misra* v. *Jagmohan Lall*(3) and *Mamillapalli Kotappa* v. *Pamidipati Raghavayya*(4). In the Privy Council case of *Mahomed Ibrahim Hossain Khan* v. *Ambika Prashad Singh*(2) the facts, briefly stated, were these: There were successive mortgages in respect of certain properties, the earliest being for Rs. 12,000 under a zerpeshgi deed, dated the 20th November, 1874, and the latest being for Rs. 12,000 under a simple mortgage bond, dated the 17th February, 1888. The money under the zerpeshgi deed was repayable at the end of Jeth 1294 Fasli (June, 1887—'September, 1887', in the judgment is a mistake). The zerpeshgi was redeemed on the 15th July, 1888, with the money borrowed under the last mortgage of the 17th February, 1888. The assignee of the last mortgage brought a suit to enforce it on the 22nd September, 1900, claiming priority in respect of the zerpeshgi against certain intermediate mortgagees who were impleaded in the suit. The intermediate mortgagees themselves had already sued on their respective mortgages and obtained decrees in execution of which the respective mortgaged properties were sold. To all these decrees except one the last mortgagee was a party. Their Lordships held that in the suit on the last mortgage the claim for priority in respect of the zerpeshgi was barred by constructive res judicata as against those

(1) (1935) I. L. R. 58 All. 602, F. B.
(2) (1912) I. L. R. 39 Cal. 527, P. C.
(3) (1922) I. L. R. 1 Pat. 780.
(4) (1926) I. L. R. 50 Mad. 626.

intermediate mortgagees in whose suits the last mortgagee was made a party. As against the remaining intermediate mortgagee who in his suit failed to implead the last mortgagee the latter's claim for priority, though otherwise tenable, was held to be barred by limitation. Their Lordships observed as follows "But as the Rs. 12,000 were under the zerpeshgi deed of the 20th of November, 1874, repayable in Jeth, 1294 Fasli (September, 1887), and this suit was not brought until the 22nd of September, 1900, the claim of the plaintiffs to priority is barred by article 132 of the second schedule of the Indian Limitation Act, 1877". In the first place, it is to be noticed that the suit was brought after 12 years not only from the date when the money on the zerpeshgi deed was repayable but also from the date when it was repaid with the money borrowed on the last mortgage, the latter date being the 15th July, 1888. It was on this latter date that the right of subrogation accrued. The question whether limitation would run from the date when the money on the zerpeshgi deed was repayable or from the date when the right of subrogation accrued upon payment of that money was not raised or decided as it was immaterial, the claim being barred in either case. In the second place, the mortgage under the zerpeshgi deed had not ripened into a decree. In cases where subrogation is claimed by reason of payment of a prior mortgage decree to which the intermediate incumbrancers were parties different considerations may arise. On these grounds the said decision of the Privy Council is really of no assistance to the respondents.

In the case of *Sibanand Misra* v. *Jagmohan Lall*(1) the facts were these: A subsequent mortgagee obtained a decree on his mortgage in execution of which he purchased the mortgaged properties. The judgment-debtors made an application under Order XXI, rule 90, of the Civil Procedure Code to set aside that sale. Pending that application the decree-holder paid off a

(1) (1922) I. L. R. 1 Pat. 780.

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decree on a prior mortgage which had in the meantime been put to execution. The proceeding under Order XXI, rule 90, ended in a compromise by which the sale was set aside on the judgment-debtors paying the decretal amount. The subsequent mortgagee then brought a suit against the mortgagors to enforce the earlier mortgage by right of subrogation or, in the alternative, for a personal decree against them. The claim to enforce the earlier mortgage was dismissed as barred by limitation as the suit was brought more than 12 years after the accrual of the cause of action on that mortgage. The suit was, however, decreed, being treated as a simple action for reimbursement. Das, J., who delivered the judgment (Coutts, J. concurring), relied on the decision of the Privy Council in *Mahomed Ibrahim Hossain Khan* v. *Ambika Prashad Singh*(1). While dealing with the facts of that Privy Council case the learned Judge fell into an obvious error in supposing that the suit was well within time if the right to enforce the earlier security under the zerpeshgi deed could be considered to have arisen on the date on which the zerpeshgi was redeemed. In fact the suit was beyond 12 years even from that date, the date of institution of the suit being the 22nd September, 1900, and the date of redemption being the 15th July, 1888 (not 17th February, 1888, as stated by Das, J.). There is also some distinction between the case where (as in the Patna case) a person interested in a mortgaged property, either as subsequent mortgagee or otherwise, pays off a prior mortgage out of his own pocket in order to protect his own interest and the case where (as in the present case) under a new contract of mortgage a person who thereby becomes a mortgagee advances money to the mortgagor for the express purpose of paying off a prior mortgage. In the former class of cases subrogation arises by operation of law whereas in the latter class it arises under a contract. When there is a contract there is no reason

(1) (1912) I. L. R. 39 Cal. 527, P. C.

why it should not be deemed to give rise to a new cause of action.

The case of *Mamillapalli Kotappa* v. *Pamidepati Raghavayya*(1) appears to have been decided on the assumption that inference deducible from the Privy Council decision in *Gopi Narain Khauna* v. *Bansidhar*(2) is that limitation would run from the accrual of the cause of action on the original mortgage. With all respect I am unable to agree with this view or with the view also expressed therein as to the applicability of the Privy Council decision in *Mahomed Ibrahim Hossain Khan* v. *Ambika Prashad Singh*(3).

In my opinion the cause of action for the present suit, so far as the claim for subrogation is concerned, arose on the 13th of February, 1930, when the prior mortgage decree was paid off and therefore no question of limitation can arise.

Another question was raised as to whether the plaintiff who paid only a part of the mortgage decree could claim the right of subrogation. The law on the subject is that a right of subrogation cannot be claimed unless the prior mortgage has been redeemed in full. It does not mean that the redemption must be effected entirely by the particular person who claims subrogation. All that is necessary is that the mortgage dues must have been fully satisfied. For instance if three persons, *A*, *B* and *C*, advance money with which a prior mortgage is redeemed in full, they are entitled to claim subrogation in proportion to the amounts they have respectively paid. In support of this proposition I may refer to the case of *Hira Singh* v. *Jai Singh*(4).

The question then arises as to the extent of the amount in respect of which the plaintiff will be

(1) (1926) I. L. R. 50 Mad. 626.
(2) (1905) I. L. R. 27 All. 325, P. C.
(3) (1912) I. L. R. 39 Cal. 527, P. C.
(4) I. L. R. [1937] All. 880, F. B.

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entitled to claim priority against the defendant no. 13. As I have already indicated, the plaintiff's claim must be limited by the decree that has been paid off. It has been satisfactorily proved that the entire sum of Rs. 5,000 advanced by the plaintiff was utilised for the satisfaction of the decree. She is entitled to recover this sum with interest at the rate allowed by the decree. She has, however, claimed compound interest at the rate of 12 per cent. per annum according to the stipulation in her own mortgage bond which is not enforcible against the defendant no. 13. A certified copy of the decree has been filed in this Court and we accepted it in evidence as we considered it necessary for the ends of justice. The copy has been marked Ext. 3. It shows that the decretal amount carried interest at Rs. 1-2-0 per cent. per mensem, the decree being on compromise. The plaintiff would, therefore, be entitled by virtue of subrogation to recover Rs. 5,000 with interest at Rs. 1-2-0 per cent. per mensem thereon from the 13th February, 1930. But on behalf of the minor respondents nos. 6 to 9 it has been contended that in view of the Bihar Money-Lenders Act (Act III of 1938) which came into force on the 15th of July, 1938, the plaintiff is not entitled to interest at more than 9 per cent. per annum. It is not necessary to go into the question whether the Bihar Money-Lenders Act is applicable in this case, because the learned Advocate on behalf of the plaintiff-appellant has agreed to reduce the interest to 9 per cent. simple. The plaintiff's claim, therefore, will be reduced accordingly against all the defendants.

In the result the appeal is allowed and the decree of the lower Court will be modified as follows: The suit will be decreed for Rs. 5,000 principal with simple interest at 9 per cent. per annum from the 13th February, 1930, till the expiry of 3 months from this date together with proportionate costs of the lower Court and full costs of this Court (the

appeal being valued at Rs. 2,500 only). If the defendants do not pay within three months from this date the amount that will be thus found due, the mortgaged properties shall be sold for realisation of the same with interest thereon at 6 per cent. per annum from the expiry of the said period of three months till realisation.

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KHAJA MOHAMAD NOOR, J.—I entirely agree.

Appeal allowed.

Decree modified.

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APPELLATE CIVIL.

Before Fazl Ali and Varma, JJ.

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Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *Schedule III, article* 2(*b*)(*ii*), *whether retrospective—suit for produce rent instituted after the Act came into force—accrual of cause of action before passing of the Act—suit, whether governed by shorter period of limitation.*

A suit for produce rent instituted after the Bihar Tenancy Act, 1885, came into force is governed by the period of limitation provided by that Act, although the cause of action for the claim accrued before the passing of the new Act.

Shaikh Reyasat v. *Gopi Nath Missir*(1), followed.

A statute which takes away or impairs rights acquired under the existing law must not be construed to have a

*Appeal from Appellate Decree no. 740 of 1936, from a decision of Babu Nirmal Chandra Ghosh, Subordinate Judge of Monghyr, dated the 20th June, 1936, confirming a decision of Babu Janki Prashad Singh, Munsif of Monghyr, dated the 17th March 1936.

(1) (1938) I. L. R. 18 Pat. 1.

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retrospective force, unless by express words or necessary implications it appears that such was the intention of the legislature which passed it.

An Act of limitation, being a law of procedure, will ordinarily govern all proceedings, to which its terms are applicable, from the moment of its enactment; but this rule must admit of the qualification that when the retrospective application of the statute of limitation would destroy vested rights, or inflict such hardship or injustice as could not have been within the contemplation of the legislature, then the statute is not, any more than any other law, to be construed retrospectively.

Khusalbhai v. *Kabhai*(1), followed.

There is no rigid rule that where an Act does not come into force immediately but allows some time for the enforcement of existing causes of action, it must be inferred that the Act was intended to be retrospective.

Where, however, it appeared that the litigants had a reasonable opportunity of enforcing their existing causes of action between the date when the Bihar Tenancy Act, 1885, was published in the Gazette and the date when it came into force, *held*, that the provision embodied in article 2(*b*)(*ii*) of Schedule III of the Act was intended to be retrospective so as to affect existing causes of action.

Queen v. *Leeds and Bradford Railway Company*(2), *Manjhori Bibi* v. *Akel Mahumed*(3), *Gopeshwar Pal* v. *Jiban Chandra Chandra*(4), *Ramkrishna Chetty* v. *Subbaray Aiyer*(5) and *Rajah Sahib Meharban-I-Doston Sri Raja Row V. K. M. Surya Row Bahadur* v. *G. Venkata Subba Row*(6), reviewed.

Appeal by the defendant.

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

(1) (1881) I. L. R. 6 Bom. 26.
(2) (1852) 21 L. J. (N. S.) M. C. 193.
(3) (1913) 17 Cal. W. N. 889.
(4) (1914) I. L. R. 41 Cal. 1125, S. B.
(5) (1912) I. L. R. 38 Mad. 101.
(6) (1913) I. L. R. 39 Mad. 645, F. B.

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M. K. Mukherjee, for the appellant.

G. N. Mukherjee, for the respondent.

FAZL ALI, J.—This appeal arises out of a suit instituted by the plaintiff-respondent to recover arrears of manhunda rent for the years 1339 to 1342 Fasli. The suit having been decreed by the courts below the defendant has preferred this second appeal.

As the suit was instituted by the plaintiff after the Bihar Tenancy Act came into force, it is contended on behalf of the appellant that the period of limitation which will govern the suit is the period provided by the new Act and so the claim for the years 1339 and 1340 Fasli is time barred under Schedule III, Article 2(*b*)(*ii*), of that Act. On the other hand, it is contended on behalf of the plaintiff that inasmuch as the claim for the rent of the years 1339 and 1340 arose before the passing of the new Act, the suit must be governed by the Bengal Tenancy Act as it stood before the new Act was passed. The parties have cited before us a number of decisions, the most recent decision being that of a Division Bench of this Court in *Shaikh Reyasat* v. *Gopi Nath Missir*(1) which supports the view put forward on behalf of the appellant. This decision has already been followed by this Bench in Second Appeals nos. 978 and 979 of 1936, but as its correctness were challenged both in the present appeal and in Second Appeals nos. 978 and 979 of 1936 and as we have been pressed to refer this case to a larger Bench, I propose to deal with the matter at some length. That the question is not free from difficulty will be evident from what follows.

It is well settled that a statute which takes away or impairs rights acquired under the existing law must not be construed to have a retrospective

(1) (1938) I. L. R. 18 Pat. 1.

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force, unless by express words or necessary implications it appears that such was the intention of the Legislature which passed it. It is true that ordinarily the enactments which regulate procedure take effect immediately on the principle that "no suitor has a vested interest in the procedure" and that an Act of limitation, being a law of procedure, will ordinarily govern all proceedings, to which its terms are applicable, from the moment of its enactment. But, as was pointed out in *Khusalbhai* v. *Kabhai*(1), this rule must admit of the qualification that when the retrospective application of the statute of limitation would destroy vested rights, or inflict such hardship or injustice as could not have been within the contemplation of the Legislature, then the statute is not, any more than any other law, to be construed retrospectively. The propositions enunciated above have not only been affirmed in a series of decisions but they have received statutory recognition in section 6 and section 8, clause (*c*), of the Bihar and Orissa General Clauses Act, 1917, and the new Bihar Tenancy Act must be construed subject to them.

Section 8 of the Bihar and Orissa General Clauses Act provides that

"where any Bihar and Orissa Act repeals any enactment hereto made, or hereafter to be made, then, *unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed.*"

Now there are no express words in the Bihar Tenancy Act to show that the provision made in Schedule III, Article 2(*b*)(*ii*), of the Act was intended to affect rights which had accrued before the Act came into operation, but there is some authority for the proposition that where the Act does not come into force immediately but allows some time for the enforcement of existing causes of action it may be inferred that the Act was intended

(1) (1881) I. L. R. 6 Bom. 26.

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to be retrospective. This view has been very clearly expressed by Lord Campbell in *Queen* v. *Leeds and Bradford Railway Company*(1), while dealing with *11 and 12 Vict. Chapter 43*, in the following passage:—

"If the Act had come into operation immediately after the time of its being passed, the hardship would have been so great that we might have inferred an intention, on the part of the Legislature, not to give it a retrospective operation; but when we see that it contains a provision suspending its operation for six weeks, that must be taken as an intimation that the Legislature has provided that as the period of time within which proceedings respecting antecedent damages or injuries might be taken before the proper tribunal.....a certain time was allowed before the Act was to come into operation and that removes the difficulty".

Again in *Manjhoori Bibi* v. *Akel Mahmud*(2) Mookerjee, J. observed as follows:—

"On the other hand where a new statute of limitation reduces the time previously allowed for commencement of the suit, but does not come into operation forthwith and allows a reasonable time for the enforcement of existing causes of action, the Court will not hesitate to hold that the statute may affect causes of action already accrued in the same manner as those accruing after its passage".

The observations made by Mookerjee, J. were approved by a Full Bench of the Calcutta High Court in *Gopeshwar Pal* v. *Jiban Chandra Chandra*(3) as will appear from the following extract from the judgment delivered by Sir Lawrence Jenkins in that case:

"The law as amended may regulate the procedure in suits in which the plaintiff could comply with its

(1) (1852) 21 L. J. (N. S.) M. C. 193.
(2) (1913) 17 Cal. W. N. 889.
(3) (1914) I. L. R. 41 Cal. 1125, S. B.

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provisions, but cannot govern suits where such compliance was from the first impossible. The effect is to regulate not to confiscate. There are thus, two positions; where in accordance with its provisions a suit could be brought after the passing of the amendment, it may be that the amendment would apply, but where it could not, then the amendment would have no application."

I have underlined certain passages in the above quotations to show that neither Mookherjee, J. nor Sir Lawrence Jenkins meant to lay down any rigid rule to the effect that whenever the operation of a statute is postponed, the Court must draw the inference that the statute was intended to affect causes of action already accrued. That there may be cases in which such an inference cannot reasonably be drawn, may be illustrated by the decisions of the Madras High Court in *Ramkrishna Chetty* v. *Subbaray Aiyer*(1) and *Rajah Sahib Meharban-I-Doston Sri Raja Row V. K. M. Surya Row Bahadur* v. *G. Venkata Subba Row*(2). In these cases the question of limitation arose in connection with the Estates Land Act passed by the Madras Legislature in March, 1908. It was stated in that Act that it would come into force *on the 1st of July, 1908*, that is to say, nearly four months after it was passed and the Governor gave his assent to it on the 25th March, 1908 (nearly three months before the Act was to come into force). But the assent of the Governor-General having been given on the 28th June, Wallis, C.J. pointed out in the Full Bench case referred to above that "the result of the passing of the Act, which came into force only two days after it received the Viceroy's assent, was to leave no opportunity for the exercise of the plaintiffs' vested right of suit" and held that the Act did not affect the causes of action which had accrued before it came into force.

(1) (1912) I. L. R. 38 Mad. 101.
(2) (1913) I. L. R 39 Mad. 645, F. B.

Now the points to be noticed with reference to the Bihar Tenancy Act are:—

(*1*) Unlike *11 and 12 Vict. Chapter 43* which Lord Campbell had to construe and the Estates Land Act of Madras, which was the subject of the two decisions of the Madras High Court cited above, the Act itself did not specify the date on which it was to come into force. All that was stated in the Act was that "it shall come into force on such date as the local Government with the previous sanction of the Governor-General in Council may by notification in the local official gazette appoint in this behalf".

(*2*) After the assent of the Governor-General had been obtained the Bihar Tenancy Act was published in the *Bihar and Orissa Gazette* on the 14th November, 1934, but the Government notification which announced that the Act would come into force from the 10th June, 1935, was not published in the *Bihar and Orissa Gazette* until the 12th June, 1935, that is to say, two days after the date which was notified as the date of its commencement.

(*3*) Even if the present suit and other similar suits had been brought on the 14th November, 1934, when the Act was published for the first time in the Gazette, the claim for 1339 Fasli would have been barred because as regards the claim for that year the limitation ran from 30th Bhado, that is to say, 14th September, 1933.

The points which arise from those facts are obvious and the learned Advocate for the respondent fully emphasised them in his argument. His first contention was that where the Act itself does not state the period for which its operation has been suspended, no inference can be drawn as to the intention of the Legislature in postponing its operation. It was suggested by him that as the Act could not come into force without the sanction of the Governor

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and the Governor-General, the Legislature could not but have left it to the local Government to notify the date of the commencement of the Act and the mere fact that the local Government in the exercise of its discretion thought it fit to postpone the operation of the Act, should not be a ground for holding that the Legislature when it passed the Act intended to take away the rights which had already accrued.

The respondents then ask—what will happen to suits instituted on the 10th and 11th of June, 1935? This point arises because the notification that the Act was to come into force on the 10th of June was not published in the gazette until the 12th of June. Then again, as has been already stated, even if suits for the rent of 1339 Fasli which under the old Act could be brought up to the middle of September, 1936, had been brought on the date on which the Bihar Tenancy Act was published for the first time in the Gazette, the claim for that year would have been barred. Thus in the present case, to use the words of Sir Lawrence Jenkins the effect of the new law was not merely " to regulate but to confiscate ". This raises a serious question because even Lord Campbell observed with reference to *11 and 12 Vict. Chapter 43* that

" If the Act did come into operation immediately after the time of its being passed, the hardship would have been so great that we might have inferred an intention on the part of the Legislature not to give it retrospective operation."

I have dealt with these points at some length because I am convinced that there is a good deal to be said in favour of the contention that the statute should not be given retrospective effect. We are, however, not disposed to refer this case to a larger Bench because we are not prepared to disagree with the decision in *Saikh Reyasat's* case(1) in the present state of the

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authorities which have been elaborately dealt with in that case and in the judgments of Carnduff and Mookerjee, JJ. in *Manjhoori Bibi* v. *Akel Mahmud*(1). On the other hand certain facts which came to light in the course of the argument in this appeal lend, in our opinion, considerable support to the view expressed in *Shaikh Reyasat's* case(2). From the dates already given it will appear that there was an interval of nearly seven months between the publication of the Act and the date on which it came into operation. The matter, however, does not rest there. On the 13th February, 1935, that is to say, two months after the Act had been published in the Gazette, the local Government issued a press communique to the following effect:—

"It is notified for general information that the Government of Bihar and Orissa intend to appoint a date not earlier than the 1st of June, 1935, as the date on which the Bihar Tenancy Amendment Act will come into force. The exact date will be notified later."

Then came the notification of the 4th of June, which was published in the Gazette of the 12th of June. Thus no vigilant suitor can legitimately complain that he did not get a reasonable opportunity to institute his suit before the Act came into force. The strongest argument against the retrospective operation of the Act is that the claim for the rent of the year 1339 would have, in any case, become time-barred: but if from the circumstances of the case taken as a whole, it can be gathered that the Act was intended to be retrospective, this fact alone will not alter the situation. The fact that the period of limitation provided in the previous Act was shortened by the Legislature shows that it looked with disfavour upon the practice of postponing the institution of suits for produce rent for three years, and that may be the reason why it did not show much consideration to plaintiffs who, though they could have instituted their

(1) (1913) 17 Cal. W. N. 889.
(2) (1938) I. L. R. 18 Pat. 1.

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suit earlier, had postponed its institution till the last day of limitation. It may be stated here that the present suit was instituted in August, 1935, that is to say, nearly two months after the present Act came into force.

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Thus following the decision of the Division Bench in *Shaikh Reyasat's* case(1), I would allow this appeal in part and dismiss the claim of the plaintiff in regard to the rent for the years 1339 and 1340 and direct that a decree be passed for the rent due from the defendants in 1341 and 1342. The damages must be calculated upon the rent due for these two years but in other respects the decree of the lower appellate court will be upheld. The parties will bear their own costs in this appeal and in the proceedings in both the courts below.

VARMA, J.—I agree.

Ordinarily an Act of limitation is placed in the category of adjective law and under the established rules of interpretation it has retrospective effect; but, as was laid down in *Khusalbhai* v. *Kabhai*(2), this rule must in certain instances be qualified, e.g., when a retrospective effect of the statute of limitation would destroy vested rights by inflicting such hardship or injustice as could not have been in the contemplation of the Legislature. The question in the present case is whether the Bihar Tenancy Act will apply to the present suit, which was filed for realising arrears of manhunda rent for the years 1339 to 1342, Fasli. The suit was filed on the 30th August, 1935. The Act was published in the Gazette of the 14th of November, 1934, after the assent of the Governor-General given on the 21st of October, 1934. A notification, published in the *Bihar and Orissa Gazette* on the 12th of June, 1935, announced that the Act would come into force from the 10th of June, 1935,

(1) (1938) I. L. R. 18 Pat. 1.
(2) (1881) I. L. R. 6 Bom. 26.

that is to say, two days before the publication in the Gazette; and we also find that on the 13th of February, 1935, a press communique was issued by the local Government to the following effect:

"It is notified for general information that the Government of Bihar and Orissa intend to appoint a date not earlier than the 1st of June, 1935, as the date on which the Bihar Tenancy (Amendment) Act will come into force. The exact date will be notified later."

I respectfully agree with the view taken in *Manjhoori Bibi* v. *Akel Mahmud*(1) and *Gopeshwar Pal* v. *Jiban Chandra Chandra*(2) that where a new statute of limitation reduces the time previously allowed for commencement of the suit, but does not come into operation forthwith and allows a reasonable time for the enforcement of existing causes of action, the Court will not hesitate to hold that the statute may affect causes of action already accrued in the same manner as those accruing after its passage. The whole question is whether on the dates mentioned it can be held that there was reasonable time for the litigant public to enforce their existing causes of action. Taking into consideration the date of the publication of the Act in the Gazette and the communique on the 13th of February, 1935, I am of opinion that the Act will affect causes of action already accrued; and following the decision in *Shaikh Reyasat's* case(3) I hold that in this case also the Bihar Tenancy Act will apply. I agree, however, with my learned brother that there is a good deal to be said for the opposite view and the question is not free from difficulty.

S.A.K. *Appeal allowed in part.*

(1) (1913) 17 Cal. W. N. 889.

(2) (1914) I. L. R 41 Cal. 1125, S. B.

(3) (1938) I. L. R. 18 Pat. 1.

APPELLATE CIVIL.

Before James and Rowland, JJ.

1939.

January, 24.

KAMALDHARI LAL

v.

RAI BAHADUR KAMLESHWARI SAHAY.*

Execution—decree-holder, right of, to proceed in the first instance against either the person or property of judgment-debtor—Court, whether can impose restriction on this freedom of choice.

A decree-holder has the right to decide whether he should execute the decree for money by arrest of the judgment-debtor or by attachment and sale of property, and, except as specifically provided in the Code, it is not for the Court to impose restrictions on this freedom of choice of the decree-holder. *Hargobind-Kishan Chand* v. *Hakim Singh & Co.*(1), *Chena Pemaji v. Ghelabhai Narandas*(2), *Raj Chandra Roy* v. *Shama Soondari Debi*(3) and *Johari Mal* v. *Sant Lal*(4), followed.

Appeal by the decree-holder.

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

S. N. Bose, for the appellants.

D. L. Nandkeolyar, for the respondent.

ROWLAND, J.—This is an appeal by the decree-holder who sought to execute a decree for money against one of his judgment-debtors who happened to be in the original transaction not the person primarily liable but a surety. The decree-holder has applied to the executing Court to execute the decree by the arrest of this judgment-debtor and the latter objected, first,

*Appeal from Original Order no. 125 of 1938, from an order of Babu Nirmal Chandra Ghosh, Subordinate Judge at Bhagalpur, dated the 20th April, 1938.

(1) (1925) I. L. R. 6 Lah. 548.
(2) (1883) I. L. R. 7 Bom. 301.
(3) (1879) I. L. R. 4 Cal. 583.
(4) (1887) I. L. R. 9 All. 484.

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that he being the surety and not the principal person liable, execution should not be levied against him until all means of execution against the principal judgment-debtors had been exhausted. That first objection was disallowed by the Subordinate Judge and rightly so. The second objection was that the decree-holder, if he could proceed against this judgment-debtor, ought in the first instance to levy execution against the property and only be permitted to levy execution against the person on failure of his remedy against the property. This objection the Subordinate Judge allowed on the grounds that the objector had sufficient properties against which the decree-holder might proceed in the first instance and that there was nothing convincing to show that the objector was likely to obstruct or to leave the jurisdiction of the Court or that he had dishonestly transferred, sold or removed any of his property or committed any other act of bad faith. For the appellant decree-holder it is argued that these are not grounds on which a Court should disallow an application for the arrest of a defaulting judgment-debtor; that the decree-holder is given by the Code the option of chosing the manner in which he will ask the Court to execute his decree and that except as specifically provided in the Code it is not for the Court to impose restrictions on this freedom of choice of the decree-holder. Reference is made to the decision in *Hargobind-Kishan Chand* v. *Hakim Singh*(1) in which it was held that the decree-holder has the right to decide whether he should execute the decree for money by arrest of the judgment-debtor or by attachment and sale of property or by both; and that the discretion given to the Court by Order XXI, rule 21, to refuse simultaneous execution against the person and the property did not extend to compelling the decree-holder to take either one of these methods. The decision was founded on an examination of section 51 of the Code of Civil Procedure and of Order XXI, rules 11(*1*), 11(*2*), and particularly

(1) (1925) I. L. R. 6 Lah. 548.

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clause (*j*), and 17. Rule 30 is also referred to. Reliance is placed on observations of the Bombay High Court in *Chena Pemaji* v. *Ghelabhai Narandas*(1) to the effect that the creditor has a right to all the assistance which the law can give him. For the respondent we have been referred to the amendment made in section 51 of the Code subsequent to the above decision. The Amendment Act of 1936 inserted a proviso placing some restrictions on the right of the decree-holder to obtain an order for arrest against the judgment-debtor. The Court must be satisfied either

(*a*) that the judgment-debtor has done or is likely to do certain things designed to defeat the decree; or

(*b*) " that the judgment-debtor has or had since the date of the decree the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same " or

(*c*) that the decree was for a liability of a peculiar nature.

Now in dealing with the objection of the judgment-debtor the Subordinate Judge has referred to the absence of matters referred to in clause (*a*) of the proviso; but he has not paid any attention to clause (*b*) and it is substantially the case of the decree-holder that arrest ought to be ordered on the ground that the judgment-debtor is perfectly capable of paying but is unwilling to do so. The objector took the following as grounds 10 and 11 of his petition of objection in the lower Court:

(*10*) " That the petitioner is a man who holds high position in society and it is only with a view to lower him in the estimation of the public that such a wrong step is taken ".

(*11*) " That the petitioner has got sufficient properties and hence the decree-holders ought not to have prayed for warrant of arrest ".

It has been submitted to us that the application for arrest was made with the purposes of humiliating

(1) (1883) I. L. R. 7 Bom. 301.

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the judgment-debtor. On the other hand the appellant maintains that the sole purpose of applying for arrest was to obtain payment of the judgment-debt. The objection taken shows in my opinion a misconception of the principles which should govern the relations between creditors and debtors. If it is considered an abnormal thing for a gentleman of wealth and position to be arrested this should be because it is an abnormal thing for such a gentleman to evade, avoid, delay and obstruct payment of his just debts; and a debtor who is able to pay but does not pay is in the position of a person in contempt of Court. The proper course for such a person is to purge his contempt by fulfilling the order of the Court and pay the decretal amount. The petitioner before the Subordinate Judge took an objection that he was not liable; but this was asking the Court to go behind the decree and a party against whom a decree has been passed is not entitled to be the judge in his own cause and to chose whether it should or not be executed against him. He is not entitled to resist execution merely because he is dissatisfied with the decision in the suit.

On the legal point, I entirely agree with the decision in *Hargobind-Kishan Chand* v. *Hakim Singh*(1) which seems to be in accordance with the current of authority in earlier decisions under the old Code in the Calcutta and Allahabad High Courts—*Raj Chunder Roy* v. *Shama Soondari Debi*(2) and *Johari Mal* v. *Sant Lal*(3). The Lahore decision which I have cited shows that the view of the Bombay High Court is on similar lines.

I would allow the appeal and set aside the order of the Subordinate Judge. I would disallow the objection of the judgment-debtor and direct that the execution case be restored and do proceed according to law. Mr. Bose for the appellant has assured us that in order to give the respondent an opportunity of

(1) (1925) I. L. R. 6 Lah. 548.
(2) (1879) I. L. R. 4 Cal. 583.
(3) (1887) I. L. R. 9 All. 484.

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satisfying the decree and avoiding arrest, his client will not take steps for the arrest of the respondent within two months. The appellant will get his costs of this appeal and of the objection in the Court below.

JAMES, J.—I agree.

Appeal allowed.

S. A. K.

APPELLATE CIVIL.

1939.

February, 8, 9.

Before James and Rowland, JJ.

GANJHU UPENDRA SINGH

v.

GANJHU MEGHNATH SINGH.*

Crown Grants Act, 1895 (*Act XV of* 1895)—*grant of Jagir by Government—stipulation as to restraint against alienation —tenure, whether can be sold in execution of money decree—measure of liability to involuntary transfer.*

In 1842 a tenure was granted as jagir in favour of *G's* ancestor in consideration of certain services, but the estate was subsequently forfeited to Government. In 1881 there was a formal dispensation with the services and a new grant, freed of those services, was made at a fixed annual rent. The new grant created a jagir for the descendants of an earlier jagirdar to enjoy so long as any descendants of the jagirdar should survive. There was a stipulation that the jagirdar had no power to transfer by sale or by creation of mukarrari tenures with a liability to resumption if unauthorised transfer should be made. When the tenure was sought to be sold in execution of a money decree against the jagirdar, the latter objected, but his objection was overruled by the executing Court.

Held, on appeal, (*i*) that the tenure was a Crown grant affected by the Crown Grants Act of 1895 in such a manner

*Appeal from Appellate Order no. 257 of 1938, from an order of T. Luby, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 29th July, 1938, confirming an order of Babu Hargobind Prasad Singh, Subordinate Judge at Ranchi, dated the 23rd May, 1938.

that the provisions of the Transfer of Property Act, 1882, did not apply to it, and that the grant took effect according to its tenor whatever might be the conditions laid down;

(*ii*) that the grant was of a limited interest which was not transferable either by operation of law or by voluntary alienation, and that the measure of liability to involuntary alienation was the power of voluntary transfer.

Sundararajulu Naidu v. *B. Papiah Naidu*(1), *Thakur Khitanarain Sahi* v. *Surju Seth*(2) and *Janaki Amal* v. *Marudai Chetti*(3), followed.

Golak Nath Roy Chowdhury v. *Mathura Nath Roy Chowdhury*(4) and *Keshab Chandra Pramanik* v. *Ajahar Ali Biswas*(5), distinguished.

Nawab Bahadur of Murshidabad v. *Karnani Industrial Bank, Ltd.*(6), referred to.

Per ROWLAND, J.—Where a lessee accepts from his lessor a new lease of the property leased to take effect during the continuance of the previous lease, this is an implied surrender of the former lease which is thus determined.

When a Crown grant contains a prohibition against alienation of the estate, that prohibition must take effect in accordance with its terms.

Sheo Singh v. *Raghubans Kunwar*(7) and *Sundararajulu Naidu* v. *B. Papiah Naidu*(1), followed.

Appeal by the judgment-debtor.

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

K. K. Banarji and *S. N. Bose*, for the appellant.

S. M. Mullick (with him *S. N. Banarji* and *L. K. Chaudhury*), for the respondent.

JAMES, J.—The appellant is a judgment-debtor who holds a jagir under Government in Ranchi district. His ancestor enjoyed a tenure which was created in 1842 by the proprietor of the Barkagarh estate, granted in consideration of services to be

(1) I. L. R. [1938] Mad. 767.
(2) (1931) I. L. R. 10 Pat. 582.
(3) (1937) A. I. R. (Mad.) 864.
(4) (1891) I. L. R. 20 Cal. 273.
(5) (1914) 19 Cal. W. N. 1182.
(6) (1931) I. L. R. 59 Cal. 1, P. C.
(7) (1905) I. L. R. 27 All. 634, P. C.

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rendered as barkandaz. The estate was subsequently forfeited to Government and in 1881 there was a formal dispensation with the services which the jagirdar had to render as barkandaz and a new grant was created of the tenure freed of those services at an annual rent of Rs. 48-8-0. The new grant created a jagir for the descendants of an earlier jagirdar Ratan Singh to enjoy, so long as any descendants of Ratan Singh should survive. There was a stipulation that the jagirdar had no power to transfer by sale or by creation of mokarrari tenures any part of the tenure with a liability to resumption if unauthorised transfer should be made.

The opposite-party sought to bring this tenure to sale in execution of his money decree; but the jagirdar objected that his jagir could not be brought to sale. The Subordinate Judge dismissed this objection on the ground that the tenure in favour of the petitioner's ancestor did not come into existence by the grant of 1881 and on the general ground that where there is a stipulation in a lease restricting the right of transfer by the lessee, his interest can be sold in execution of a decree. The judgment-debtor appealed to the Judicial Commissioner who maintained the order of the Subordinate Judge and dismissed the appeal.

Mr. S. N. Bose on behalf of the appellant argues that this is a grant of the same nature as the Crown grant which was the subject-matter of proceedings before the High Court of Madras in *Sundararajulu Naidu* v. *B. Papiah Naidu*(1) where it was held that the actual interest possessed by the decree-holders was merely a right to enjoy the rents and profits during their lives and that the tenure enjoyed under a grant from the Government of Madras with a prohibition against alienation could not be sold in execution of a decree. Mr. Bose also refers to the decision of the Judicial Committee in *Nawab Bahadur of Murshidabad* v. *Karnani Industrial Bank, Ltd.*(2), but there

(1) I. L. R. [1938] Mad. 767.
(2) (1931) I. L. R. 59 Cal. 1, P. C.

the conditions of the enjoyment of the estate of the Nawab of Murshidabad had been determined by formal legislation and there could be no question regarding the inalienability of the immoveable property affected by that legislation. Mr. Bose also lays some stress upon the decision of Macpherson and Dhavle, JJ. in *Thakur Khitanarain Sahi* v. *Surju Seth*(1) wherein the basis of the decision, to use the language of Macpherson, J., was that " property is not liable to sale by the Court unless the judgment-debtor has a disposing power over it for his own benefit. The measure of liability to involuntary alienation is the power of voluntary transfer ". This part of the decision of the Division Bench of this High Court was cited with approval by Sir Owen Beasley, C.J. in *Janaki Amal* v. *Marudai Chetti*(2).

Mr. S. M. Mullick on behalf of the respondent argues in the first place that this jagir ought not to be regarded as a Crown grant at all because it was originally created by a private landlord as a service tenure. He suggests also that the restriction on transfer merely renders the purchaser liable to find that the grant may be resumed by the superior landlord after purchase, but that it cannot prevent the tenure from being brought to sale in execution by a Court. In *Golak Nath Roy Chowdhury* v. *Mathura Nath Roy Chowdhury*(3) which is cited by Mr. Mullick it was held that a restriction on assignment in the lease did not apply to an assignment by operation of law taking effect against the will of the lessee by a sale in execution proceedings. Mr. Mullick also cites the decision in *Keshab Chandra Pramanik v. Ajahar Ali Biswas*(4) where it was held that the condition in a permanent lease that the landlord would re-enter if the tenant made any transfer of the land demised did not

(1) (1931) I. L. R. 10 Pat. 582.
(2) (1937) A. I. R. Mad. 864.
(3) (1891) I. L. R. 20 Cal. 273.
(4) (1914) 19 Cal. W. N. 1182.

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prevent a sale by the Court. The learned Judges in this latter case distinguished the lease before them from the lease which was under discussion in *Vyankatraya* v. *Shivrambhat*(1) on the ground that in the Bombay case there was a distinct prohibition on the tenant's permitting his tenure to be attached or sold in execution; and Mr. S. M. Mullick argues generally that prohibition against transfer in a grant or a lease does not affect the liability of the tenant to have his estate brought to sale against his will.

Now in the first place it appears to us that it cannot be reasonably held that the tenure which is here in question is not a Crown grant, or that it is not a grant which is affected by the Crown Grants Act of 1895 in such a manner that the provisions of the Transfer of Property Act do not apply to it, so that it takes effect according to its tenor whatever may be the conditions laid down. It is possible that the ancestors of the jagirdar enjoyed this tenure on different terms before the grant was made in 1881; but there is nothing to indicate that the ancestors of the tenure-holder ever at any time enjoyed a tenure which could be transferred or could be brought to sale in execution of a decree. The tenure for which services had to be rendered as barkandaz could certainly not be alienated without the consent of the grantor to whom the services were to be rendered. When in 1881 these special services were commuted for an increased money rent payable by the jagirdar, the jagir would have become transferable if no restriction had been made in the grant; but the grant did make a clear restriction and it granted a limited interest which was not transferable. In the cases of the Calcutta High Court cited by Mr. S. M. Mullick it was remarked that involuntary alienation would not be a breach of a covenant not to assign; but we are not here concerned with a covenant not to assign, but with a grant by

(1) (1883) I. L. R. 7 Bom. 256.

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the Crown of a limited interest which was not assignable either by operation of law or by voluntary alienation. Mr. Mullick criticises the view expressed in *Thakur Khitanarain Sahi* v. *Surja Seth*(1) that "the measure of liability to involuntary alienation is the power of valuntary transfer" pointing out that a Mitakshara coparcener may have his interest brought to sale in execution although he has no power of making a voluntary transfer; but the Mitakshara coparcener can always by separating himself from the joint family obtain a disposing interest over his own share and where involuntary transfer is allowed in this way, the creditor is merely compelling the coparcener to do what he himself has power to do by applying for a partition.

The interest enjoyed by virtue of the grant of 1881 is a strictly limited interest in this way that it is to be enjoyed by the heirs of Ratan Singh and by nobody else and that what is granted is not a property which the heirs are to treat as their own in the sense that they may if they please transfer it to somebody else; it is a property created in the manner in which so frequently jagirs in India are created by the Crown which can be enjoyed only by the heirs of the grantee and cannot be alienated or assigned. No more can be brought to sale in execution of the decree than the judgment-debtor himself enjoys; and the judgment-debtor here possesses no right in the corpus of the property which can be assigned or which can be brought to sale. The only manner in which the decree-holder can utilise for his own benefit the interest of the jagirdar in this property is by obtaining the appointment of a receiver of the rents and profits until his decree is satisfied or during the life-time of the judgment-debtor whichever might be the shorter period.

I would set aside the decisions of the Courts below and allow this appeal with costs. This jagir cannot

(1) (1931) I. L. R. 10 Pat. 582.

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be brought to sale in execution of the respondent's decree.

ROWLAND, J.—I agree and would like to add a few observations. The Subordinate Judge rested his decision on the view that the Crown Grants Act did not apply to this tenure, and, secondly, he was of opinion that if it did apply, it was of no advantage to the judgment-debtor. His view that the Crown Grants Act did not apply was entirely erroneous. He thought that the tenure was not to be considered to be a tenure created by and held under the terms of the grant of 1881 but an older tenure which had merely been continued by that grant. The true position was that the lessee by accepting a new grant had made an implied surrender of the former lease. That is the position contemplated in section 111(*f*) of the Transfer of Property Act. Where a lessee accepts from his lessor a new lease of the property leased to take effect during the continuance of the previous lease this is an implied surrender of the former lease which is thus determined. The observation of the Subordinate Judge that the Government having only stepped into the shoes of Thakur Biswanath Sahi Deo on account of the confiscation of his estate, was not entitled to impose a fresh condition as regards the transferability of the tenure in question is plainly unsupportable. The Crown Grants Act was passed in order to prevent the Courts from saying that the Crown could not grant lands on such and such terms. Then the Subordinate Judge in construing the restrictions imposed on transfer has proceeded on a view which is supported by some authority in respect of grants made by private persons to private persons containing covenants against alienation. Now such covenants are referred to in section 10 of the Transfer of Property Act. The restriction on alienation is void except in a lease where the condition is for the benefit of the lessor or those claiming under him; and the validity of the condition has generally come in question in

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connection with the claim of the lessor to forfeit the lease. The Courts have generally been reluctant to enforce such forfeiture; but the principles of those decisions do not seem to me to be applicable in the other class of cases where the restriction on alienability is expressed either in a Statute as in *Nawab Bahadur of Murshidabad* v. *Karnani Industrial Bank, Ltd.*(1) and *Thakur Khitanarain Sahi* v. *Surju Seth*(2) or in the case of a grant from the Crown. In *Sheo Singh* v. *Raghubans Kunwar*(3), the Judicial Committee of the Privy Council considered the case of an estate granted by a Sanad in which provision had been made for descent by primogeniture which was said to be at variance with the custom of the family. It was held that the Crown Grants Act was a complete answer to the contention that it was not open to the Crown in making a grant to alter the ordinary rules of succession in respect of the estate. When a Crown grant contains a prohibition against alienation of the estate that prohibition must take effect in accordance with its terms as held in *Sundararajulu Naidu* v. *B. Papiah Naidu*(4). In all this class of cases the rule in my view is that laid down by Macpherson, J. in *Thakur Khitanarain Sahi* v. *Surju Seth*(2): "The measure of liability to involuntary alienation is the power of voluntary transfer. The latter is taken away from the holder by the statute so far as sale or attempted sale of the property is concerned and the exercise of it is rendered void. Full ownership is cut down—the holder's power of disposition for his own benefit is restricted to the profits accruing within his lifetime". That being so, a creditor can only proceed in execution against the profits accruing and not against the estate or tenure itself.

S. A. K.

Appeal allowed.

(1) (1931) I. L. R. 59 Cal. 1, P. C.
(2) (1931) I. L. R. 10 Pat. 582.
(3) (1905) I. L. R. 27 All. 634, P. C.
(4) I. L. R. [1938] Mad. 767.

APPELLATE CIVIL.

Before Varma and Rowland, JJ.

1939.

January, 6, 9, 10, 11.

LAL INDERJIT NATH SAHI DEO

v.

MAHARAJA PRATAP UDAI NATH SAH DEO.*

Chota Nagpur Tenancy Act, 1908 (*Act VI of* 1908), *sections* 181, 182 *and* 231—*decree for rent—Deputy Commissioner, whether has power to transfer it for execution to a Civil Court—application for execution before Civil Court on transfer, whether loses its character as a proceeding under the Act—limitation—section* 181, *whether applicable—previous execution dismissed on part satisfaction—succeeding application, whether can be treated as one in continuation—limitation—section* 231, *applicability of—matter agitated and decided in earlier execution—same matter, whether can be raised in subsequent execution—res judicata.*

Where a matter is agitated and decided against a judgment-debtor in an earlier execution, it is not open to him to raise it in a subsequent execution, the principle of res judicata being a bar to the contention.

Bindeshwari Charan Singh v. *Thakur Bageshwari Charan Singh* (1), followed.

Section 182, Chota Nagpur Tenancy Act, 1908, provides :—

" A decree or order passed by a Deputy Commissioner under this Act may be executed either by his own Court or by any other prescribed Court."

" Deputy Commissioner " in this section includes any Deputy Collector trying a rent suit and a " prescribed Court ", under the Government notification, includes any Court to which the Deputy Commissioner of the district transfers the application for execution.

Held, (*i*) that the " prescribed Court " contemplated by section 182 of the Act and the notification thereunder is

* Appeal from Appellate Order no. 152 of 1938, from an order of Maulavi Saiyid Muhammad Ibrahim, Subordinate Judge of Ranchi, dated the 27th April, 1938, reversing an order of Babu Shib Chandra Prasad, Munsif of Ranchi, dated the 19th February, 1937.

(1) (1935) I. L. R. 15 Pat. 203, P. C.

not confined to a revenue Court having powers under the Act, but includes a Civil Court;

(*ii*) that, therefore, a rent Court has power to transfer its decree for execution to the Court of a Munsif.

Maharaja Pratap Udai Nath Sahi Deo v. *Baraik Lal Sahi* (1), distinguished.

Chandra Nath Tewari v. *Protap Udai Nath* (2), referred to.

(*iii*) that when an application for execution is before a Civil Court on transfer, it does not cease to be a proceeding under the Act, and, therefore, that the limitation for such an application would be that provided by section 181 (or other section) of the Act.

Firm Nayamat Ram Pujara Lal v. *Lal Rameshar Nath Sha Deo*(3), *Sudhanyya Kumar Poddar* v. *Gouranga Chandra Saha* (4) *and Maharaja Pratap Udai Nath Sahi Deo* v. *Baraik Lal Sahi* (1), followed.

Pathak Harbans Singh v. *Thakur Jagdishwar Dayal*(5) and *Jagdishwar Dayal Singh* v. *Pathak Dwarka Singh*(6) distinguished.

Chandra Nath Tewari v. *Protap Udai Nath*(2), *Raja Sri Sri Jyoti Prasad Singh Deo Bahadur* v. *Tarasankar Chattarji* (7) and *Bhagbat Prasad* v. *Sudarsan Bhagat* (8), referred to.

M obtained a decree for rent in the Rent Court on the 11th July, 1932, and on an application by the decree-holder the decree was transferred for execution to the Court of a Munsif and execution proceedings were started on the 19th January, 1933. The properties under attachment were proclaimed for sale; but on the 16th April, 1934, an order of the Commissioner under section 2 of the Chota Nagpur Encumbered Estates Act protecting from sale one of the

(1) (1936) I. L. R. 15 Pat. 439.
(2) (1913) 18 Cal. W. N. 170.
(3) (1927) 9 Pat. L. T. 678.
(4) (1917) 41 Ind. Cas. 542.
(5) (1929) I. L. R. 8 Pat. 620.
(6) (1933) I. L. R. 12 Pat. 626, P. C.
(7) (1933) I. L. R. 12 Pat. 799.
(8) (1937) I. L. R. 16 Pat. 643.

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judgment-debtors was received in the executing Court. In the meantime some amounts of cash had been realised in the course of the execution and the Munsif ordered on the same date that the execution case be dismissed on part satisfaction with costs. The next step taken was the presentation, on the 23rd December, 1935, of another application to execute the decree.

Held, (*i*) that the order of the 16th April was a final order disposing of the execution and the succeeding application to execute the decree must be considered to be a fresh application and to be barred by limitation.

Maharaja Pratap Udai Nath Sahi Deo v. *Thakur Jagat Udai Nath Sahi Deo* (1) and *Mohammad Taqi Khan* v. *Raja Ram* (2), followed.

Qamaruddin Ahmad v. *Jawahir Lal* (3), distinguished.

(*ii*) that even if the second application be treated as an application to revive or restore the previous execution, it was barred under section 231 of the Chota Nagpur Tenancy Act, 1908.

Appeal by the judgment-debtors.

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

L. K. Chowdhury, for the appellants.

B. C. De, for the respondents.

ROWLAND, J.—This appeal by the judgment-debtors arises out of an application to execute a decree, against which objection was taken and allowed by the Munsif. On appeal the decision was reserved and execution directed to proceed.

The decree in question was obtained in the Rent Court on 11th July, 1932, by the Maharaja of Chota Nagpur in respect of the rent of a tenure held by a

(1) (1938) M. A. No. 267 of 1937 (unreported).
(2) (1936) A. I. R. (All.) 820, F. B.
(3) (1905) I. L. R. 27 All. 334, P. C.

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number of co-sharers. On application by the decree-holder, the decree was transferred to the Munsif of Ranchi for execution, and execution proceedings were started on the 19th January, 1933, against 9 judgment-debtors, seeking a sale of five properties. The properties under attachment were proclaimed for sale; but on 16th April, 1934, an order of the Commissioner under section 2 of the Chota Nagpur Encumbered Estates Act, 1876, protecting from sale the property of judgment-debtor no. 9, Lal Gokulnath Sahi Deo, was received in the Court. In the meantime some amounts of cash had been realised in the course of the execution, and the Munsif ordered on the same date that the execution case be dismissed on part satisfaction with cost. The next step taken was the presentation on 23rd December, 1935, of the application to execute the decree out of which the present appeal arises. Notices were issued to the judgment-debtors named in the application under Order XXI, rule 22, of the Civil Procedure Code. Thereafter the names of five of the judgment-debtors named in the application were expunged from it.

It is contended that the Civil Court had no jurisdiction to execute the decree at all, the order of transfer to the Civil Court having been incompetent.

As against the objection that the transfer of the application to the Civil Court was without jurisdiction, Mr. De for the respondent points out that this very matter was agitated and was decided against the judgment-debtors in the earlier execution, that an appeal was presented from that decision and failed, and, therefore, he contends that it is no longer open to the judgment-debtors to raise it, the principle of res judicata being a bar to the contention. On this point Mr. De's argument must be accepted. It is supported by the decision of the Privy Council in *Bindeswari Charan Singh* v. *Thakur*

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Bageshwari Charan Singh (1). The Court before whom the previous execution was presented may or may not have taken a wrong view of law, but the same parties are not entitled to agitate that matter again between themselves.

The next and principal objection taken is that the application to execute the decree having been presented on 23rd December, 1935, whereas the decree was obtained on 11th July, 1932, is barred by limitation under the provisions of section 181 of the Chota Nagpur Tenancy Act, which prescribes a three years' period from the date on which the decree or order is signed. The Munsif allowed this objection holding that the application was a fresh application in execution presented after the period of three years laid down in the statute.

As to this point, Mr. De, for the respondent, has contended that section 181 of the Chota Nagpur Tenancy Act has no application to this case. He argues that the suit having been transferred to the Civil Court, the decree-holder is entitled, subject to the provisions of Article 182 of the Schedule to the Indian Limitation Act, to execute his decree at any time within twelve years of its passing, under section 48 of the Civil Procedure Code.

It is necessary therefore to say something on the question of the legality of transferring decrees of the Deputy Commissioner to the Civil Court for execution and the consequences of such transfers. The transfer purported to be made under section 182 of the Chota Nagpur Tenancy Act, the terms of which are—

"A decree or order passed by a Deputy Commissioner under this Act may be executed either by his own Court or by any other prescribed Court."

"Deputy Commissioner" in this section includes any Deputy Collector trying a rent suit; and a

(1) (1935) I. L. R. 15 Pat. 203, P. C.

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"prescribed Court", under the Government notification, includes the successor in office of the Deputy Commissioner who passed the decree, and includes any court to which the Deputy Commissioner of the district transfers the application for execution; "Deputy Commissioner of the District" is explained as meaning the actual Deputy Commissioner for the time being. For the appellants it is contended that this power of transferring only extends to transferring an execution application to a Revenue Officer having powers under the Chota Nagpur Tenancy Act. A doubt was expressed by Macpherson, J. in *Maharaja Pratap Udai Nath Sahi Deo* v. *Baraik Lal Sahi*(1) whether the Deputy Commissioner of the district himself had power to transfer the decree of a Revenue Officer to the Court of a Munsif; but the point was not directly before him, as in that case the Deputy Commissioner of the district had not passed any such order of transfer. I may, however, point out that if nothing more than transfer from one revenue Court to another is authorised by section 182 and the notification, these provisions appear superfluous for such transfers can be made under other sections of the Act.

The expression "Deputy Commissioner" is used generally in the Act in referring to the Court dealing with suits and applications under the Act and is thus defined in section 3 (*viii*)—

'"Deputy Commissioner," in any provision of this Act includes—

(*a*) any Revenue-officer or Deputy Collector who is specially empowered by the Local Government to discharge any of the functions of a Deputy Commissioner under that provision; and

(*b*) any Deputy Collector to whom the Deputy Commissioner may, by general or special order, transfer any of his functions under that provision.'

In section 137 a general power is given to the Deputy Commissioner to withdraw any suit (application

(1) (1936) I. L. R. 15 Pat. 439.

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or proceeding) from any Deputy Collector or Revenue Officer who is exercising powers of the Deputy Commissioner under this Act, and to try it himself or transfer it to any Deputy Collector. Perhaps "the Deputy Commissioner" in this context means the Deputy Commissioner of the District; if not, there would seem to be some overlapping of this section with section 269 which runs :—

"A Revenue-officer may at any time transfer any pending suit, application or proceeding under this Act from the file of any Revenue-officer acting under this Act to the file of any other Revenue-officer so acting who is duly authorized to entertain and decide such suit, application or proceeding."

When there is such abundant power of transfer to a "Deputy Commissioner", Deputy Collector or Revenue Officer, it would appear that section 182 and the notification regarding maintainability of an execution case in a prescribed Court must be given a wider meaning. In *Chandra Nath Tewari* v. *Protap Udai Nath* (1) reference was made to possible execution proceedings "in the ordinary Civil Court" or "in a Civil Court competent to execute such a decree" and although the words there used may be considered to be of the nature of obiter dicta, it is said to be the ordinary practice that the Civil Court accepts and deals with execution cases transferred to it by the Deputy Commissioner of the District. It is impossible to say that only a rent Court or Deputy Commissioner can hear proceedings under the Act: for the Act itself provides instances of the contrary. Section 87 (*1*), first proviso, empowers the Revenue Officer, subject to section 264 and rules, to transfer certain cases to a competent Civil Court for trial; section 182 and the notification thereunder do not in terms restrict the power of transfer to a power of transfer to a revenue Court; section 139, which gives to the Deputy Commissioner exclusive jurisdiction (save as otherwise provided in the Act) over certain classes of

(1) (1913) 18 Cal. W. N. 170.

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cases, contains a proviso (inserted in 1920) that the Deputy Commissioner may, subject to rules, transfer suits or applications to a competent Civil Court. It does not, therefore, appear that the judgment-debtors could have succeeded on their objection to the jurisdiction of the Civil Court to entertain the execution, even if this objection had been open to them in the present proceeding.

Mr. De further argued that the result would be that once an application is before a Civil Court it will lose its character as a proceeding under the Act and will be governed by all the rules and statutes which regulate the procedure of the Civil Court, including the Civil Procedure Code (section 48), the Limitation Act (Articles 182 and 181) rather than the Chota Nagpur Tenancy Act (section 181 and section 231 to which I shall come later). He presses on our notice the difficult position which might arise for a decree-holder should a different view be taken, and refers to *Pathak Harbans Singh* v. *Thakur Jagdishwar Dayal*(1), a decision affirmed by the Judicial Committee of the Privy Council in *Jagdishwar Dayal Singh* v. *Dwarka Singh* (2). In that case the plaintiffs who were among the persons interested in the tenure, not having been impleaded in a rent suit, recovered possession of their shares which had been sold at an auction sale purporting to be held under section 208. In the course of his judgment Das, J. (with James, J. concurring) had said " Now if I am right in saying that a rent suit could not be instituted against defendants nos. 2, 3 and 4, then it must follow that the Deputy Commissioner's Court had no jurisdiction to pass a rent decree against defendants nos. 2, 3 and 4 ".

The above decision was affirmed by the Judicial Committee of the Privy Council in *Jagdishwar*

(1) (1929) I. L. R. 8 Pat. 620.
(2) (1933) I. L. R. 12 Pat. 626, P. C.

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Dayal Singh v. *Pathak Dwarka Singh*(1), and at one place in their judgment their Lordships have referred to the sale as being "not made under this Chapter" (Chapter XVI) and "outside the jurisdiction of the Court."

Following that decision, Macpherson, J., in *Raja Sri Sri Jyoti Prasad Singh Deo Bahadur* v. *Tara-Sankar Chattarji*(2), said that a sale of a tenancy purporting to be under section 208, but in a case in which the conditions of that section were not satisfied, was entirely without jurisdiction, and he said "the sale of the tenancy under section 208 being without jurisdiction did not affect the interest of any of the judgment-debtor". Mr. De says that if these words are given their full meaning, then a decree obtained by a landlord in circumstances which did not entitle him to proceed to sale of the tenure under section 208, would appear not to be executable under Chapter XVI of the Act at all, and that if taken in the character of a decree for money it should be executable according to the procedure of the ordinary Civil Courts in executing money decrees. That contention seems to be founded in part on the language used in *Chandra Nath Tewari* v. *Protap Udai Nath*(3) above cited but mainly on the words I have cited from the judgment of Das, J. But the expressions "rent suit" and "rent decree" are popular expressions which can be used in more than one sense; and before pressing the dictum of Das, J. to what may appear its logical conclusion we must be sure what the words mean in this context. Rent is defined in the Act, section 3(*xxiii*):—

"'Rent' means whatever is lawfully payable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant, and includes all dues (other than personal services) which are recoverable under any enactment for the time being in force as if they were rent.'"

(1) (1933) I. L. R. 12 Pat. 626, P. C.
(2) (1933) I. L. R. 12 Pat. 799.
(3) (1913) 18 Cal. W. N. 170.

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Every suit to recover money due on account of rent is in one sense a rent suit; where several tenants are joint promisors, such a suit can be instituted against one or more of them and decreed for the entire sum due as held in *Maharaja Kesho Prasad Singh* v. *Shamnandan Rai*(1) and many other cases. Such a suit is cognizable by the rent court only, section 139(*3*), and it is impossible to believe that the learned Judge thought that such a suit could not be instituted or could not be decreed. What he was dealing with was the consequences of the decree passed, which might be a decree both against the judgment-debtor and against the holding or tenure, or a decree against the judgment-debtor only. The context makes it clear that by the words "rent decree" a decree binding on the tenure was intended; and he meant that the Court could not pass a decree executable under section 208.

It does not follow that the Court's decree is not executable under the rent Act, because it is a decree against the judgment-debtor and not against the holding or tenure, and is found to be not executable by sale of the tenure under section 208. The claim for money due on account of rent, which was the cause of action in the suit, is one in respect of which section 139 of the Chota Nagpur Tenancy Act confers exclusive jurisdiction on the Deputy Commissioner, i.e., on the rent court. But it is not the only kind of suit over which that Court has exclusive jurisdiction. Suits for arrears of anything payable in respect of pasturage, forest produce, fishery, etc., are exclusively cognizable by the Revenue Court; but decrees passed in such suits may in many, if not all, cases be only executable as personal decrees. Suits against agents employed in the management of land for money received or for accounts are also exclusively cognizable in the Revenue Court. These suits can only in the last resort issue in the passing of a decree for payment of money. Section 142(*1*)(*a*) permits a co-sharer landlord to sue to recover from a tenant his

(1) (1925) I. L. R. 5 Pat. 233, P. C.

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share of the rent. In such a suit the remedy under section 208 is not open to him, but the decree does not cease to be a decree under the Act. I need not multiply instances but may turn next to the provisions of the Act dealing with execution. There are a number of remedies provided, besides the special remedy given in section 208.

The first section dealing with the method of execution is section 184, which enacts that processes may be issued

> "against either the person or the property of a judgment-debtor but shall not be issued simultaneously against both person and property;"

succeeding sections provide exemption of certain particulars from attachment (section 186), methods of seizure and sale of moveable property (sections 187, etc.), and of execution by arrest (section 191). It, therefore, by no means follows that because a decree can only be executed as a money decree its execution is not governed by the provisions of Chapter XVI. There is, furthermore, provision in section 198 permitting execution of a decree of the Deputy Commissioner for payment of money (not being money due or recoverable as an arrear of rent) to be under certain conditions carried out by bringing to sale the immovable property of the debtor in accordance with the provisions of section 210. If the permission of the Deputy Commissioner is obtained under this section, it would seem that a sale could be held under section 210 notwithstanding that sale under section 208 had not been or could not be first resorted to.

Except for the observations of Das, J. which, as we have seen, can be explained, there is nothing in the decisions of this Court and of the Privy Council in *Pathak Harbans Singh's* case(1) bearing on the matter before us. We were shown a number of decisions regarding sales held in execution of

(1) (1933) I. L. R. 12 Pat. 626, P. C.

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decrees passed in rent suits against some only of the tenants, and the interpretation placed on the Privy Council's pronouncement by Macpherson, J. in *Jyoti Prasad Singh Deo Bahadur* v. *Tarasankar Chattarji*(1) was referred to. Whether that interpretation is warranted by the earlier decision seems to have been doubted by James, J. and Dhavle, J. in *Bhagbat Prasad* v. *Sudarsan Bhagat*(2) and the precise effect of a non-joinder on a rent sale may require to be further examined, when necessary. But on any view as to the validity of a sale purporting to be under section 208, I can find nothing in any of these decisions to support the proposition that unless the decree-holder is allowed to execute his decree by a procedure foreign to the Act he is left without a remedy at all. There are other remedies under the Act.

Moreover, we are not without direct authority as to the procedure governing execution of a decree passed under the Act when it has been transferred to a Civil Court for execution. In *Firm Nayamat Ram Pujara Lal* v. *Lal Rameshar Nath Sha Deo*(3) the contention was raised that by getting his decree transferred to the Civil Court a decree-holder could avoid the restrictions and limitations governing execution under the Act, in particular section 181A. The contention was negatived. The decision in *Sudhanyya Kumar Poddar* v. *Gouranga Chandra*(4) supports the view there taken. In *Maharaja Pratap Udai Nath Sahi Deo* v. *Baraik Lal Sahi*(5), above cited, Macpherson, J. was of opinion that the limitation for an application to execute a decree would be that provided by section 181 of the Act even if the decree had been lawfully transferred to a Civil Court for execution. Following these decisions, I hold that

(1) (1933) I. L. R. 12 Pat. 790.
(2) (1937) I. L. R. 16 Pat. 643.
(3) (1927) 9 Pat. L. T. 678.
(4) (1917) 41 Ind. Cas. 542.
(5) (1936) I. L. R. 15 Pat. 439.

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section 181 bars the execution if it is a fresh application.

But it is contended by Mr. De that this is no fresh application but merely a continuation or revivor of the execution previously instituted in which proceedings were taken up to 16th April, 1934. Mr. De relies on *Qamaruddin Ahmad* v. *Jawahir Lal*(1) in which it was held that a decree-holder, who had for a longish period been prevented from pursuing an execution owing to objections which had been allowed in the Court below, but of which he finally obtained the dismissal in appeal, was not compelled to institute a fresh execution but could be permitted to revive the proceedings which might be regarded as being suspended while the parties were litigating as to their maintainability, notwithstanding that an order had been passed by the executing Court which was represented as being an order finally disposing of the execution. Their Lordships considered the terms of that order and said that it was in no sense a final order. The decision of their Lordships, therefore, was based partly on the terms of the order and partly on the circumstances of the case. We have been referred to a number of cases in which a prayer to treat previous executions as being merely suspended and revived has been either allowed or refused; but most of these cases seem to lay down no new principle and it will be sufficient to refer to the Full Bench decision of the Allahabad High Court in *Mohammad Taqi Khan* v. *Raja Ram*(2). The Full Bench considered an order passed in the following terms:

"Execution struck off for partial satisfaction of the decree; costs on judgment-debtor."

This order was read by the Judges as being a final order, and it was held that limitation applied accordingly and that the succeeding application to

(1) (1905) I. L. R. 27 All. 334, P. C.
(2) (1936) A. I. R. (All.) 820, F. B.

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execute the decree was to be treated as a fresh application. I think the circumstances of that case are more analogous to those before us than the circumstances of the Privy Council decision which I have cited. The order of 16th April, 1934, was to the effect that the execution case be dismissed on part satisfaction with costs; and it is difficult to distinguish the form of this order from that which was before the Full Bench in the Allahabad High Court. A similar order was considered by a Division Bench of this Court in *Maharaja Pratap Udai Nath Sahi Deo* v. *Thakur Jagat Udai Nath Sahi Deo*(1) (decided on 22nd April, 1938, by Fazl Ali and Chatterji, JJ.). Here, as in the case before us, the occasion for stopping the execution proceedings was that the Commissioner had passed an order prohibiting the sale under section 2(*b*) of the Chota Nagpur Encumbered Estates Act, the holder of the property having applied for protection. The Deputy Collector, before whom the execution proceedings were pending, passed an order striking off the execution. Against that order an appeal was preferred to the High Court, because, if that order stood, it was apprehended that the execution proceedings having been finally disposed of, a subsequent application to execute would be considered to be barred by limitation. Their Lordships in this Court thought it necessary to interfere and vacated the order passed by the Deputy Collector. In lieu thereof they directed

> "the proceedings will be restored and will remain pending till the final order is passed upon the application made by the judgment-debtors under section 2 of the Chota Nagpur Encumbered Estates Act."

No such thing was done in the case before us. The order of the Munsif, dated 16th April, 1934, on its face was an order finally disposing of the execution case. The Munsif was not moved to review that order, nor was any appeal presented to any superior

(1) (1938) M. A. 267 of 1937 (Unreported).

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court to revise or vacate it. In my opinion, it was a final order disposing of the execution, and the application presented on 23rd December, 1935, must be considered to be a new application and to be barred by limitation.

Assuming that we took another view and held that the former execution was merely suspended from 16th April, 1934, onwards, then on that view it would be necessary to see what was the period of limitation governing an application to revive and resume the old execution proceeding. According to Mr. De the proceedings of the Civil Procedure Code and the Limitation Act having become applicable to this case by virtue of its transfer to the Munsif, he would have three years from the 16th April, 1934, to present an application to renew the old execution. But if the whole of these proceedings are governed by the Chota Nagpur Tenancy Act, then limitation also will be in accordance with that Act. In the Limitation Act an application of this nature is dealt with under the residuary Article 181, in which the period is three years. Section 230 of the Chota Nagpur Tenancy Act applies the provisions of the Indian Limitation Act to suits, etc., under the Act "so far as they are not inconsistent with this Act". Where the two Acts differ the intention clearly is that the special and local Act is to prevail. There is a residuary provision in the Chota Nagpur Tenancy Act—section 231. Subject to certain exceptions entered in the proviso, the section enacts that all suits and applications under the Act, for which no period of limitation is provided elsewhere in the Act, are to be commenced and made respectively within one year from the date of the accruing of the cause of action.

I need not repeat my reasons for holding that the present proceedings are proceedings under the Tenancy Act and are governed by its provisions, including those fixing special periods of limitation. It is clear that section 231 must apply; that the last

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date for the respondent to present an application was 16th April, 1935, and that on this computation he is more than six months beyond time, even if this can be treated as an application to restore the previous execution.

The result is that I would allow the appeal, set aside the order of the Subordinate Judge and restore that of the Munsif. The appellant will have his costs here and below.

VARMA, J.—I agree.

Of the two points urged by Mr. Chowdhury, one on the question of limitation and the other that the decree by a rent suit Deputy Collector cannot be executed by a Munsif of a Civil Court, I do not want to take much time over the latter question, because, as has been pointed out by my learned brother, the appellant is estopped by the principle of res judicata.

So far as the question of limitation is concerned, Mr. Chowdhury has relied upon sections 181 and 231 of the Chota Nagpur Tenancy Act. In order to meet the argument of Mr. Chowdhury, Mr. De has tried to show that the procedure before the Munsif would be governed by the Civil Procedure Code and not the Chota Nagpur Tenancy Act, and for that purpose he has relied in his argument to a very great extent upon the interpretation placed on the Privy Council decision in *Jagdishwar Dayal Singh* v. *Pathak Dwarka Singh*(1) *in Raja Jyoti Prasad Singh Bahadur* v. *Tarasankar Chattarji*(2) in this Court. In that case their Lordships of the Judicial Committee were dealing with the facts of that particular case and also with the decision of this Court which went in appeal before them. All the parties were not represented in the suit and their Lordships came to the conclusion that the sale that took place was not a sale under section 208 of the Chota Nagpur Tenancy Act, on the principle that the tenure was

(1) (1933) I. L. R. 12 Pat. 626, P. C.
(2) (1933) I. L. R. 12 Pat. 799.

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not fully represented before the Court. I would like to quote the observations of their Lordships as to the result of a decree in which the tenure is not fully represented. Towards the latter portion of their judgment they say, after giving their opinion, as follows:—

"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. 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,'";

Then comes the important portion of the decision, as to what would be the result of a decree in which the tenure is not fully represented—

"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".

I was a party to the decision in *Manki Kanak Ratan Singh* v. *Sundar Munda*(1) in which this case was referred to, but that appeal was decided especially with reference to section 11 of the Chota Nagpur Tenancy Act, as to what the effect will be if a landlord's name is not registered.

I agree that the appeal should be allowed and the judgment of the lower appellate Court set aside and that of the learned Munsif restored.

S. A. K.

Appeal allowed.

(1) (1938) S. A. 660 of 1934 (unreported).

APPELLATE CIVIL.

Before James and Rowland, JJ.

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v.

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Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 48—"*decree sought to be executed*", *meaning of—Limitation Act,* 1908 (*Act IX of* 1908), *article* 182(4)—*section* 48 *of the Code, whether affected by article* 182(4)—*amendment of decree—period of twelve years under section* 48, *whether is to be calculated from the date of amended decree.*

Section 48, Code of Civil Procedure, 1908, is not controlled by the provisions of Article 182(4) of the Limitation Act, 1908, and, therefore, the amendment of a decree does not afford a new starting point for limitation so as to extend the period of twelve years fixed by section 48.

Faqir Chand v. *Kundan Singh*(1), *Ganesh Das* v. *Vishan Das*(2), *Narsingrao Konher Inamdar* v. *Bando Krishna Kulkarni*(3), *Narendra Bahadur Singh* v. *Oudh Commercial Bank, Ltd.*(4) and *Khulna Loan Co.* v. *Jnanendra Nath Bose*(5), followed.

Baldeo Shukul v. *Syed Yusuf*(6), not followed.

Ram Ranbijaya Prasad Singh v. *Kesho Prasad Singh*(7) and *Muhammad Suleman Khan* v. *Muhammad Yar Khan*(8), distinguished.

Appeal by the decree-holders.

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

* Appeal from Original Order no. 302 of 1937, from an order of Babu Jugal Kishore Narayan, Subordinate Judge of Gaya, dated the 16th August, 1937.

(1) (1932) I. L. R. 54 All. 622.
(2) (1935) A. I. R. (Lah.) 292.
(3) (1918) I. L. R. 42 Bom. 309.
(4) (1934) I. L. R. 10 Luck. 208.
(5) (1917) 22 Cal. W. N. 145, P. C.
(6) (1921) 60 Ind. Cas. 318.
(7) (1938) 19 Pat. L. T. 424.
(8) (1894) I. L. R. 17 All. 39.

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Sir Sultan Ahmed and *Syed Hasan*, for the appellant.

Sir M. N. Mukherji (with him *P. C. Manuk*, *Sarjoo Prasad*, *Rai G. S. Prasad*, *Rai Paras Nath*, *R. J. Bahadur*, *G. C. Das* and *N. K. Prasad II*), for the respondents.

ROWLAND, J.—The only point for decision is whether as held by the Subordinate Judge the application presented to him for execution of a mortgage decree by sale of the mortgaged properties was barred by time. The Subordinate Judge was of opinion that section 48 of the Code of Civil Procedure was a bar. The plaintiff (now decree-holder) had sued on three mortgage bonds and obtained a preliminary decree dated 23rd June, 1922, for approximately Rs. 42,000. The decree mentioned as usual a period of grace which having expired the decree-holder applied for and obtained a decree absolute for sale dated the 19th December, 1923. He applied to execute this decree on 16th August, 1926, and was met by an objection on behalf of some of the judgment-debtors that the decree in the form in which it had been drawn was not executable because the debts due on the three mortgage bonds were separate debts secured on different items of property and the amounts for which the several properties were liable must be specified in the decree before it could be executed. The Subordinate Judge disallowed this objection, but on appeal this Court on 3rd August, 1928, reversed that decision and said, referring to the judgment in the original suit, that the decree as it stood could not be executed and the Subordinate Judge must proceed to execute the decree substantially as three decrees. That being so, the order of the lower Court directing execution to proceed was set aside and the case remanded for disposal according to law. Thereafter on 15th September, 1928, the decree-holder suffered the execution to be dismissed for default. He next applied in 1930 for amendment of the decree which

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was duly ordered to be done on 16th July, 1930. Subsequently he found that some further amendment was necessary and obtained orders to that effect on 27th August, 1932, and 24th September, 1932. On 8th July, 1933, he made his second application to execute the decree and this application was dismissed on 20th June, 1934, for default in prosecution. The third application to execute the decree was presented on 2nd January, 1937, and is the application against which the objection under section 48 of the Code of Civil Procedure has been allowed by the Subordinate Judge. The Subordinate Judge was of opinion that the period of twelve years began to run from the 19th December, 1923, the date of the decree absolute and expired in December, 1935.

For the appellants reference is made to the words in section 48—

"twelve years from the date of the decree sought to be executed"

and it is said that when there was no executable decree in existence before the 16th July, 1930, the decree sought to be executed must be considered to be of that date and twelve years will run from that date and it has further been suggested that the 24th September, 1932, again gives a starting point available to the decree-holder for computing the period of twelve years laid down in section 48. In support of this contention reference is made to *Baldeo Shukul* v. *Syed Yusuf*(1) where a single Judge of this Court took the view that the words "decree sought to be executed" must include the amended decree. The learned Judge did not quote authority for his view, but he referred to what was generally understood to be the law under the old Limitation Act when Article 179 had to be construed. It may be that the learned Judge was referring to such decision as that in *Muhammad Suleman Khan* v. *Muhammad Yar Khan*(2) in which, although Article 179 as it then

(1) (1921) 60 Ind. Cas. 318.
(2) (1894) I. L. R. 17 All. 39.

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stood contained no reference to the date of the amended decree as distinct from the date of the decree itself, the date of decree had been held for the purposes of that Article to mean or at least to include the date of the amended decree where there had been an amendment. It may be noticed here that subsequent to that decision both the Limitation Act of that time and the Code of Civil Procedure have been repealed and their place taken by new enactments. Article 182 which takes the place of Article 179 in the Limitation Act has been amplified and now makes specific provisions for a period of three years' limitation to run from the date of an amended decree where there has been an amendment. In section 48 on the other hand the words are—

"date of decree sought to be executed"

without any qualifying reference to possible amendments subsequent to the date of the original decree. It has, therefore, been argued for the respondents that in construing section 48 we ought to limit ourselves to examination of the provisions of the Code itself and not import the provisions of other enactments, more particularly Article 182 of the Limitation Act which by its own terms applies only to the period for execution of a decree or order not provided for by section 48 of the Code of Civil Procedure. In support of this view we have been referred to decisions of the High Courts in Bombay, Allahabad, Calcutta, Lahore and the Chief Court of Lucknow. In Bombay the matter came under consideration in *Narsingrao Konher Inamdar* v. *Bando Krishna*(1). In this case the decree had been passed under the old Code and the Court considered the words in section 205—

"the decree shall bear date the day on which the judgment was pronounced".

It was said that this language was imperative and was designed' to meet precisely a case of this sort

(1) (1918) I. L. R. 42 Bom. 309.

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where owing to certain oversights or irregularities a delay has intervened between the delivery of the judgment and the formal drawing of a correct decree. This was said notwithstanding that the decree which was at first drawn was incapable of execution until it was amended. I may in passing mention that this case was not apparently brought to the notice of the learned Judge of this Court who decided *Baldeo Shukul* v. *Syed Yusuf*(1). Both those decisions were examined in *Faqir Chand* v. *Kundan Singh*(2) where the learned Judges drew special attention to the wording of the first column of Article 182 and held that the amendment of a decree does not give a new date for starting a period of limitation if the application for execution is beyond the period of twelve years allowed by section 48. That is, the period of twelve years under section 48 is final and cannot be extended by any amendment of the decree. The view of the Lahore High Court is expressed in *Ganesh Das* v. *Vishan Das*(3) in which the above Bombay and Allahabad decisions were considered and approved; and the Allahabad decision was also followed by the Chief Court of Oudh in *Narendra Bahadur Singh* v. *Oudh Commercial Bank, Ltd.*(4). In Calcutta a similar view was taken in a decision apparently unreported but which was taken on appeal to His Majesty in Council and the judgment of the Judicial Committee is reported in *Khulna Loan Co.* v. *Jnanendra Nath Bose*(5). The report shows that the Subordinate Judge had proceeded on the view that the period of twelve years provided in the case of a decree does not certainly begin to run until the decree becomes operative and capable of execution; but the High Court took the opposite view observing "The terms of section 48 seem to us to be perfectly

(1) (1921) 60 Ind. Cas. 318.
(2) (1932) I. L. R. 54 All. 622.
(3) (1935) A. I. R. (Lah.) 292.
(4) (1934) I. L. R. 10 Luck 208.
(5) (1917) 22 Cal. W. N. 145, P. C.

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clear, and according to that section time runs from the date of the decree. The date of the decree is fixed by Order XX, rule 6, and we cannot understand how there can be any other date of the decree, from which limitation should run". Their Lordships in the Judicial Committee simply stated that they saw no reason to differ from the judgment of the High Court.

I think that we are bound to follow these authorities and cannot hold that time for the purposes of section 48 is to be calculated from a date prescribed elsewhere than in that section. I should, however, state that we have been referred to a recent decision of this Court in *Ram Ranbijaya Prasad Singh* v. *Kesho Prasad Singh*(1) which is said to favour a different view. The facts in that case are not quite on all fours with those before us, for the question there was whether the starting point for the period of twelve years under section 48 was the date of the decree of the original Court or the date of the final order of the appellate Court. The point decided was that time would run from the final order of the appellate Court, and in the course of the judgment reference is made to Article 182 in support of that proposition. The learned Judges did not say that the decree sought to be executed in section 48 was the decree of the appellate Court as has been sometimes held; if that had been their reading of the scope of section 48, then it would not have been necessary to invoke Article 182 in the determination of the starting point for limitation under section 48 in cases where there has been an appeal. But whether the observations in *Ram Ranbijaya Prasad Singh* v. *Kesho Prasad Singh*(1) are in their entirety correct or not with reference to Article 182(*2*), I do not think we are to treat those observations as applicable to cases falling within all the sub-clauses of article 182. Such a view would have a surprising result, if applied to

(1) (1938) 19 Pat. L. T. 424.

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article 182(5), and one which I do not think can have been intended by the learned Judge. So I think we should not regard these observations as applying to sub-clause (4) or any other sub-clause than (2). And in dealing with the matter before us, I feel no doubt that we ought to follow the current of authority in Bombay, Allahabad, Lahore, Calcutta and Lucknow and to hold that the application presented on the 2nd January, 1937, to execute the decree dated 19th December, 1923, was barred by section 48 of the Code of Civil Procedure.

I would dismiss this appeal with costs to each set of contesting respondents.

JAMES, J.—I agree to the order proposed by my learned brother and I agree with his view that we must regard ourselves as bound by the current of authority on this question to accept as correct the view of the learned Subordinate Judge, although if the matter were *res integra* I should feel more difficulty. In *Muhammad Suleman Khan* v. *Muhammad Yar Khan*(1) the Allahabad High Court was dealing with Articles 178 and 179 of the Limitation Act of 1877. Sir Sultan Ahmad for the appellants suggests that section 230 of the former Code of Civil Procedure would also have applied to that case; but the application in execution with which the learned Judges were dealing had been made within twelve years of the original decree so that whether the provisions of section 230 applied or whether they did not, the Court in that particular case was not required to consider them. Sir Sultan Ahmad suggests that the remark with which the judgment ends, that with regard to any future application in execution paragraph 4 of the third column of Article 179 contains the limitation which will be applicable, implies that the learned Judges had considered the question of whether after twelve years from the date of the original decree

(1) (1894) I. L. R. 17 All. 39.

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execution would or would not be barred by the provisions of section 230. If it had been clear that section 230 did apply to that particular case, the decision would have been of considerable authority in support of Sir Sultan Ahmad's view, because any obiter dictum of Sir John Edge is to be treated with respect; but it is not clear that section 230 did apply in this case at all.

In 1908, when both of these Acts were repealed and re-enacted, a new section 48 of the Code of Civil Procedure took the place of old section 230; and Articles 181 and 182 took the place of Articles 178 and 179 of the schedule in the Limitation Act. Article 182 was amended in such a manner as to give statutory authority to the decision of Sir John Edge and Mr. Justice Banerji; but applications governed by section 48 of the Code of Civil Procedure were excluded from its operation; and section 48 merely said that limitation was to run from the date of the decree of which execution was sought. In favour of the appellants' view we have the decision of a single Judge of this Court in *Baldeo Shukul* v. *Syed Yusuf*(1); but the Allahabad High Court expressly dissented from that decision in *Faqir Chand* v. *Kundan Singh*(2) and the weight of authority in general appears to be against it. I find some difficulty in treating the decision of this Court in *Ram Ranbijay Prasad Singh* v. *Kesho Prasad Singh*(3) in the manner in which Sir Sultan Ahmad suggests, as authority for the view that in looking for the starting point for limitation under section 48 of the Code of Civil Procedure we must apply the conditions laid down in Article 182 of the schedule to the Limitation Act. In that case the learned Judges were dealing with paragraph 2 of the third column of the schedule and not with paragraph 4; but I find it difficult to act upon

(1) (1921) 60 Ind. Cas. 318.
(2) (1932) I. L. R. 54 All. 622.
(3) (1938) 19 Pat. L. T. 424.

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the general proposition that the provisions of Article 182 should be held in any way to affect section 48 of the Code of Civil Procedure. The provisions of Article 182 cannot be read into Article 183, as is clear from the decision of the Judicial Committee of the Privy Council in *Abdul Majid* v. *Jawahir Lal*(1) wherein it was held that the decision of the appellate court could only afford a new starting base for limitation under Article 183 when there was a decree of the appellate court in which the original decree merged; and if Article 182 cannot be invoked to find the starting point for the twelve years' rule of limitation prescribed by Article 183, it appears to me difficult to hold that it can be invoked to find the starting point for the twelve years' rule under section 48 of the Code of Civil Procedure, since Article 182, prescribing the three years' rule for petitions of decree-holders in execution, is expressly excluded from application where the twelve years' rule may apply, under Article 183 of the schedule or section 48 of the Code of Civil Procedure. In *Khulna Loan, Co.*, v. *Jnanendra Nath Bose*(2) their Lordships of the Judicial Committee approved of the decision that the period of twelve years under section 48 ran, not from the date when the decree became operative and capable of execution, but from the date of the decree; and I consider that the decisions of the Allahabad High Court in *Fakir Chand* v. *Kundan Singh*(3), of the Bombay High Court in *Narsingrao Konher Inamdar* v. *Bando Krishna*(4) and of the High Court at Lahore in *Ganesh Das* v. *Vishan Das*(5) leave us no option but to hold that the view taken by the learned Subordinate Judge was right and to dismiss the appeal.

S. A. K.

Appeal dismissed.

(1) (1914) I. L. R. 36 All. 350, P. C.
(2) (1917) 22 Cal. W. N. 145, P. C.
(3) (1932) I. L. R. 54 All. 622.
(4) (1918) I. L. R. 42 Bom. 309.
(5) (1935) A. I. R. (Lah.) 292.

APPELLATE CIVIL.

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February, 14, 15.

Before Fazl Ali and Manohar Lall, JJ.

SATNARAIN PRASAD CHOUDHURY

v.

MAHABIR PRASAD CHOUDHURY.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 73 *and Order XXI, rule* 55—*money deposited by judgment-debtor under rule* 55 *for satisfaction of a particular decree, whether is asset available for rateable distribution among other creditors.*

A sum of money paid into Court by a judgment-debtor, under Order XXI, rule 55, Code of Civil Procedure, 1908, to satisfy the decree of certain creditors at whose instance his property has been attached is an asset available for rateable distribution among his other creditors under section 73 of the Code.

Where there are several decrees outstanding against a judgment-debtor, and all the requirements of section 73 are complied with, the judgment-debtor cannot prevent rateable distribution by merely earmarking his payments for the benefit of one of the decree-holders.

Bhattoo Singh v. *Raja Raghunandan Prasad Singh*(1), *Noor Mahomed Dawood* v. *Bilasiram Thakursidass*(2), *Ghisulal Agarwala* v. *Todermall Agarwala*(3) *Hari Charan Roy Chaudhury* v. *Birendra Nath Saha*(4), *Chittagong Urban Co-operative Bank, Ltd.* v. *The Indo Burma Trades Bank, Ltd.*(5), *Thireviyam Pillai* v. *Lakshmana Pillai*(6), *Sidhnath Tewari* v. *Tegh Bahadur Singh*(7), *Nathmal Ghamirmal* v.

*Appeal from Appellate Order no. 252 of 1938 with Civil Revision no. 582 of 1938, from a decision of R. B. Beevor, Esq., I.C.S., District Judge of Muzaffarpur, dated the 29th June, 1938, affirming a decision of Babu Ram Anugrah Narayan, Subordinate Judge of Muzaffarpur, dated the 28th May, 1938.

(1) (1933) I. L. R. 12 Pat. 772.
(2) (1919) I. L. R. 47 Cal. 515.
(3) (1921) 70 Ind. Cas. 539.
(4) (1921) 70 Ind. Cas. 541.
(5) (1938) 42 Cal. W. N. 840.
(6) (1917) I. L. R. 41 Mad. 616.
(7) (1932) I. L. R. 54 All. 516.

Maniram Radhakisson(1) and *Indaji Majaji* v. *Coovarji Nowroji Gamadia*(2), followed.

Sorabji Coovarji v. Kala Raghunath(3), *Firm of Haji Umar Sharif* v. *Rodba*(4) and *Administrator-General of Burma* v. *M. E. Moolla*(5), not followed.

Radha Mohan v. *Musammat Wahidan*(6), referred to.

Per MANOHAR LALL, J.—It is a well-known rule of construction that each part of a statute should be endeavoured to be construed in such a way that there may be no conflict with any part, if it can be done without doing any violence to the plain meaning of the language adopted by the legislature. If rule 55(*a*) is so read along with section 73 it seems clear that the decree can only be satisfied if the amount is available to the decree-holder in full satisfaction of his decree.

Appeal by the judgment-debtors.

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

S. K. Mitter, for the appellants.

A. K. Mitter, for the respondents.

FAZL ALI, J.—The question to be decided in this appeal is whether a certain sum of money paid in Court by a judgment-debtor to satisfy the decree of certain creditors at whose instance his property has been attached is an asset available for rateable distribution among his other creditors under section 73 of the Code of Civil Procedure. This question arises upon the following undisputed facts :—

The appellants being judgment-debtors under several decrees for money, one of the decree-holders, namely, Mahabir Choudhury, proceeded to attach some of their properties in execution of his decree.

(1) (1919) 21 Bom. L. R. 975.
(2) (1925) 28 Bom. L. R. 237.
(3) (1911) I. L. R. 36 Bom. 156.
(4) (1925) A. I. R. (Nag.) 157.
(5) (1927) I. L. R. 5 Rang. 573.
(6) (1934) I. L. R. 13 Pat. 446.

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The appellants in order to pay up the decree deposited in Court on various dates several sums of money aggregating to Rs. 2,472-12-0 which, if there had been no other dues outstanding against them, would have fully satisfied this particular decree. All these deposits, however, were made after two other creditors of the appellants, who had also obtained decrees against them, had applied for rateable distribution under section 73 of the Code of Civil Procedure. The learned Munsif rateably distributed the amount deposited by the appellants among their three creditors and overruled their contention that as their payments had been ear-marked for the purpose of satisfying the dues of Mahabir Choudhury, their property had to be automatically released under Order XXI, rule 55. This rule provides, among other things, that where the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court the attachment shall be deemed to be withdrawn. The learned Munsif held that the entire decree of Mahabir Choudhury had not been satisfied and so the attachment must continue. The appellants after unsuccessfully appealing against the decision of the Munsif to the District Judge have now preferred this second appeal.

Now, if the case had to be decided under the Code of Civil Procedure as it stood before it was amended in 1908, there would not have been much difficulty in upholding the contention of the appellants. Indeed it appears that the precise point which has been raised in this case by the appellants was raised in *Gopal Dai* v. *Chunnilal*(1) and upon the view of the law which then prevailed it was held that the amount paid by the judgment-debtor for the satisfaction of a particular decree was not available for rateable distribution to the other decree-holders. It is to be noticed that the language of section 295 of the old

(1) (1885) I. L. R. 8 All. 67.

Code, to which section 73 of the new Code corresponds, was somewhat different from that of section 73. Under the old Code the Court could rateably distribute such assets only as were "realised by sale or otherwise in execution of the decree". In *Purshotamdass Tribhovandass* v. *Mahant Surajbhari Haribharthi*(1), Sir Charles Sargeant, C.J. expressed the view that these words must be read as if the words "from the property of the judgment-debtor" were inserted after the word "realised". That case was followed in a number of other cases and though its correctness was doubted by Sir Lawrence Jenkins in *Manilal Umedram* v. *Nanabhai Manek Lal*(2), the view which prevailed in all the High Courts was that section 295 applied only to sale-proceeds of property sold in execution of a decree and money realised in one of the modes expressly prescribed by the various sections of the Code. In 1908 the section being amended the words "wherever assets are realised by sale or otherwise in execution of a decree" have been replaced by the words "where assets are held by a Court". It is obvious that by the use of these words the legislature has considerably enlarged the scope of the section and it is no longer permissible to hold that rateable distribution must be confined only to those cases where assets are realised by sale or by some other process of execution. The words of the new section are wide enough to cover not only the money which a judgment-debtor is compelled to pay, but also money voluntarily paid into Court by him to satisfy a decree under execution. The words "assets held by a Court" obviously mean any fund in possession of a Court or at its disposal which may be applied by it for the payment of judgment-debtor's debt. It is difficult to hold that the payments made by the appellants in this case fall outside this definition.

(1) (1880) I. L. R. 6 Bom. 588.

(2) (1903) I. L. R. 28 Bom. 264.

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Now, section 73 being imperative, it is obligatory upon a Court to distribute rateably the assets held by it (irrespective of how they came into its hands) among all the creditors who are entitled to the benefit of this section. The assets are so distributable by the operation of law and there is nothing in this section or any other provision of the Code to show that the Court must deal with them in accordance with the wishes of the judgment-debtor. When, therefore, there are several decrees outstanding against a judgment-debtor, and all the requirements of section 73 are complied with, the judgment-debtor cannot prevent rateable distribution by merely ear-marking his payments for the benefit of one of the decree-holders. Thus in the present case though the payments made by the appellants were made for the satisfaction of the decretal dues of Mahabir Choudhury alone, the Munsif had to dispose of the money paid by them in the manner provided in section 73 with the result that the entire decree of Mahabir Choudhury has not been satisfied. Order XXI, rule 55, must be read subject to section 73, and if it is so read, the case before us will present no difficulty whatsoever.

The view which I have expressed is supported by the decision of a Division Bench of this Court in *Bhattoo Singh* v. *Raja Raghunandan Prasad Singh*(1) and by a number of decisions of the High Courts of Calcutta, Madras and Allahabad [*See Noor Mahomed Dawood* v. *Bilasiram Thakursidass*(2); *Chisulal Agarwalla* v. *Todermall Agarwalla*(3); *Hari Charan Roy Chaudhury* v. *Birendra Nath Saha*(4), *Chittagong Urban Co-operative Bank, Ltd.* v. *The Indo Burma Trades Bank, Ltd.*,(5); *Thiraviyan Pillai* v. *Lakshmana Pillai*(6) and *Sidnath Tewari* v. *Tegh*

(1) (1933) I. L. R. 12 Pat. 772.
(2) (1919) I. L. R. 47 Cal. 515.
(3) (1921) 70 Ind. Cas. 539.
(4) (1921) 70 Ind. Cas. 541.
(5) (1938) 42 Cal. W. N. 840.
(6) (1917) I. L. R. 41 Mad. 616.

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Bahadur Singh(1)]. For the purpose of the present discussion it will be sufficient to refer to the first mentioned case only which has been relied on in a number of other cases. In that case on an application by a judgment-creditor for execution of a decree, money was paid by the judgment-debtor to the Sheriff who paid it into Court. Two other creditors, who had previously applied for execution, had part of their claim and the costs of execution respectively unpaid and asked for rateable distribution of the assets. A question then arose as to whether the money lying in the Court was available for rateable distribution, and, while answering it in the affirmative, Rankin, J. observed as follows :—

" 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 object of the new Code in using larger language can only be to avoid anomaly. To introduce a distinction on the strength of the voluntariness of the payment or the purpose of the debtor, is, I think, to cut down the language and intention of the Code upon a principle which is inapplicable to the subject-matter and which if applicable is very difficult to imply."

It has been pointed out to us that a contrary view has been expressed by Scott, C.J. in *Sorabji Cooverji* v. *Kala Raghunath*(2) who has commented upon section 73 in these words :—

" In the reference to ' the cost of realisation ' we have an indication that the legislature contemplated that the assets referred to should be assets held

(1) (1932) I. L. R. 54 All. 516.
(2) (1911) I. L. R. 36 Bom. 156.

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in the process of execution. If we were to hold that money paid into Court under Order XXI, rule 55, was assets held by the Court within the meaning of section 73, we should be only nullifying the provisions of rule 55; for, there would be no inducement to any judgment-debtor to procure a payment into Court of the amount of the claim of his attaching creditor if the money could at once be absorbed by rateable distribution amongst a number of other creditors."

The soundness of this view was doubted by a learned Judge of the Bombay High Court in *Nathmal Ghamirmal* v. *Maniram Radhakisson*(1). In that case the learned Judge referring to the grounds on which the remarks of Scott, C.J. were based observed as follows:—

"The first ground follows the cases decided on the words 'sale or otherwise', which are held to mean sale or other process of execution provided for in the Civil Procedure Code.....But these cases all followed *Purshotamdas'* case(2) in restricting the process to one of sale or conversion of the property and I venture to doubt whether this is not too restrictive a construction under the amended section in which the words 'sale or otherwise' have been dropped and in which there is merely an implication that the assets should have been realised or obtained in execution proceedings. I also venture to doubt the correctness of the second reason. Order XXI, rule 55, operates effectively where there is one decree-holder. If there are a number of decree-holders, there is no scope for the rule for the judgment-debtor has no motive for paying off one judgment-creditor when the same property is liable to be re-attached by the others. To allow one decree-holder to be paid off in full when the property is insufficient to discharge other judgment-debts might possibly be undue preference and defeat

(1) (1919) 21 Bom. L. R. 975.
(2) (1882) I. L. R. 6 Bom. 588.

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the object of the section which is equal distribution of all the monies received in execution. Again, why should a judgment-creditor, whose attachment has been removed under Order XXI, rule 55, be in a better position than a judgment-creditor who has taken the trouble of bringing the property to sale. Lastly, if the money paid under Order XXI, rule 55, to remove an attachment is not available for rateable distribution then *a fortiori* money paid to stop a sale under Order XXI, rule 83, would also not be so available..... So that the interpretation put upon the section in *Sorabji Coovarji* v. *Kala Raghunath*(1) makes the new section more restrictive than the old one, and this is not what the Legislature intended."

Again in *Indaji Majaji* v. *Coovarji Nowroji Gamadia*(2) another learned Judge of the Bombay High Court refused to follow the opinion of Scott, C.J., on the ground that the observations made by him were in the nature of obiter dicta. We are informed that the opinion expressed by Scott, C.J. has been followed in *Firm of Haji Umar Sharif* v. *Rodba*(3) and has also been quoted with approval in *Administrator-General of Burma* v. *M. E. Molla*(4) but it appears to me that the balance of authority is against that view and for the reasons I have already stated I have no hesitation in following the view already expressed in *Bhattoo Singh* v. *Raja Raghunandan Singh*(5). In my opinion, therefore, the decisions of the Courts below are correct and I would accordingly dismiss this appeal with costs. The Civil Revision no. 582 of 1938 is dismissed without costs.

MANOHAR LALL, J.—On the 30th March, 1938, the appellant deposited a sum of Rs. 2,479/12/0 towards the full satisfaction of the decretal amount and costs due from him to the respondents who were

(1) (1911) I. L. R. 36 Bom. 156.
(2) (1925) 28 Bom. L. R. 237.
(3) (1925) A. I. R. (Nag.) 157.
(4) (1927) I. L. R. 5 Rang. 573.
(5) (1933) I. L. R. 12 Pat. 772.

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executing their money decree by attaching a property of the appellants in Execution Case no. 44 of 1937. Prior to that date two other decree-holders, who are also respondents before us, had applied on the 27th September, 1937, and on the 21st March, 1938, respectively, for a share in the rateable distribution of the assets if and when realised from the sale of the property of the judgment-debtor under attachment. The learned Munsif distributed the amount deposited on the 30th March, 1938, rateably among the three decree-holders. The appellant being aggrieved by the order which has resulted in the continuation of the attachment of the property due to the partial satisfaction of the decree under execution in Case no. 44 of 1937 has appealed to this Court against the appellate order of the learned Subordinate Judge affirming the decision of the Munsif ordering a rateable distribution.

The question upon these facts which arises is whether the courts below had any jurisdiction to distribute the amount which had been deposited by the judgment-debtor-appellant. The argument before us took the form that the provisions of Order XXI, rule 55, sub-clause (*a*), specifically provided that

> "where the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, the attachment shall be deemed to be withdrawn",

and therefore it was argued that when on the 30th March, 1938, the amount of the decree in Execution Case no. 44 of 1937 together with costs had been deposited, the Court had no jurisdiction except to withdraw the attachment and erred in law in distributing the proceeds rateably. It appears to me that this argument is unsound. The provisions of section 73 are imperative. It leaves no option in the Court and directs the Court that where assets are held by the executing Court, the assets after deducting the cost

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of realisation shall be rateably distributed among the persons entitled to share rateably in the distribution as provided in the section. The assets become available for payment in the hands of the Court on the date when the assets are paid in or realised by the Court. The direction under section 73 seizes the assets as soon as they are paid in and the subsequent diversion of the assets is then regulated not by the wishes of the person who has deposited the asset but by the operation of law. It is immaterial with what object and desire the judgment-debtor deposited the amount in Court because, as observed by Rankin, J. in *Noor Mahomed Dawood* v. *Bilasiram Thakursidass*(1), the deposit in Court must be taken to be on the terms provided by the Code of Civil Procedure and not upon the supposed wishes or desires of the judgment-debtor. If the judgment-debtor so desired, it was open to him to pay the money outside the Court, but when he chooses to deposit the money within the Court, the terms of the Civil Procedure Code begin to operate and the law as provided in the Code must take effect. The apparent difficulty which has been felt by Wort, J. in *Radha Mohan* v. *Musammat Wahidan*(2) does not appear to me to be any difficulty at all. Order XXI, rule 55, is so worded as to ensure that the attachment shall be deemed to be withdrawn when the decree has been satisfied. It will be a strange result if the decree is not satisfied and yet the attachment is deemed to be withdrawn by a mere deposit. The legislature could not have meant to reach such an inequitable result. The decree may be satisfied either by deposit under clause (*a*) or otherwise as stated in clause (*b*). But the legislature has never stated that a mere deposit will satisfy the decree. Ordinarily a decree will be satisfied if the deposit is made of the amount of the decree and there is no obstacle whatsoever in the decree-holder receiving it. In cases where the

(1) (1919) I. L. R. 47 Cal. 515.
(2) (1934) I. L. R. 13 Pat. 446.

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law intervenes and directs that although the full amount was intended to be paid to the decree-holder, but it has to be diverted by reason of section 73 or some other provisions of the Code, obviously the decree has not been satisfied in full even though there had been a deposit of the full decretal amount. Sub-clause (*a*) of rule 55 ought to be read in such a way that the provisions of section 73 and Order XXI, rule 55, do not conflict with each other. It is a well-known rule of construction that each part of a Statute should be endeavoured to be construed in such a way that there may be no conflict with any part, if it can be done without doing any violence to the plain meaning of the language adopted by the legislature. If rule 55 (*a*) is so read along with section 73, it seems to me clear that the decree can only be satisfied if the amount is available to the decree-holder in full satisfaction of his decree. It has been held in a number of cases that a deposit which is made by the judgment-debtor under Order XXI, rule 83, of the Code of Civil Procedure is an asset available for rateable distribution. I do not see similarly how it can be argued that the deposit in the present case was not an asset within the meaning of the word "asset" used by my learned brother at page 465 in *Radha Mohan's* case(1) which in my view gives the key to the solution of the present problem. The word "assets" must be taken to mean any fund in the hands of a Court which may be applied by the Court for the payment of the debt of a judgment-debtor. If the debtor has only a single debt, the Court is bound to apply the deposit or fund to the payment of that debt, but if the judgment-debtor has a number of decree debts, the execution Court, if satisfied that the conditions of section 73 of the Code are fulfilled, is bound to apply it rateably to reduce the decree debts of the number of decree-holders who are so entitled to share in the rateable distribution of the assets. In other words, the moment the deposit

(1) (1934) I. L. R. 13 Pat. 446.

is made by a judgment-debtor in the executing Court or the money is realised involuntarily or voluntarily in the course of execution by the executing Court, the assets are held by the Court and they will be applied in the manner provided by the Code.

An argument was advanced in some cases depending upon the construction of Order XXI, rule 89, of the Code of Civil Procedure. It was argued that where rule 89, sub-clause (*a*), directs payment of five per centum of the amount of sale price as compensation to the auction-purchaser, then logically this five per centum ought to be treated as part of the assets of the judgment-debtor and, therefore, it should be available for distribution to all the decree-holders and should not be paid to the auction-purchaser. The answer to this argument is very simple. The five per centum of compensation which is paid to the auction-purchaser is not in payment of a debt due to the auction-purchaser. It is a statutory payment in order to ensure the setting aside of the sale. The auction-purchaser is never executing any decree and nothing is due to him from the judgment-debtor—the amount which is being paid by the judgment-debtor as a part of the statutory requirement is not being paid by him to his creditor and therefore it cannot be called an asset available for distribution.

For these reasons I think that the decision of this Court in *Bhattoo Singh* v. *Raja Raghunandan Prasad Singh*(1) was correct and with great respect, the doubt expressed by Wort, J. in *Radha Mohan's* case(2) was not justified. The remarks of the learned Judge are expressly obiter because he says—" I think it is unnecessary to decide the question in the present case ". He then goes on to observe—" to hold that the payment under Order XXI, rule 55, was an asset

(1) (1933) I. L. R. 12 Pat. 772.
(2) (1934) I. L. R. 13 Pat. 446.

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distributable amongst decree-holders would raise difficulties which from one point of view are unsurmountable" and proceeds to point out that the terms of rule 55 definitely require that the attachment should cease the moment the amount is deposited irrespective of the claims against that deposit. I have already pointed out that I do not agree with this view. But even if this view is taken to be correct, I do not see how the fact, that an attachment is to be deemed to be raised the very instant the deposit is made, can have any bearing at all upon the subsequent diversion of the deposit by the operation of section 73. The distribution of the assets is one thing and the raising of the attachment is another. A recent case of the Calcutta High Court in *Chittagong Urban Co-operative Bank, Limited*, v. *The Indo Burmah Trades Bank, Limited*(1). expressly follows the decision of this Court in *Bhattoo Singh*'s case(2).

My learned brother in the judgment just delivered has traced the history of the legislation by which a radical change has been effected in the corresponding section under the Code of 1882 shewing that the present section 73 is now much wider and in effect adopts the view expressed by Sir Lawrence Jenkins in the earlier Bombay case. I agree with those observations entirely and have nothing to add.

For these reasons I agree that the appeal fails and must be dismissed with costs.

The Civil Revision also fails, but there will be no costs.

S. A. K.

Appeal and application dismissed.

(1) (1938) 42 Cal. W. N. 640.
(2) (1939) I. L. R. 12 Pat. 772.

REVISIONAL CIVIL.

Before Khaja Mohamad Noor and Dhavle, JJ.

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December, 22, 23.

February, 15.

BIBI ZOHRA

v.

BIBI HABIBUNNESSA.*

Muhammadan Law—Wakf—Kazi—District Judge as Kazi, limits to the powers of—appointment of mutawalli, when can be made.

Under the Muhammadan law the kazi has power to appoint a Mutawalli when a vacancy occurs and there is none to take office under the terms of a wakf or when the mutawalliship devolves under the deed of wakf upon a minor.

The District Judge as a principal Court of Original Civil Jurisdiction has, by virtue of his power as a kazi, a general power of appointing Mutawallis in a summary proceeding, but he has no power in such a proceeding to appoint another mutawalli in place of one who is in office. This can only be done in a suit instituted either under the Religious Endowments Act of 1863 or under section 92 of the Code of Civil Procedure, 1908.

The appointment of a mutawalli by a District Judge in a summary proceeding not being appealable, such appointment should be made in cases of emergency and, by the very nature of it, must be subject to the result of any suit which may be instituted by any of the parties who claim adversely to one another, or any suit which may be instituted under section 92 of the Code of Civil Procedure or under the provisions of the Religious Endowments Act, 1863.

The District Judge has no jurisdiction in a summary proceeding to decide that under a wakf deed a certain person is to be the mutawalli on the death of the last incumbent.

Halima Khatun, In re(1), *Atimannessa Bibi* v. *Abdul Sobhan*(2), *Nimai Chand Addya* v. *Golam Hossein*(3), *Shama*

*Civil Revision no. 293 of 1938, against an order of R. Chatterji, Esq., District Judge, Darbhanga, dated the 24th August, 1938.

(1) (1910) I. L. R. 37 Cal. 870.
(2) (1915) I. L. R. 43 Cal. 467.
(3) (1909) I. L. R. 37 Cal. 179.

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Churn Roy v. *Abdul Kabeer*(1), *Abdul Alim Abed* v. *Abir Jan Bibi*(2), *Syed Diljan Ali* v. *Bibi Akhtari Begum*(3), *Fakrunessa Begum* v. *District Judge of 24-Parganas*(4), and *Mia Mohammad Yusuf* v. *Mia Mohammad Ayub*(5), *reviewed.*

The provisions of the Religious Endowments Act, 1863, apply not only to those endowments which were in existence at the time the Act was passed and had been taken under its control by the Board of Revenue under Regulation XIX of 1810, but also to later institutions which come within its purview.

Syed Diljan Ali v. *Bibi Akhtari Begum*(3), *Ram Prasad Gupta* v. *Ramkishun Prasad*(6), *Syed Husain* v. *Syed Hamid*(7), and *Badar Rahim* v. *Badsha Mia*(8), followed.

Application in revision by one of the applicants for mutawalliship.

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

Hasan Jan and *Azizullah*, for the petitioners.

Sir Sultan Ahmed (with him *Murari Prasad* and *Syed Ali Khan*), for the opposite party.

KHAJA MOHAMAD NOOR AND DHAVLE, JJ.—This is an application against an order of the District Judge of Darbhanga directing that a Deputy Mutawalli of a wakf be appointed in the manner indicated in the order. The facts are these.

One Sheikh Shukrullah, along with one of his wives, Zaibunissa, made a wakf of certain properties for religious and charitable purposes. By the wakf deed he appointed himself to be the Mutawalli for his life; on his death his wife, Zaibunissa, if she was alive then, was to be the Mutawalli, and after her, Wajihuddin, a son of his from another wife Habibunnissa, was to be the Mutawalli. In case Zaibunissa

(1) (1898) 3 Cal. W. N. 158.
(2) (1928) I. L. R. 55 Cal. 1284.
(3) (1925) I. L. R. 4 Pat. 741.
(4) (1920) I. L. R. 47 Cal. 592.
(5) (1938) 19 Pat. L. T. 934.
(6) (1932) I. L. R. 11 Pat. 594.
(7) (1930) A. I. R. (All.) 577.
(8) (1934) 38 Cal. W. N. 1056.

died during the life-time of Shukrullah, Wajihuddin was to be the Mutawalli if a major at the time of Shukrullah's death; but if he (Wajihuddin) be a minor at the time, then till he attained majority, Musammat Bibi Zohra, daughter of Sheikh Shukrullah from Zaibunissa, was to be the Mutawalli, but on his (Wajihuddin's) attaining majority he was to become the Mutawalli and the Mutawalliship of Bibi Zohra was to terminate. Wajihuddin was given power to nominate the Mutawalli after him from among the male members of the family of Shukrullah, and each successive Mutawalli thereafter was given a similar power. This was to continue as long as capable and honest male members of the family of Shukrullah were available. In case of extinction of the male descendants of Shukrullah, female members of his family who would be found capable were to be nominated Mutawalli in accordance with the aforesaid arrangement, and the power of nominating successors was given to them also.

Wajihuddin died during the life-time of Shukrullah, who continued to work as Mutawalli till his death in December, 1929. Thereupon Zaibunissa became the Mutawalli. Her right to the Mutawalliship was disputed by her co-widow Habibunissa who applied to be the Mutawalli, but the District Judge in a proceeding (Miscellaneous Case no. 30 of 1930) overruled the objection of Habibunnissa. Zaibunissa continued as Mutawalli till her death.

It appears that towards the end of the year 1935 one Razid Ali applied to the District Judge of Darbhanga for action under Act XIV of 1920 or Act XLII of 1923 calling upon the Mutawalli, Musammat Zaibunissa, to submit accounts. Accounts were submitted on the 10th February, 1936, and they were being examined when Zaibunissa died on the 23rd May, 1938. Musammat Zohra, the daughter of Shukruallah and Zaibunissa, appeared in that proceeding and intimated to the Court that her mother

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was dead, and stated that according to the deed of wakf she had succeeded to the Mutawalliship of the wakf and had taken charge of it from the *mukhtar-am*, who had rendered all accounts to her. She asked that her name should be substituted in the proceeding in place of the deceased Musammat Zaibunissa. To this Musammat Habibunnissa, widow of Sheikh Shukrullah, objected. Her case was that according to the deed of wakf, Abdul Hai, son of Shukrullah from her, was entitled to be the Mutawalli after the death of Zaibunissa, and she prayed that the application of Bibi Zohra be rejected and Abdul Hai who was then a minor be recognised as Mutawalli. Having, on the death of Shukrullah, been appointed guardian of the properties of Abdul Hai, Habibunnissa applied to be appointed guardian of the wakf properties also.

By an order dated the 18th June, 1938, the District Judge held that on a true construction of the wakf deed Abdul Hai was the rightful Mutawalli, but that as he was a minor aged only about 12 years, some Deputy Mutawalli should be appointed to act in his place during his minority. He called upon both the parties to convene a meeting of the local public interested in the wakf and to place before him by the 30th June the opinion of the majority as to who was the most proper person to be appointed Deputy Mutawalli. On the 30th June Musammat Habibunnissa filed a petition stating that the meeting was held and by a resolution she was appointed the Deputy Mutawalli.

In the meantime Musammat Zohra filed the present application for revision in this Court. Further proceedings in the lower Court were stayed by an order of this Court dated the 29th June, 1938; and by another order dated the 29th July, 1938, the revision application was admitted for hearing and it was ordered that the District Judge, when he

appointed a Deputy Mutawalli, should appoint that person to be the Receiver of the wakf also so that the interest of the wakf property might be fully safeguarded. This order was to remain in force pending the hearing of the Civil Revision application. By an order dated the 24th August, 1938, the District Judge accordingly appointed Maulavi Halim Raza to be the Deputy Mutawalli and Receiver till the disposal of this revision application.

Mr. Hasan Jan, who has appeared on behalf of the petitioner, Bibi Zohra, has contended that the District Judge had no jurisdiction in a summary proceeding to appoint a Deputy Mutawalli, and the less so when there was a *de facto* Mutawalli in the person of Bibi Zohra to whom the estate was made over by Sheikh Abdul Haq, the *Mukhtar-am* of the late Mutawalli Bibi Zaibunissa, under instructions from the latter.

As regards the powers of a District Judge in such matters, it is beyond question that under the Muhammadan Law the kazi has power to appoint a Mutawalli when a vacancy occurs and there is none to take office under the terms of a wakf or when the Mutawalliship devolves under the deed of wakf upon a minor. But at present there is no officer with the designation of kazi, and the question is how far a District Judge of a British Court has the powers of a kazi.

The District Judge, as presiding in the principal Court of original civil jurisdiction (or the officer presiding in any other Court empowered in that behalf by the Local Government), has been given power under section 92 of the Civil Procedure Code, in a suit instituted under the provisions of that section, to remove a Mutawalli and appoint a new one. There is, similarly, with reference to those wakfs that come under the Religious Endowments Act of 1863, the power of the Civil Court, in a suit instituted with

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the leave of the Court, to remove the trustee; the Act defines the Civil Court as meaning the principal Court of original civil jurisdiction and any other Court empowered in that behalf by the Provincial Government. It has been held in a number of cases that the provisions of this Act apply not only to those endowments which were in existence at the time the Act was passed and had been taken under control by the Board of Revenue under Regulation XIX of 1810, but also to later institutions which come within its purview [*Syed Diljan Ali* v. *Bibi Akhtari Begum*(1), *Ram Prasad Gupta* v. *Ramkishun Prasad*(2), *Syed Husain* v. *Syed Hamid*(3) and *Badar Rahim* v. *Badsha Mia*(4)].

There is no other statutory provision vesting a District Judge or any other Court with the power of appointing or removing a Mutawalli; but there is a number of decisions to the effect that the District Judge as a principal Civil Court of original jurisdiction has, by virtue of his power as a kazi, a general power of appointing Mutawallis in a summary proceeding, which we must now examine. His powers under section 92, Civil Procedure Code and section 14 of the Religious Endowments Act of 1863 (as we have already indicated) can only be exercised in a properly framed suit, and the question before us has arisen not in a suit but on an application to be dealt with summarily.

In the case of *Halima Khatun*(5), Pugh, J., sitting on the Original side of the Calcutta High Court, held that although a Judge of the High Court exercises the functions of a kazi when administering Muhammadan Law, the procedure to be adopted is to be regulated by the Code of Civil Procedure and the

(1) (1925) I. L. R. 4 Pat. 741.
(2) (1932) I. L. R. 11 Pat. 594.
(3) (1930) A. I. R. (All.) 577.
(4) (1934) 38 Cal. W. N. 1056.
(5) (1910) I. L. R. 37 Cal. 870.

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Rules and Orders of the High Court. This was the view taken by the learned Judge on an application by a Mutawalli for the sanction of the Court to sell certain wakf properties. This, if we may say so, would prima facie appear to be the correct position so far as statutory provisions are concerned; but a number of decisions point the other way.

In *Atimannessa Bibi* v. *Abdul Sobhan*(1) the Calcutta High Court had to consider the general powers of a District Judge as a kazi in respect of wakfs. The plaintiff had instituted the suit in the Court of a Subordinate Judge for a declaration that she was entitled to be the Mutawalli of a certain wakf and for recovery of possession of the property. The Subordinate Judge decreed the suit. On appeal the District Judge dismissed it, and there was a second appeal to the High Court. Mookerjee, J. after an examination of a number of decided cases and other texts, held that under the Muhammadan Law that Qadi alone was competent to exercise authority in respect of wakf who was so expressly authorised in his letters patent. The balance of opinion of Muhammadan jurists (he found) favoured the view that the Chief Qadi should have authority expressly conferred on him in order to enable him to deal with wakfs. It followed, in his opinion, that a Subordinate Judge who was not expressly authorised by the Government to exercise functions in connection with the administration of wakfs was not competent to deal with wakf cases. He considered it doubtful whether a District Judge had implied authority to exercise the functions of a kazi under the Muhammadan Law. In respect of wakfs for public purposes of a religious nature within sub-section (*1*) of section 92 of the Civil Procedure Code the District Judge might, in his view, be assumed to have been authorised to discharge the functions of a kazi, but (the learned Judge observed) " the real difficulty

(1) (1915) I. L. R. 43 Cal. 467.

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arises in cases of private wakfs ". In an earlier case [*Nimai Chand Addya* v. *Golam Hossein*(1)] the same learned Judge (sitting with Vincent, J.) had upheld the approval by a Subordinate Judge of a mortgage of wakf property lying within his jurisdiction as no less effectual than a sanction by a District Judge whose position (as he considered) offered only a more or less far-fetched analogy to that of a kazi.

In *Shama Churn Roy* v. *Abdul Kabeer*(2) it was held that a Court of superior jurisdiction in a district and the High Court in a Presidency Town is, generally speaking, vested with the powers of a kazi, under the Muhammadan Law. This was followed in *Woozatunnessa's* case(3).

In *Abdul Alim Abed* v. *Abir Jan Bibi*(4) it was held (to quote from the placitum) that " a Mutwalli of a wakf under the Muhammadan Law can be appointed by application when it does not involve the removal of an existing Mutawalli ". It was also held that a District Judge should exercise the powers of a kazi in connection with public religious trusts, the administration of which is vested in the kazi under the Muhammadan Law, and that as such it is his duty to appoint a trustee when there is no one to administer the trust. It was further held that sub-clauses (*a*) and (*b*) of clause (*1*) of section 92 of the Civil Procedure Code are correlative and not disjunctive; that is to say, the power to appoint a new trustee given by the section is dependent on the removal of the old one. In other words, it was held that when there is a vacancy and no Mutawalli is otherwise available, the District Judge may appoint one on application, but that he cannot do so in that way if the conditions of section 92 (a section which is available for the removal of a trustee *de son tort* also) are satisfied.

(1) (1909) I. L. R. 37 Cal. 179.
(2) (1898) 3 Cal. W. N. 158.
(3) (1908) I. L. R. 36 Cal. 21.
(4) (1928) I. L. R. 55 Cal. 1284.

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In a case recently decided in this Court—*Mia Mohammad Yusuf* v. *Mia Mohammad Ayub*(1)—James, J. held that when an office of a Mutawalli of a wakf falls vacant the District Judge is entitled under proper circumstances to make an appointment to fill the vacancy, but he has no general power to remove a Mutawalli in miscellaneous proceedings, his powers in this respect being limited.

In *Syed Diljan Ali* v. *Bibi Akhtari Begum*(2), a case already referred to, it was held that a suit for the removal of the trustee by the donor or his heirs cannot be instituted except under the special jurisdiction conferred by the Religious Endowments Act, 1863, or section 92, Civil Procedure Code.

In *Fakrunessa Begum* v. *District Judge of 24-Parganas*(3) it was held that section 92 of the Code of Civil Procedure relates to suits claiming any of the reliefs specified in sub-section (*1*) thereof and an application by a Mutawalli for sanction to grant a lease is not a suit under sub-section (*1*) of section 92; and the following passage from Ameer Ali's Muhammadan Law was quoted and followed :—

" The application for sanction should be made to the District Judge if the property is situated in the mofussil, or to the Judge on the Original Side of the High Court if it is within a Presidency Town. It is not necessary to bring a suit for obtaining such sanction; it will be granted upon a proper application being made by the Mutawalli."

The learned Judges further observed that " any application made by the Mutawalli will of course be enquired into by the District Judge before sanctioning a lease as kazi ". This case is also an authority for the proposition that the District Judge by virtue of his office is vested with the general powers of a

(1) (1938) 19 Pat. L. T. 934.
(2) (1925) I. L. R. 4 Pat. 741.
(3) (1920) I. L. R. 47 Cal. 592.

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kazi under the Muhammadan Law, and that these powers can be exercised in cases for which no provision has been made in the statutes.

We may now refer to the powers of the District Judge under two recent Acts, Act XIV of 1920 which is of general application, and the Mussalman Wakf Act of 1923 (Act XLII of 1923). Under the former Act a District Judge may, on an application made to him, direct a trustee to furnish the petitioner through the Court with particulars of a trust property and that the accounts of the trust be audited; on the failure of the trustee to furnish information so required, he is to be deemed guilty of breach of trust so as to attract the provisions of section 92 of the Civil Procedure Code. But if the party complained against undertakes to institute a suit the proceeding has to be stayed. Under the second Act, which applies to Mussalman wakf only the Mutawalli is placed under an obligation to furnish particulars relating to the wakf to the Court (inter alia) of District Judge; these particulars are to be published and further particulars may be called for, and periodical accounts are to be submitted to the Court. These two Acts thus place wakfs under the control and supervision of the District Judge within the limits indicated.

It may be said on these authorities that there is practically a consensus of opinion that when there is a vacancy in the office of a Mutawalli the District Judge in his discretion may nominate a Mutawalli but that he has no power in a summary proceeding to appoint another Mutawalli in place of one who is in office. This can only be done in a suit instituted either under the Religious Endowments Act of 1863 or under section 92 of the Civil Procedure Code. When, however, two persons each claim to be the Mutawalli, the dispute between them is one of a civil nature and must be decided in an ordinary Civil Suit (*see* Mulla's Civil Procedure Code, pages 304-5, 10th Edition, and the cases cited there): the vindication

of individual rights is not a matter for decision either under section 92 of the Civil Procedure Code or under the provisions of the Religious Endowments Act.

Now the appointment of a Mutawalli by a District Judge in a summary proceeding is not appealable, and according to the trend of the authorities we have already referred to, such appointment should be made in cases of emergency and, by the very nature of it, must be subject to the result of any suit which may be instituted by any of the parties who claim adversely to one another to be the Mutawalli, or subject to the result of any suit which may be instituted either under section 92 of the Civil Procedure Code or under the provisions of the Religious Endowments Act.

The next question is whether the appointment of a Deputy Mutawalli was within the competence of the learned District Judge in the circumstances of the present case. We have already referred to Mr. Hasan Jan's contention that Bibi Zohra was a *de facto* Mutawalli though she may be no more than a trustee *de son tort* and that the learned Judge had no jurisdiction in this summary proceeding to interfere with her possession. But was Bibi Zohra in actual charge of the trust properties as Mutawalli when the learned District Judge intervened in the matter? Musammat Zaibunissa, the last Mutawalli, died on the 23rd May, 1938, as we have already said, and Zohra applied for substitution of her name in the proceeding started under Act XIV of 1920 and Act XLII of 1923 on the 28th of May. The interval was one of five days only—too short for a definite supposition that Zohra had taken possession of the wakf estate. There was no doubt an application by Abdul Haq, claiming to have been the *mukhtar-am* of Musammat Zaibunissa, that in accordance with the instructions of Musammat Zaibunissa deceased, he had made over the estate to Zohra. But Musammat Zaibunissa's power-of-attorney in favour of Abdul Haq ceased to have any effect on her death, and what he claims to have done

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under it by way of making the estate over to Zohra was plainly unauthorized. Zaibunissa also had no power to nominate a Mutawalli under the wakf deed. In view of all these circumstances we are of opinion that Zohra had not really assumed the office of Mutawalli and that there was certainly a vacancy in that office.

The learned District Judge had, however, no jurisdiction in the proceeding before him to decide that under the wakf deed Abdul Hai was to be the Mutawalli on the death of Zaibunissa. Such a decision can only be given in a properly constituted suit. His order further that a Deputy Mutawalli should be appointed during the minority of Abdul Hai was also wrong. A Deputy Mutawalli presupposes a Mutawalli. Even if Abdul Hai be the rightful Mutawalli, the kazi had power to appoint a Mutawalli during Abdul Hai's minority and incapacity to perform the duties of Mutawalli. The minority makes it impossible for him to depute anybody else to work as the Mutawalli. We hold, therefore, that the decision of the District Judge that Abdul Hai is the Mutawalli and his order that a Deputy Mutawalli should be appointed are without jurisdiction and must be set aside.

The fact, however, remains that the estate is without a Mutawalli. It is true that in the wakf deed it was provided that in case Wajihuddin be a minor at the death of Shukrullah, Zohra was to act as Mutawalli during his minority. But Zohra, it appears, repudiated the wakf in Miscellaneous Case no. 23 of 1930 in which Habibunnissa had applied to be appointed a Mutawalli in preference to Zaibunissa. She has thus forfeited any claim (such as it may have been) to be appointed Mutawalli even during the minority of Abdul Hai.

We accordingly, while setting aside the order of the learned District Judge, direct that Habibunnissa

be appointed Mutawalli. This appointment will hold good during the minority of Abdul Hai and will be subject to the result of any suit which may be instituted for the regular determination of the question as to who is entitled to be mutawalli. In case no such suit be instituted, Habibunnissa will cease to be Mutawalli when Abdul Hai attains majority and will then make over the trust property to him. We make no order about costs.

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S.A.K. *Order accordingly.*

APPELLATE CIVIL.

Before James and Rowland, JJ.

INDERDEO SINGH.

v.

RAMLAL SINGH.*

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February 15, 16.

Registration Act, 1908 (*Act XVI of* 1908), *sections* 17, 28 *and* 29—*mortgage bond—fraud on registration—effect—suit on personal covenant—document, whether can be treated as a registered instrument for purposes of limitation—Limitation Act*, 1908 (*Act IX of* 1908), *Article* 116, *applicability of.*

If the registration of a mortgage bond has been obtained by a fraud on the law of registration, the document cannot be treated as a registered instrument for the purpose of applying the provisions of Article 116 of the Limitation Act, 1908, to a suit on the personal covenant.

Sailendra Nath Singha v. *Keshab Chandra Chowdhury*(1) and *Jageshwar Prasad Onkar Prasad* v. *Mulchand*(2), followed.

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*Appeal from Appellate Decree no. 510 of 1937, from a decision of Babu Rabindra Nath Ghosh, Subordinate Judge of Gaya, dated the 31st May, 1937, reversing a decision of Babu Ramjivan Sinha, Munsif of Gaya, dated the 21st September, 1936.

(1) (1937) 41 Cal. W. N. 783.
(2) (1939) A. I. R. (Nag.) 57, F. B.

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Dronamraju Rama Rao v. *Vissapragada Vedayya*(1), dissented from.

Biswanath Prasad v. *Chandra Narayan Chowdhury*(2), distinguished.

Appeal by the plaintiffs.

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

Sarjoo Prasad, for the appellants.

B. K. Prasad Sinha, for the respondents.

JAMES, J.—This second appeal arises out of a suit based on a mortgage bond. The bond was registered at Tikari, but the sub-registrar at Tikari could not have accepted it for registration unless it had contained a description of land within the jurisdiction of the Tikari sub-registry office. Both Courts have found that this entry was fictitious, and that registration was obtained by fraud to which mortgagor and mortgagee were parties, so that the deed cannot be treated as a registered mortgage deed, and therefore the mortgage debt cannot be regarded as secured on the mortgaged property described in the bond. The Munsif considered that he could give effect to the personal covenant as contained in a registered document, and he gave a money decree for the amount of money due under the covenant. The Subordinate Judge on appeal held that the document could not be regarded as a registered document at all. If the document could be treated as a registered document under Article 116 of the Schedule to the Limitation Act, the mortgagee would have six years during which he might sue on the personal covenant; but if the document were regarded as an unregistered document he would have been obliged to institute a suit within three years, and the suit in the present case would have been barred by limitation.

(1) (1922) I. L. R. 46 Mad. 435.
(2) (1921) I. L. R. 48 Cal. 509, P. C.

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The plaintiff has come up in second appeal from that decision. The only question for decision in this appeal is whether, if the registration of a mortgage bond has been obtained by a fraud on the law of registration, the document can be treated as a registered document for the purpose of applying the provisions of Article 116 of the Limitation Act to a suit on a personal covenant. The question precisely in this form came before the Madras High Court in *Dronamarju Rama Rao* v. *Vissapragada Vedayya*(1) wherein it was held that in similar circumstances the registration was good so far as it was registration of the personal covenant to repay the mortgage money, and the mortgagee was entitled to take advantage of the provisions of Article 116 of the Schedule to the Limitation Act. In *Sailendra Nath* v. *Keshab Chandra*(2), a Bench of the Calcutta High Court considering the same question expressly differed from the view of the Judges of the Madras High Court; and in a case recently decided a Full Bench of the Nagpur High Court has adopted the view taken by the Calcutta High Court [*Jageshwar Prasad Onkar Prasad* v. *Mulchand*(3)]. Mr. Sarjoo Prasad for the plaintiff-appellant argues in favour of the view taken by the learned Judges of the Madras High Court. He suggests that it should be considered that there was no fraud in obtaining registration of the bond so far as the personal covenant was concerned, because if the bond had contained nothing but the personal covenant, the provision of section 29 of the Registration Act would have applied and the document could have been registered at any registry office. The argument appears to be that if the document registered had been something other than what it was, no fraud would have been committed, and we

(1) (1922) I. L. R. 46 Mad. 435.
(2) (1937) 41 Cal. W. N. 783.
(3) (1939) A. I. R. (Nag.) 57, F. B.

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are asked to call the document something other than what it was for the benefit of one of parties who actually did commit the fraud. I think that it would be more correct to say that if a party desires registration of a document containing a personal covenant he is entitled to obtain registration of it wherever he pleases, provided that the document does not affect immovable property: but if he desires to obtain registration of a document containing a personal covenant which also affects immovable property he is bound by the provisions of section 28 of the Indian Registration Act, and he is bound by those provisions for the whole of the document from beginning to end, and those provisions apply to the whole of the document. Mr. Sarjoo Prasad also suggests that the decision of their Lordships of the Judicial Committee in *Biswanath Prasad* v. *Chandra Narayan Chowdhury*(1) implies that in that case, although there was a fraud in registration which rendered the mortgage bond invalid, their Lordships considered that it might be valid as a registered contract to repay, because they left it open to the plaintiff of that case to apply to the High Court for a personal judgment on the mortgage debt. But there is nothing in that decision which implies that their Lordships considered that the plaintiff should be entitled to any advantage arising from the registration of the document, or that Article 116 of the Schedule would apply to the case. Lord Finlay expressly said that if the High Court should think it right to enter upon the consideration of this claim, all defences arising out of the lapse of time must be open to the defendants, and there is nothing in the decision which suggests that Article 116 of the Schedule would be applicable to the case. Mr. Sarjoo Prasad also suggests that to deny to the mortgagee, seeking a decree on the personal covenant, the benefit of the provisions of Article 116 is to permit a

(1) (1921) I. L. R. 48 Cal. 509, P. C.

mortgagor to benefit by his own fraud. This is of course to some extent true of a judgment refusing a mortgage decree; but the finding of the courts below is that the mortgagor and the mortgagee are in this matter in pari delicto: and in those circumstances the position of the defendant is the better; and if one or the other is to profit by the fraud it cannot be the plaintiff in a suit. I do not consider that any grounds have been made out which would warrant our declining to follow the decision of the Calcutta High Court and the decision of the Full Bench of the Nagpur High Court. The view of the law taken by the learned Subordinate Judge is correct; and I would dismiss this appeal with costs.

ROWLAND, J.—I entirely agree.

In my view the jurisdiction conferred on the Sub-Registrar by section 29 is limited to receiving and registering "Every document other than a document referred to in section 28" and once it is found that the document was a document referred to in section 28 then the result is that if a Registrar had been aware of the facts he would have refused registration. The same consequences must follow as if registration had in fact been refused, that is to say, the entire document is on the footing of an unregistered document. Not only does it not affect any immovable property—section 49, but it must be considered unregistered for the purposes of limitation—Article 116 of the Schedule to the Limitation Act.

Appeal dismissed.

S. A. K.

APPELLATE CIVIL.

Before Fazl Ali and Manohar Lall, JJ.

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February, 15, 16, 24.

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v.

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Chota Nagpur Encumbered Estates Act, 1876 (*Beng. Act VI of* 1876), *sections* 2 *and* 12*A—joint Hindu family, whether entitled to protection under the Act—karta applying for protection in a representative capacity—whole family, whether deemed to be "holder"—disqualification under section* 12*A, whether attaches to entire family property—subsequent partition—disqualification, whether still exists—person affected by the Act, whether debarred from borrowing money —acknowledgment of liability by a co-mortgagor not acting as agent of other mortgagors—effect—Limitation Act,* 1908 (*Act IX of* 1908), *sections* 19 *and* 21.

When an estate is placed under the management of the Collector or some other officer under the provisions of the Chota Nagpur Encumbered Estates Act, 1876, upon the application of a person who is the karta of a joint Hindu family governed by the law of Mitakshara, such person being described as a "holder" in the notification issued under section 2 of the Act, the disqualification referred to in section 12A of the Act applies not only to that person but to all the members of the joint family who were the owners of the estate on the date of the application.

The expression "holder" is used in the Act in the same sense as the expression "holder of land" which occurs in the preamble to the Act and as such applies to all such person or persons as own any particular property.

There is nothing in the Act to prevent the manager of a joint Hindu family from applying for protection under the Act on behalf of the entire family, and when such an

*Appeal from Original Decree no. 140 of 1936, from a decision of Babu Baidya Nath Das, Special Subordinate Judge of Palamau, dated 10th February, 1936, and Appeal from Appellate Decree no. 722 of 1934 from a decision of Herbert Whittakar, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 11th May, 1934, affirming a decision of Babu Gobind Sharan, Munsif of Daltonganj, dated the 25th of August, 1933.

application is made by him in a representative capacity, the whole family and not he alone will be deemed to be the holder of the estate.

There is also nothing in the Act to suggest that a Mitakshara joint family is not entitled to protection under the Act.

Gulab Singh v. *Raja Seth Gokuldas*(1), applied.

If a disqualification under section 12A of the Act attaches to the alienation of the entire estate as it existed at the time of the assumption of charge, a subsequent partition after the release of the estate can in no way get rid of that superimposed disqualification.

Section 12A only prohibits the alienation of the property or the creation of a charge thereon, but does not debar the person affected by the Act from borrowing money.

An acknowledgment of liability by a co-mortgagor, who is not acting as the agent of the other mortgagors, gives a fresh start to the period of limitation only against the mortgagor who makes the acknowledgment.

Sarab Narain Das v. *Top Ojha*(2), followed.

Muthu Cheltiar v *Muhammad Hussain*(3), *Srimati Achola Sundari Debi* v. *Srimati Doman Sundari Debi*(4) and *Ibrahim* v. *Lala Jagdish Prasad*(5), distinguished.

First Appeal no. 140 on behalf of the defendant.

Second Appeal no. 722 on behalf of the plaintiffs.

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

Sir Sultan Ahmad and *Phulan Prasad Varma*, for the appellant in F. A. 140 and the respondents in S. A. 722.

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(1) (1913) L. R. 40 Ind. App. 117.
(2) (1916) 43 Ind. Cas. 351.
(3) (1919) 55 Ind. Cas. 763.
(4) (1925) 90 Ind. Cas. 774.
(5) (1926) 99 Ind. Cas. 424.

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S. M. Mullick (with him *Sarjoo Prasad* and *A. N. Lal*), for the respondent in F. A. 140 and the appellants in S. A. 722.

First Appeal no. 140 *of* 1936:

MANOHAR LALL, J.—This is an appeal by the principal defendant against the decision of the learned Subordinate Judge of Daltonganj dated the 10th February, 1936, by which he decreed the suit of the plaintiffs which was instituted to recover the dues on a mortgage bond dated the 21st October, 1927, executed by the defendant Parmeshwar Dayal Singh in favour of the first plaintiff for Rs. 4,250 along with interest at the rate stated in the bond. The defence to the action was that the loan was contracted for purposes not binding upon the joint family of the defendants, that the bond was invalid and for no consideration and that the rate of interest was excessive. The learned Subordinate Judge decided all the issues in favour of the plaintiffs and these findings were not challenged before us. Another defence raised was that the bond in suit was void in view of the provisions of section 12A of the Chota Nagpur Encumbered Estates Act; but the learned Subordinate Judge repelled that objection also and this was the main contention advanced before us on behalf of the appellant.

In order to understand this objection it is necessary to state that the family of the defendants was at one time a joint Hindu family governed by the Mitakshara School of Hindu Law descending from one Saligram Singh who had two sons Nageshwar and Parmeshwar (defendant no. 1). Nageshwar was the father of Chaudrika (defendant no. 3), of Bhagwat (defendant no. 4) and of Lal Bahadur (defendant no. 5). The appellant Parmeshwar Dayal is the father of Rameshwar Dayal (defendant no. 2). Defendants nos. 6, 7 and 8 are the sons of Chandrika, Bhagwat and Lal Bahadur respectively. In the year 1894 Nageshwar Dayal,

the father of defendant no. 3 and brother of the appellant, made an application to the proper authorities for the assumption, by the Encumbered Estate authorities, of the Namudag Estate belonging to the joint family of Nageshwar and Parmeshwar and their descendants. On the 10th December, 1894, by a notification (Exh. A), the Namudag Estate was placed in charge of the Deputy Commissioner of the Palamau district under the provisions of section 2 of the Chota Nagpur Encumbered Estates Act VI of 1876 (hereinafter to be referred to as the Act). The notification describes the name of the property as Namudag Estate and the name of the holder is stated therein as Nageshwar Dayal Singh. Nageshwar Dayal at that time, as the evidence discloses, was the karta of the joint Hindu family consisting of Nageshwar, Parmeshwar and their sons about whom the evidence is not clear as to which of these other than Chandrika (defendant no. 3) were not born at that time; but that is not material for the purpose of this case. Nageshwar Dayal died in 1895 but the Namudag Estate continued to be managed under the Encumbered Estates Act until it was released on the 26th August, 1910, by a notification (Exh. A-1) and handed over to Parmeshwar Dayal, the first defendant, and Chandrika, the 3rd defendant. On the 15th February, 1920, Chandrika and Parmeshwar executed a mortgage bond in favour of the respondent giving as security a portion of the Namudag Estate which had been released to them in 1910. This transaction forms the subject of Second Appeal no. 722 of 1934 and will be considered later. In the year 1922 a partition was effected between the two branches of Nageshwar and Parmeshwar. After this partition the mortgage bond in suit was executed by Parmeshwar alone; the total amount advanced was made up of the half share of Parmeshwar in the dues under the mortgage bond of February, 1920, and some other advances which were

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made to him by the plaintiff on handnotes and orally. These facts have been amply proved in this case and were not seriously challenged by either side.

The question which arises is whether upon these facts the provisions of section 12A operate to make the mortgage bond in suit invalid, because it is admitted that the mortgage bond was executed without the sanction of the Commissioner as required by that provision in the Act. The learned Subordinate Judge held that the holder who made over charge of the estate to the Encumbered Estate authorities in 1894 was Nageshwar and that the disqualification which is provided in section 12A extended only to that holder and not to the heirs of the holder. The learned Advocate for the respondents adopted this view of the learned Subordinate Judge and further submitted that by virtue of the partition of 1922, the estate which was given as security under the mortgage bond in suit was now a different estate from that which was taken over charge of in 1894, but this in my opinion is a wholly untenable contention. If a disqualification attaches in law to the alienation of the entire estate as it existed in 1894, a subsequent partition after the release of the estate can in no way get rid of that superimposed disqualification. It was also argued that a creditor is not required to look beyond the notification assuming charge of the estate and the notification which released the estate, and submitted that the creditor should be held to be amply protected, for by reference to the notification of 1894 he found that the holder who gave the estate in charge of the Encumbered Estate authorities was Nageshwar and the notification of 1910 showed that the persons to whom the estate has been released were different from the holder and, therefore, it is argued that by virtue of section 12A(*vi*) the only hindrance in the way of these persons who have been restored to possession is that the debt for which the alienation may be made should not be with respect to a period during which the authorities were in charge.

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In my opinion the crucial point to determine in the present case is whether the holder who made over charge of the estate in 1894 was Nageshwar Dayal only or whether it was the entire joint Hindu family consisting of Nageshwar, Parmeshwar, Nageshwar's son Chandrika and others. The evidence in the present case discloses that Nageshwar and Parmeshwar were joint and Nageshwar Dayal was the karta at the time when the estate went under the management of the Encumbered Estate authorities, and of his sons Chandrika at least was then alive. The defendants had specifically pleaded in the written statement that Parmeshwar and Nageshwar were persons of extravagant habits and were about to squander away the ancestral property of the family when the Government took away the property from the hands of the then members of the family and that Nageshwar was the karta. The evidence is to the same effect (*see* witness no. 1 for the defendants who was not cross-examined on this point). It seems to be established, therefore, that on the date when the authorities assumed charge the Namudag Estate belonged to Nageshwar, Parmeshwar and Chandrika as members of a joint Hindu family governed by the Mitakshara School of Hindu Law. Again the estate, when it was released, was made over not to the heir of Nageshwar only but to Nageshwar's heir Chandrika and to Nageshwar's brother Parmeshwar, showing that the estate was released to these persons as members of a joint Hindu family who were the then owners of the estate. In these circumstances I must construe the two notifications as indicating that the property referred to in the notification, namely, the Namudag Estate, must be deemed to have been the immoveable property which constituted the ancestral estate of the joint family of which Nageshwar was the karta and which was under his management. It was that ancestral property which it had been proposed by the karta should be taken under the

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superintendence of the authorities so that the liabilities of the family should be liquidated. This view is in accord with the decision of their Lordships of the Privy Council in the case of *Gulab Singh* v. *Raja Seth Gokuldas*(1). In that case upon the application of Maharaj Singh and Duli Chand, who were brothers and were the senior and managing members of a joint Hindu family governed by the School of Mitakshara along with their sons, the property was taken charge of by the Court of Wards and it was contended that the Court of Wards must be assumed to have taken possession only of the unascertained and unpartitioned shares in the joint family property of the applicants Maharaj Singh and Duli Chand only. But their Lordships of the Judicial Committee repelled the argument and held that " the property referred to in that notification (similar to the notification in the present case) must, in their Lordships' opinion, be deemed to have been all the immoveable property which constituted the ancestral estate of the joint family which was under the management of Maharaj Singh and Duli Chand and was referred to in their application. It was that ancestral property which it had been proposed by the Deputy Commissioner should be taken under the superintendence of the Court of Wards until the liabilities of the family should be liquidated ". I, therefore, have no hesitation in holding that the prohibition under section 12A applies in the present case not only to Nageshwar but also to Parmeshwar and Chandrika who were the owners of the property at the time when the authorities assumed charge on the application of Nageshwar who must be assumed to be acting as a karta with the implied authority of the other members to place the property belonging to himself, Parmeshwar, Chandrika and others who were then alive for the benefit of the joint family. When the property was released in 1910 to

(1) (1913) L. R. 40 Ind. App. 117.

Parmeshwar and Chandrika, the bar under section 12A remained operative against these two at least and any subsequent partition in 1922 could not operate to remove that bar. The conclusion which I have arrived at is that the mortgage bond in suit executed by Parmeshwar in favour of the plaintiff-respondents cannot be enforced so as to affect the property , a portion of the Namudag Estate, as the transaction was entered into without the sanction of the Commissioner.

Mr. S. M. Mullick appearing on behalf of the respondents argued that there is no definition of the word " holder " in the Encumbered Estates Act and, therefore, he contended that it must mean only a single person in possession at the time and that we have no power to read beyond the notification and must assume that the holder of the estate was Nageshwar only and nobody else He also argued that a joint Mitakshara Hindu family can never be a holder within the meaning of the word " holder " used in the Act. I do not agree with this contention. In my opinion the word " holder " is expressly used to mean a land-holder who has a title to the property in question as owner in possession. It is a compendious way of describing the proprietors or the owners of the estate which is going to be assumed charge of. It comprises every sort of proprietor irrespective of his personal law whether he is a Christian or a Muhammadan or is governed by the Dayabhaga or Mitakshara School of Hindu Law. In each case, therefore, it will have to be decided whether the owner who had made over charge of the estate has placed only his share of the estate in charge of the authorities or whether he as representing the entire owners has induced the authorities to take over the whole of the estate of the joint family or of the other co-owners also under their superintendence. As was pointed out by their Lordships of the Judicial Committee in the case referred to above, it is impossible

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to hold that an undivided interest in a joint Mitakshara Hindu family can be dealt with or was intended to be transferred to the authorities. Just as their Lordships decided in that case it must be decided in the present case, after construing the two notifications (Exhs. A and A-1) in the light of the circumstances, that the entire Namudag Estate, belonging to a joint Hindu family of which Nageshwar was the karta along with Parmeshwar and Chandrika, was intended to be taken possession of by the authorities, with the express request of the karta and with the implied consent of the other members including Parmeshwar and Chandrika, in the interest and for the benefit of the entire joint Hindu family.

The due date for the payment of the mortgage dues under the mortgage bond (Exh. 8) is 27th November, 1928. The present suit has been instituted on the 17th November, 1934, that is within six years thereof. The plaintiff-respondents are, therefore, entitled to a personal decree for the amount due under this mortgage bond which cannot be enforced as a mortgage bond. The plaintiffs will be entitled to a decree for the amount as fixed by the learned Subordinate Judge and the same will carry interest at 6 per cent. per annum from the 9th August, 1936, till the date of realisation.

We were asked to apply the provisions of sections 9, 10 and 11 of the Bihar Money-Lenders Act, 1938, but in view of a recent Full Bench decision of this Court in *Sadanand Jha* v. *Aman Khan*(1) the argument must be overruled; the appellant, however, is entitled to a certificate that this appeal is fit to be taken to the Federal Court as it involves a construction of certain sections of the Government of India Act, 1935.

(1) (1938) I. L. R. 18 Pat. 13 F. B.

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I would, therefore, partly allow the appeal and pass a money decree (instead of a mortgage decree) for the amount as stated above. The respondents are entitled to the costs of the Court below and to half the costs of this Court.

Second Appeal no. 722 *of* 1934:

This appeal relates to the enforcement of the mortgage bond of 15th February, 1920, executed by Chandrika and Parmeshwar against a portion of the Namudag estate. The only question which arises for consideration is whether by the provisions of section 12A of the Act the plaintiffs are precluded from enforcing the mortgage bond. The learned Munsif held that the mortgage bond was executed for legal necessity and for consideration. As to the objection under section 12A he held that the property that Nageshwar Prasad was holding at the time when the estate was taken charge of by the authorities was the ancestral property. He held further that Parmeshwar and Nageshwar were governed by the Mitakshara School of Hindu Law, that Chandrika was born before the estate was taken charge of by the Encumbered Estate authorities and that Nageshwar Dayal was the head member of the family and was in charge of the estate when the estate was vested in the hands of the Encumbered Estate officials. He, therefore, came to the conclusion that section 12A was an obstacle in the way of the plaintiffs enforcing the mortgage which was given without the sanction of the Commissioner. On appeal, the learned Judicial Commissioner came to the same conclusion.

It is unnecessary to repeat the arguments which were considered by me at length in First Appeal 140 of 1936, which was heard along with this Second Appeal. For the same reasons I hold that section 12A prevents the enforcement of the mortgage given by Chandrika and Parmeshwar in 1920, because

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Chandrika, Parmeshwar and Nageshwar must be held to have made over the property to the authorities in 1894 when they were the holders of the estate within the meaning of the Chota Nagpur Encumbered Estates Act and that they were the persons to whom the property was released in 1910.

The decision of the Courts below is correct and the plaintiffs are not entitled to a mortgage decree.

It was then argued that the plaintiffs should be given a personal decree; but the suit has admittedly been filed more than six years after the due date, as was pointed out by the learned Munsif at page 10. To overcome this difficulty it was submitted that in 1335, corresponding to 1928, there was an agreement by which the 7th defendant, Parmeshwar Dayal, was absolved from all liabilities under the bond and this was said to constitute an acknowledgment by Chandrika of his liabilities within the meaning of sections 19 and 20 of the Limitation Act. This matter was put in this way. On the 21st October, 1927, Parmeshwar Dayal executed a mortgage bond which was the subject of consideration in First Appeal 140 of 1936 by which he was absolved from all liabilities under the mortgage bond of February, 1920, the bond under consideration in the present appeal in which both he and Chandrika were liable. It was stated, therefore, that the execution of the mortgage bond in October, 1927, by Parmeshwar amounted to an acknowledgment of the liability under the bond of 1920 on behalf of Chandrika also. I am unable to agree with this argument. On the date of the so-called acknowledgment Chandrika and Parmeshwar were admittedly separate and Parmeshwar was absolving himself from all liabilities under the bond of 1920 by entering into a fresh transaction with the plaintiffs in October, 1927; in other words, on that date he was erasing his liability under the first bond. This cannot mean an acknowledgment

of the liability under the first bond by, or on behalf of, Chandrika. Chandrika never made any acknowledgment of his liability under the bond of 1920 in October, 1927.

It has been decided in this Court that an acknowledgment of liability by a co-mortgagor will ordinarily give a fresh start to the period of limitation against the mortgagor who acknowledges the same [*See Sarab Narain Das* v. *Top Ojha*(1)]. I am aware that a contrary view has been taken, for instance, in *Muthu Chettiar* v. *Muhammad Hussain*(2), *Srimati Achola Sundari Debi* v. *Srimati Doman Sundari Devi*(3) and *Ibrahim* v. *Lala Jagdish Prasad*(4); but these cases can be distinguished on the ground that in the circumstances thereof the mortgagor who was making the acknowledgment must be held to have made it as agent of the other co-mortgagors within the meaning of section 21 of the Indian Limitation Act; but in the circumstances of the present case Parmeshwar was never making the acknowledgment on behalf of Chandrika. He was expressly putting an end to his own liabilities on the mortgage bond of 1920. I, therefore, hold that the plaintiffs are not entitled even to a money decree in the present case.

The appeal of the plaintiffs, therefore, fails and is dismissed, but without costs.

FAZL ALI, J.—The principal question which has to be decided in these appeals may be formulated as follows :—

When an estate is placed under the management of the Collector or some other officer under the provisions of the Encumbered Estates Act upon the

(1) (1916) 43 Ind. Cas. 351.
(2) (1919) 55 Ind. Cas. 763.
(3) (1925) 90 Ind. Cas. 774.
(4) (1926) 99 Ind. Cas. 424.

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application of a person who is the karta of a joint Hindu family governed by the law of Mitakshara, such person being described as a "holder" in the notification issued under section 2 of the Act, whether the disqualification referred to in section 12A of the Act applies only to that person or to all the members of the joint family who were the owners of the estate on the date of the application.

Section 12A provides that when the possession and enjoyment of property is restored.....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.

In the present case the Namudag estate was placed under the Encumbered Estates management in 1895 upon the application of Nageshwar Dayal who is now dead; and its possession was restored in 1910 to Nageshwar's brother Parmeshwar Dayal, his son Chandrika and certain other members of his family. It is well settled that the disqualification contained in section 12A does not apply to the heir of the holder, because he was not the holder of the estate when the application under section 2 was made. There is, however, no direct authority to show whether it would or would not apply to the members of a joint family other than the person on whose application protection was given under the Act to the estate held by the joint family and who was described as a holder in the proceedings taken under the Act. It is contended on behalf of the plaintiffs that as Nageshwar alone was described as a holder in the notification of 1895 Parmeshwar and Chandrika were entitled to mortgage the property to them without the previous sanction of the Commissioner. The defendants, on the other hand, contend that the disqualification

referred to in section 12A extends to these persons also, as they were no less holders of the estate than Nageshwar and as Nageshwar had acted only as a representative of the entire joint family when he moved the authorities to take charge of the estate under the provisions of the Act.

The expression "holder" has not been defined in the Act, but there can be no doubt that it is used in the same sense as the expression "holder of land" which occurs in the preamble to the Act and as such would apply to all such person or persons as own any particular property. Therefore, the description of Nageshwar as a holder in the notification (Exhibit A) is by no means conclusive to show that he alone was the holder. As he was the karta of the family, it is evident that this description was given to him in the notification only in a representative capacity and must be held to apply to the entire family. From this it follows that the disqualification laid down in section 12A applied not only to Nageshwar but to the entire body of persons who were the holders of the Namudag estate in 1895.

It was contended on behalf of the plaintiffs that the intention of section 12A is to disqualify only that particular person from alienating or encumbering the properties of the estate after release from the Encumbered Estates management whose negligence and extravagance had put the estate in jeopardy at the time when the Act was applied. This contention is to some extent supported by the following words which occur in sub-clause (*ii*) of section 2 of the Act:

> "Such Deputy Commissioner is satisfied, after making such inquiry as he may think fit, and after considering and placing on record all representations if any made by such holder, that such holder has entered upon a course of wasteful extravagance likely to dissipate his property."

Now section 2 provides that an application to the Commissioner under the Act may be made by (*a*) any

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holder of immoveable property (*b*) when such holder is a minor or of unsound mind or an idiot, by his guardian, committee or other legal curator, or the person who would be the heir to such holder if he died intestate and (*c*) by the Deputy Commissioner. Sub-clause (*ii*) of the Act which refers to the extravagance of the holder applies only when the application is made by the Deputy Commissioner. In the case of other applicants all that the section requires is that it should be stated in the application that the holder of the property is subject to, or that his property is charged with, debts or liabilities other than debts due or liabilities incurred to Government. There is nothing in the Act to prevent the manager of a joint family from applying for protection under the Act on behalf of the entire family and where such an application is made by him in a representative capacity, the whole family and not he alone will be deemed to be the holder of the estate. There is also nothing in the Act to suggest that a Mitakshara joint family is not entitled to protection under the Act. The following observations made by the Judicial Committee in *Gulab Singh* v. *Raja Seth Gokuldas* (1) seem to me to support the view expressed by my learned brother and myself :—

"It appears to their Lordships to be obvious that the intention of Maharaj Singh and Dulichand in making that application was that the Court of Wards should in the interest of all the members of the joint family assume the superintendence of the immoveable property which was the ancestral property of the joint family, and not merely the management and superintendence of the then unascertained and unpartitioned shares in the joint property which on a partition of that property, not then in contemplation, might possibly come to Maharaj Singh and Dulichand. Neither Maharaj Singh nor Dulichand

(1) (1913) L. R. 40 Ind. App. 117.

had more than the mere coparcenary interest of a member of the joint family in the family property. Neither of them had any defined shares. It was held by this Board in 1903, in *Gharib-ul-lah* v. *Khalak Singh*(1), that the interest of an undivided Mitakshara family in the family property is not individual property. It had previously been held by this Board in 1866, in *Appovier* v. *Rama Subba Aiyan*(2), that no member of a joint Hindu family, whilst it remains undivided, can predicate of the joint or undivided property that he has a certain definite share. It has not been shewn to their Lordships that it was the practice of the Court of Wards of the Central Provinces to assume the superintendence of the unpartitioned interest of some only of the members of a joint Hindu family in the family property, nor has it been explained in this appeal how a joint family property could be preserved for the members of a joint family by a Court of Wards assuming the superintendence of the unpartitioned interests of some only of the members of the family. Under the circumstances of the family, Maharaj Singh and Dulichand acted prudently and in the best interest of the joint family in applying to the Deputy Commissioner of Hoshangabad to have the family property taken under the management of the Court of Wards, and in their Lordships' opinion Maharaj Singh and Dulichand in making that application acted within their powers and authority as the managing members of the joint family."

There can be no doubt that in the present case Nageshwar had asked for the protection of the entire estate and not only his unascertained and unpartitioned share in it. In my opinion, therefore, the disqualification set out in section 12A applies to the

(1) (1903) L. R. 30 Ind. App. 165.
(2) (1866) 11 Moo. I. A. 75.

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executants of the mortgage bonds in suit and, that being so, no mortgage decree can be passed in favour of the plaintiffs. At the same time, as was held by this Court in *Bhaiya Balmakund Sahay* v. *Bhagwat Narayan*(1), section 12A only prohibits the alienation of the property or the creation of a charge thereon, but does not debar the person affected by the Act from borrowing money. Thus, although the plaintiffs cannot get a mortgage decree, they must be held in First Appeal 140 to be entitled to enforce the personal covenant by the mortgagor to repay the loan which is always implied in a mortgage. The plaintiffs cannot enforce the covenant in Second Appeal no. 722, as they instituted the suit after the expiry of the period of limitation.

I therefore agree with my learned brother that Second Appeal no. 722 of 1934 must be dismissed and First Appeal no. 140 of 1936 should be partly allowed by substituting a money decree for the mortgage decree passed by the learned Subordinate Judge.

S. A. K.

Appeal no. 140 *allowed in part.*

Appeal no. 722 *dismissed.*

APPELLATE CRIMINAL.

Before Varma and Rowland, JJ.

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March, 14, 15, 16.

KING-EMPEROR

v.

MAYADHAR POTHAL.*

Evidence Act, 1872 (*Act I of* 1872), *sections* 27 *and* 114—*Code of Criminal Procedure*, 1898 (*Act V of* 1898), *sections* 162 *and* 235—*statement by accused person to a police officer*

* Death Reference no. 1 of 1939, and Criminal Appeal no. 1 of 1939 (Cuttack). Reference under section 374 of the Code of Criminal Procedure made by J. A. Byers, Esq., I.C.S., Sessions Judge of Cuttack, in his letter no. 106, dated the 17th January, 1939.

(1) (1928) I. L. R. 8 Pat. 212.

during investigation under special circumstances mentioned in section 27, whether admissible—section 162 of the Code, whether is a bar—section 235, test for applying—charge of murder and robbery—recovery of stolen property—nature of presumption to be drawn—Sessions trial—index to map containing objectionable material, whether should be put to the Jury—proper course to be adopted.

Section 162 of the Code of Criminal Procedure, 1898, is no bar to the admissibility of a statement made by an accused person to a police officer in the course of an investigation when it is made under the special circumstances provided for in section 27 of the Evidence Act, 1872.

Section 27 of the Evidence Act is a special law within the meaning of section 1(2) of the Code of Criminal Procedure and is not specifically repealed by section 162 of the Code.

Syamo Maha Patro, In re(1) and *Thimmappa* v. *Thimmappa*(2), followed.

Pakala Narayan Swami v. *Emperor*(3), explained.

The course of criminal trials in India is to be governed by the provisions of the Indian statute and not by a criterion derived from the law of some other country.

The test for applying section 235, Code of Criminal Procedure, 1898, is to see whether the acts alleged form a series that can be regarded as one transaction; this question cannot be answered in the negative when the evidence to prove the one offence is identical with that by which the other is to be established.

When persons have been tried at one trial for robbery and murder, possession of recently stolen property if unexplained, such as would be presumptive evidence against the prisoners on the charge of robbery, is similarly admissible in evidence against them on the charge of murder; but when the question arises whether the presumption of the graver offence or of the lesser offence is to be drawn, it is for the prosecution to establish the graver presumption rather than for the graver presumption to be drawn in the absence of an explanation from the accused.

(1) (1932) I. L. R. 55 Mad. 903, F. B.
(2) (1928) I. L. R. 51 Mad. 967, F. B.
(3) (1939) I. L. R. 18 Pat. 234, P. C.

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Queen-Empress v. *Sami*(1) and *King-Emperor* v. *Sadasibo Majhi*(2), referred to.

In a Sessions trial the notes in the index to a map, embodying statements regarding things said to have happened at the various points referred to, are not properly to be put before the jury or assessors and where the index contains such objectionable material the better course is to have a fresh index prepared with the objectionable material eliminated.

King-Emperor v. *Lalji Rai*(3), referred to.

Reference under section 374 of the Code of Criminal Procedure, 1898.

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

M. Mahanti, for the appellant.

Public Prosecutor of Orissa, for the Crown.

ROWLAND, J.—This is a reference by the Sessions Judge of Cuttack under section 374 of the Code of Criminal Procedure for confirmation of the sentence of death passed by him on Mayadhar Pothal who has been convicted under section 302 of the Indian Penal Code on a charge of the murder of an old woman named Fula Bewa who used to live alone in her house in Krishnarainpur. The murder is said to have been committed on the night of 21st October, 1938, in the angan of the deceased. There is a chula or a raised hearth with a hole in the top. The body was found on the morning of 22nd October, 1938, with the head thrust into the mouth of the chula. Death had been caused by a number of incised wounds on the back of the neck and the back. The lobes of the ears had been cut by some cutting instrument and the ear-rings removed from them. Robbery is naturally the

(1) (1890) I. L. R. 13 Mad. 426.

(2) (1938) 19 Pat. L. T. 801.

(3) (1935) 16 Pat. L. T. 730.

motive ascribed. There is evidence of several neighbours that the deceased used to wear two pairs of gold ear-rings.

There is no eye-witness and the case against the accused rests entirely on circumstantial evidence consisting in the recovery from his house of certain suspicious articles on a statement made by him to the investigating Sub-Inspector; the recovery of a weapon proved to be blood-stained from the house of his neighbour Danai or Danadar Khatua as a result of a statement made by this accused and the finding of some marks of injury on the person of the accused which suggest that he may have taken part in some sort of a struggle at about the time of the crime. As to the statement made by the accused and leading to the recovery of the articles we have it only in a fragmentary form. P. W. 12 Mayadhar Jena, one of the search witnesses, says

"the accused told the S. I. Police that he had got the ear-rings of the deceased."

Sub-Inspector Narayan Prasad Prija says that accused told the witness that he had got the ear-rings of the deceased hidden in his thatch. The note as to accused's statement made in the search list Exhibit 5 is:

"Mayadhar Pothal having produced the ear-rings from the bundles of straw of the lowest layer of the thatch of his house over the eaves four rafters from the corner beam towards his bari (garden) side to the south saying that Janardan Khatua of Krishnarainpur after killing Fula Bowa had handed them over to be kept, they were seized".

If it was intended to admit under section 27 of the Indian Evidence Act the statement made by the accused regarding these ear-rings, the correct course was to use "so much of the information as relates distinctly to the fact thereby discovered" and no less. The question arises whether a proper reading of section 162 of the Code of Criminal Procedure prohibits the use of a statement made by an accused

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person to a police officer in the course of an investigation when it is made under the special circumstances provided for in section 27 of the Indian Evidence Act. It has recently been laid down by their Lordships of the Judicial Committee of the Privy Council in *Pakala Narayan Swami* v. *Emperor*(1) that section 162 is not confined to statements made to the police by witnesses but applies equally to statements made by accused persons; but their Lordships expressly abstained from deciding the question whether a statement followed by a discovery of fact such as is contemplated by section 27 is rendered inadmissible or still remains admissible on the ground that section 27 of the Evidence Act is a special law within the meaning of section 1(*2*) of the Code of Criminal Procedure and is not specifically repealed by section 162. Undoubtedly it has long been an unquestioned practice in all the High Courts that statements made to a police officer in the circumstances provided for by section 27 of the Evidence Act have been treated as admissible in evidence notwithstanding that they may have been made to an investigating officer during the progress of an investigation. And in *King-Emperor* v. *Syamo Maha Patro*(2) Reilly, J. has adopted the line of reasoning by which in *Thimmappa* v. *Thimmappa*(3) section 27 of the Indian Evidence Act and section 162 of the Code of Criminal Procedure were both given effect to, section 162 having effect in every case except those to which section 27 applies by way of exception or proviso. In the absence of a definite pronouncement of the Judicial Committee to the contrary, I think it is permissible to follow that reasoning and to admit proof of a statement made by an accused person to an investigating officer in the special circumstances provided

(1) (1934) I. L. R. 18 Pat. 234, P. C.

(2) (1932) I. L. R. 55 Mad. 903, F. B.

(3) (1928) I. L. R. 51 Mad. 967, F. B.

for in section 27 of the Evidence Act. Three ear-rings said to be the property of the deceased were recovered in consequence of this statement of the accused and they have been identified as the property of the deceased by P. W. 2 Surji Dibya, P. W. 4 Bela Dei, P. W. 5 Bhaban Bewa, the above three being neighbours of the deceased and women and P. W. 6 Lakhi Das, the deceased's nephew. As against the reliability of the identification by Bhaban Bewa, it is pointed out that in the committing magistrate's court she said that during the police investigation she had failed to identify the ear-rings. For the purpose of this case, I shall assume the articles to have been correctly identified as the property of Fula Bewa, but this is not to be regarded as a definite finding because that very point will be for the Sessions Court to determine in the subsequent trial of the appellant on the charges connected with the property. This reservation is necessary in consequence of the procedure followed by the Sessions Judge at the outset of the trial. The case had been committed for trial in his Court on charges under sections 302, 392 and 411 of the Indian Penal Code. It was the case of the prosecution that the murder of the deceased and the robbery were parts of one transaction and were simultaneously done and that the alleged stolen property found in the possession of the accused was property stolen in that very robbery done at the time of the murder; but the learned Judge tried the charge under section 302 only. In the circumstances stated there was ample authority in section 235 and the succeeding sections of the Criminal Procedure Code for the trial of the accused at one trial for all the offences with which he was charged. The reason given in the order-sheet for not trying all the charges together is that " the *corpus delicti* in each case is not the same ". I do not find " *corpus delicti* " in any part of the Code of Criminal Procedure; and the course of criminal trials in India is to be governed by

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the provisions of the Indian Statute and not by a criterion derived from the law of some other country. The test for applying section 235 is to see whether the acts alleged form a series that can be regarded as one transaction; and it is difficult to see how this question can be answered in the negative when the evidence to prove the one offence is identical with that by which the other is to be established. The procedure followed in taking up one charge only has the result that we are unable to deal with the whole case, and the inconvenience of holding two trials instead of one on the same evidence will be obvious to the learned Judge.

In addition to the recovery from his house of the ear-rings there is the further statement made by accused and recovery in consequence of it of a *katari* in the house of Donai. As to this statement we have it from P. W. 12 Mayadhar Jena that accused pointed out the *katari* in the house as having been used by Donai for the murder. The Sub-Inspector only says:

> "The accused took us to the house of Donai and pointed out the katari."

The Sessions Judge appears to think that the recovery of these articles directly connects the accused with the crime, he having at the trial given no explanation or a false explanation about them. Now the prosecution in order to establish a charge of murder has to prove that the accused is something more than a receiver of stolen property and so much of the evidence as I have thus far set out would appear to be equally consistent with his being a murderer or a receiver; and the position is the same whether the statements by Mayadhar to the Sub-Inspector regarding the articles found are taken into consideration or are excluded. If they are excluded, there is this to be noted, that accused is a goldsmith, and experience suggests that the nearest goldsmith is a person likely to be resorted to by a thief for the

disposal of stolen jewels. No doubt it has been held in *Queen-Empress* v. *Sami*(1) that when persons have been tried at one trial for robbery and murder possession of recently stolen property if unexplained (such as would be presumptive evidence against the prisoners on the charge of robbery) was similarly admissible in evidence against them on the charge of murder. And in this Court in *King-Emperor* v. *Sadasibo Majhi*(2) it is observed by Khaja Mohamad Noor, J. that one may presume under section 114 of the Evidence Act that the accused was either involved in the murder and robbery or at least received the stolen property knowing it to be the proceeds of the robbery. This presumption is within the terms of section 114, *Illustration* (*a*); but when the question arises whether the presumption of the graver offence or of the lesser offence is to be drawn, it is for the prosecution to establish the graver presumption rather than for the graver presumption to be drawn in the absence of an explanation from the accused. So we have to see what further material there is to show that the accused was not merely a receiver of stolen property but was himself the murderer or actively concerned in the murder. The materials relied on are, first, the finding of a sack at his house which contained a *katari* and a blood-stained rag. The *katari* had no blood stains on it. The stains on the rag may have had some other origin and as to the sack the accused says it is not his and has said in his statement before the Magistrate that it has the name of Jagabandhu written on it. No question was asked of any witness as to whether this is so and the Sessions Judge has not made any note as to whether any such name was found on the sack. The sack itself has not been sent to this Court and we are unable to say whether it has Jagabandhu's name on it.

(1) (1890) I. L. R. 13 Mad. 426.

(2) (1938) 19 Pat. L. T. 801.

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There seems to be room for doubt whether the sack is the property of the accused or not.

Then there are the injury marks found on the person of the accused which are consistent with his having taken part in some sort of scuffle at about the time of the alleged occurrence. The accused had an incised wound on the right thumb, two incised scratch marks on the left cheek and four scratch marks on the right hand besides some older marks. It is pointed out in argument that he could have received this cut in the course of his occupation as a goldsmith and the other injuries could have been caused in many ways. There is also the fact that accused's lantern was found broken. It was for the prosecution to show circumstances which could not be explained on any view consistent with the innocence of the accused; and in my opinion what has been found while sufficient to give rise to very grave suspicion is not (whether we regard the pieces of evidence individually or collectively) sufficient conclusively to demonstrate the guilt of the accused on the charge of murder.

Before leaving the case I may refer to the map and index. The notes in the index embody statements regarding things said to have happened at the various points referred to. Such notes are not properly to be put before the jury or assessors and where the index contains such objectionable material the better course is to have a fresh index prepared with the objectionable material eliminated. In the present index the entries against *F. G. H. I.* and *J.* should be substituted by entries free from objectionable matter. The learned Judge may for guidance in such matters refer to *King-Emperor* v. *Lalji Rai*(1) and the cases there cited.

In the result I would accept the unanimous opinion of the assessors and set aside the decision of

(1) (1935) 16 Pat. L. T. 730.

the learned Sessions Judge. I would discharge the reference and acquit the accused of the charge of murder. The Sessions Judge will take the necessary steps for his trial on the other charges which were framed against him.

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VARMA, J.—I entirely agree.

Reference discharged.

S. A. K.

FULL BENCH.

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March, 20, 21.

Before Wort, Varma and Manohar Lall, JJ.

GOKHUL MAHTON

v.

SHEO PRASAD LAL SETH.*

Limitation Act, 1908 (*Act IX of* 1908), *article* 75—*simple instalment bond—whole amount to become payable on any single default—suit to recover unpaid instalments—article* 75, *whether applicable—time, whether runs from the date of first default—waiver, what amounts to—abstention from suing or acceptance of a portion of overdue instalment, whether amounts to waiver.*

Where a simple instalment bond provides that on default of any single instalment the whole amount under the bond shall become payable, a suit to recover the unpaid instalments is governed by article 75 (or article 116 in the case of a registered bond) of the Limitation Act, 1908, and, in the absence of a waiver of the default clause, time begins to run from the date of the first default.

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* Appeal from Appellate Decree no. 354 of 1936, from a decision of S. L. Marwood, Esq., I.C.S., Deputy Commissioner-Subordinate Judge of Hazaribagh, dated the 25th of March, 1936, reversing a decision of Babu Basu Pershad, Munsif of Hazaribagh, dated the 23rd of September, 1935.

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Sri Ramchandra Nayek Kalia v. *Gharbharan Ahir*(1), overruled.

Jawahar Lal v. *Mathura Prasad*(2) and *Sukh Lal* v. *Bhoora*(3), followed.

Lasa Din v. *Gulab Kunwar*(4), *Rup Narain Bhattacharya* v. *Gopi Nath Mondol*(5), *Nobocoomar Mookhopadhya* v. *Siru Mullick*(6) and *Ramsekhar Prasad Singh* v. *Mathura Lal*(7), distinguished.

Mere abstention from suing in the case of an instalment bond or an acceptance of a portion of an overdue instalment does not amount to a waiver.

Mukhdeo Singh v. *Harakh Narayan Singh*(8), *Kanhai* v. *Amrit*(9), *Mohesh Chandra Banerji* v. *Prosanna Lal Singh*(10), *Sukh Lal* v. *Bhoora*(3) and *Keene* v. *Biscoe*(11), followed.

When the plaintiff alleges that all the previous instalments have been paid, he proceeds on the footing that there has been no default and no waiver, and if his allegations are, in the course of the trial, found to be false, he cannot turn round and ask the court to infer any waiver.

Appeal by the defendants.

The appeal was in the first instance heard by Wort, J. who referred it to a Division Bench by the following Order of Reference:—

WORT, J.—I shall endeavour to state my reasons for asking for the assistance of another Judge, that is to say, referring the case to a Division Bench, as simply as possible. Having regard to the circumstances of the case it is necessary for me to express my view at some length.

The appeal arises out of an action in which the plaintiffs were claiming instalments under a kistbandi bond for the years 1929 to 1933. Both the trial court and the appellate court agreed in their view of the construction of the bond that the plaintiffs were limited

(1) (1930) 11 Pat. L. T. 866.
(2) (1934) I. L. R. 57 All. 108, F. B.
(3) (1934) I. L. R. 57 All. 561.
(4) (1932) L. R. 59 Ind. App. 376.
(5) (1906) 11 Cal. W. N. 903.
(6) (1880) I. L. R. 6 Cal. 94.
(7) (1925) I. L. R. 4 Pat. 820.
(8) (1931) I. L. R. 11 Pat. 112.
(9) (1925) I. L. R. 47 All. 552.
(10) (1903) I. L. R. 31 Cal. 83.
(11) (1878) 8 Ch. Div. 201.

to one particular mode of recovery, to use the expression in the judgment of the Deputy Commissioner-Subordinate Judge. The argument based on the construction of the bond itself was that the plaintiffs were entitled either to sue for the whole amount under the defeasance clause on default of payment of one instalment or to sue for one of the instalments only. That is an argument which, in agreement with the Judges in the Courts below, I cannot accept. It is an ordinary defeasance clause although perhaps expressed, as translated, in a rather awkward language; but its meaning is plain. The meaning to be attached is the meaning to be attached to all bonds of this kind with similar defeasance clause.

The Judge in the Court below disagreeing with the trial Court has held that there had been a waiver within the meaning of Article 75 of the Limitation Act by the acceptance by the plaintiffs of a sum of Rs. 25 against the instalment due in 1928. The instalment, I should have said, was of Rs. 75 and the plaintiffs had endeavoured to show that all the instalments had been paid prior to that date; but on that point he failed, the Judge in the Court below coming to the conclusion that some of the earlier instalments were paid, but between the last complete payment and the payment of Rs. 25 some instalments remained due and owing. It was in those circumstances that the plaintiffs brought their action for those instalments which were within the period of limitation, that is to say, within six years from the date of default and for the instalments of 1929 to 1933.

If the learned Judge is correct as regards waiver, the other and somewhat more difficult question does not arise. The question to which I refer is the proper construction to be placed on Article 75 of the Limitation Act. As I have stated and repeat, the Judge in the Court below has held that there was waiver by acceptance of a part of the instalment of the year 1928. There are decisions in India regarding this matter. The first to which I refer is in *Cheni Bash Shaha* v. *Kadum Mundul*(1). There Jackson, J., delivering the judgment of the Court, said this: "By waiver in this case, we think, is meant a waiver of the condition by which a default in payment of any one instalment the whole amount unpaid became immediately payable", and held that there was no waiver in that case. The second decision is in *Mohesh Chandra Banerji* v. *Prosanna Lal Singh*(2) in which Rampini and Pargiter, JJ. held that the payment of a part of an overdue instalment is if accepted not waiver and they referred to the case of *Cheni Bash Shaha* v. *Kadum Mundul*(1) to which I have just made reference. In this connection reference was also made to the case of *Mon Mohun Roy* v. *Durga Churn Gooee*(3) which it will be necessary to refer to on another point. Had the decisions in Courts in India been to the effect that the acceptance of payment of a part of an instalment amounts to waiver of the right of the plaintiff to sue, I should certainly have found myself in some difficulty. But the decision in *Cheni Bash Shaha* v. *Kadum Mundul*(1) to which I have already made reference is consistent with what I understand

(1) (1879) I. L. R. 5 Cal. 97.
(2) (1903) I. L. R. 31 Cal. 83.
(3) (1888) I. L. R. 15 Cal. 502.

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to be the general principles of law as expressed in the case of *Keene* v. *Biscoe*(1). I am quite aware that their Lordships of the Judicial Committee of the Privy Council have expressed the view that it is dangerous to refer to English authorities where the question of the construction of an Indian statute comes up for decision; and although it may be true to say that I have here to construe Article 75 of the Limitation Act, it is in one sense merely the construction of the expression 'waiver' which, as I stated during the course of the argument, is a juridical term imported into the law of India from England. Fry, J. (as he then was) made this statement: "Where a right has accrued it can be waived, but to amount to waiver there must be something done which is inconsistent with the continuance of that right. Now, the right here was to immediate payment of £ 400 and interest (I may add in parenthesis that there an instalment mortgage debt was under consideration) and the receipt of a portion of that sum is in no way inconsistent with that demand. I cannot conceive any case more different from that of receipt of rent after a forfeiture. In that case non-payment of rent has given rise to a right of forfeiture, but if the landlord afterwards receives any rent, that puts an end to his right of forfeiture; for if, after knowing the circumstances, he accepts rent, he in fact says that though he might have avoided the lease he has chosen not to do so". In my judgment there was no ground upon which the Judge in the Court below could say that there had been a waiver in this case.

That leads me to the consideration of the other question which comes up for determination and that is, when did the right of action accrue. By a decision of the Privy Council the matter is governed by Article 116 "For compensation for the breach of a contract in writing registered". I make no observation with regard to that as that question is now beyond dispute. But Article 116 refers back to other Articles for provision as to the date from which the period of limitation would run: in this case Article 75, which is an Article "on a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due", the third column runs thus: "When the default is made, unless where the payee or obligee waives the benefit of the provision". I have held here there is no waiver. The question therefore is, does limitation run from the date when the default is made?

Shortly stated, there are two lines of cases. One which holds that the period of limitation runs from the date of default, that is to say, when the plaintiff had a right to sue, and that means on the first default, while the other is to the effect that the creditor may choose—he may sue when default is made in payment of an instalment, or he may wait till the whole becomes due. The decisions which are binding upon me are, first, the case of *Ramsekhar Prashad Singh* v. *Mathura Lal*(2). It is necessary to point out in the case to which I have just referred that what was under consideration was a mortgage bond payable by instalments. Ross and Scroope, JJ. in *Sri Ram Chandra Nayak Kalia* v. *Gharbharan Ahir*(3) followed the earlier

(1) (1878) 8 Ch. Div. 201.
(2) (1925) I. L. R. 4 Pat. 820.
(3) (1930) 11 Pat. L. T. 866.

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decision as completely covering the point which came up before them for decision under what was usually called a kistbandi bond and not a mortgage bond. As I have said, they followed the earlier decision which was to the effect that the plaintiff had an option, in other words, it was not obligatory for the mortgagee to bring a suit for the realization of the entire amount as soon as any one of the instalments was overdue. What was not noticed by Ross and Scroope, JJ. in the later decision was that the decision of Kulwant Sahay and Sen, JJ. was on a mortgage bond. The same question on a mortgage bond came up before their Lordships of the Judicial Committee in *Pancham* v. *Ansar Husain*(1). In that case their Lordships had to deal with Article 132 of the Limitation Act and not Article 75, and, referring to the Full Bench decision of the Allahabad High Court in *Gaya Din* v. *Jhuman Lal*(2), Lord Blanesburgh made this observation: " The High Court held that under a clause in the above form a single default on the part of the mortgagors, without any act of election, cancellation or other form of response or acceptance on the part of the mortgagees, and even, it would appear, against their desire, operates, *eo instanti*, to make the money secured by the mortgage " become due " so that all right of action in respect of the security is finally barred twelve years later..... All this the High Court held, notwithstanding that the mortgage is for a term certain, a provision which may be as much for the benefit of the mortgagees as of the mortgagors ". Their Lordships, however, did not decide on the construction of the Article whether the plaintiff was bound to bring his action when the instalment first became due as they took the plaintiff at his own word, to use the expression of the Chief Justice of the Allahabad High Court in the Full Bench decision in *Jawahar Lal* v. *Mathura Prasad*(3), and took his cause of action as stated in the plaint as having accrued beyond the period of limitation. The Full Bench decision to which their Lordships were referring was the case of *Gaya Din* v. *Jhumman Lal*(2). There the Full Bench was dealing with a mortgage bond and held that under Article 132 of the Indian Limitation Act the mortgage money having become due when the first default was made, the action was barred by limitation. I have already pointed out the distinction between the two decisions of this Court—*Ramsekhar Prasad Singh* v. *Mathura Lal*(4) and *Sri Ramchandra Nayak Kalia* v. *Gharbharan Ahir*(5)—the earlier one being the case of a mortgage bond and the later one being the case of an ordinary kistbandi bond and not mortgage bond.

There is the most important decision of their Lordships of the Judicial Committee of the Privy Council which makes it necessary for me to make the reference as I stated at the commencement of my

(1) (1926) L. R. 53 Ind. App. 187.
(2) (1915) I. L. R. 37 All. 400, F. B.
(3) (1934) I. L. R. 57 All. 108, F. B.
(4) (1925) I. L. R. 4 Pat. 820.
(5) (1930) 11 Pat. L. T. 866.

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observation. That is the case of *Lasa Din* v. *Gulab Kunwar*(1). Now, this case deals with a very serious question, as Lord Blanesburgh described it in *Pancham's* case(2) and disposes of it. The question is whether under Article 132 the mortgagee is bound to sue when the instalment was in default or whether he could wait till the principal sum became due: and the decision is that "under the Indian Limitation Act, 1908, Schedule I, Article 132, a suit to enforce a mortgage for a stipulated period can be instituted within twelve years of the expiry of the period, although a default by the mortgagor has occurred during the period and by the terms of the mortgage the mortgagee thereupon had an immediate right to enforce the mortgage". I have stated and I repeat that there is a very considerable distinction between a mortgage bond payable by instalments and an ordinary bond payable by instalments for the very obvious reason that in one case Article 132 of the Limitation Act has to be construed while in the other Article 75. Great as the authority of the Privy Council is, the case is not a decision on the particular point which comes up before me and in this connection I propose to read the observations of Sir George Lowndes which in my judgment casts a doubt upon all those decisions under Article 75. The observation is to this effect, while dealing with the point that the creditor has an option either to sue when one of the instalments becomes due or to wait until the whole becomes due: "Their Lordships are not greatly oppressed by the authority of *Reeves* v. *Butcher*(3). It is, they think, always dangerous to apply English decisions to the construction of an Indian Act. The clause there under consideration differed widely from that now before their Lordships, and indeed from the clauses with which the Allahabad Court had to deal [their Lordships were dealing with the Full Bench decision of the Allahabad High Court in *Pancham's* case(2). the question for decision would have fallen in India, not under article 132, but under article 75, which is in very special terms [that means the point in *Reeves* v. *Butcher*(3) would have fallen under article 75 and not under article 132]; and section 3 of the statute of James, with which the Court was concerned, made the time to run, not from the date when the money became due, but from the date when the cause of action arose. If in the Indian cases the question were—'when did the mortgagee's cause of action arise?'—i.e. when did he first become entitled to sue for the relief claimed by his suit—their Lordships think that there might be much to be said in support of the Allahabad decisions (the Allahabad decisions, I would state, being to the effect that he was bound to sue when the first instalment became due). Judged by the Indian criterion, 'when the money sued for became due', upon the best consideration their Lordships have been able to give to this difficult question, they think that the decision of the Chief Court of Oudh was wrong, and that they should have held that the appellant's suit was within time". Their Lordships stated that under Article 75 the question arising is—when did the

(1) (1932) L. R. 59 Ind. App. 376.

(2) (1926) L. R. 53 Ind. App. 187.

(3) (1891) 2 Q. B. 509.

cause of action arise or accrue, whereas under Article 132 the question is—when did the money sued for become due, and they expressed the view that very different considerations would necessarily arise.

Now, many decisions, indeed the decisions of this Court, have relied in the first place on *Rup Narain Bhattacharya* v. *Gopi Nath Mandol*(1)—a case of ordinary instalment bond. Sir Francis Maclean, in delivering the judgment of the Court, refers to a number of cases which, he decides, support the view that the plaintiff was entitled either to bring his action when the instalment became due or to wait till the whole became due and then makes this observation: "Speaking for myself if the matter had been *res integra* I should have felt some doubt whether the case did not fall within Article 75 of the Second Schedule of the Limitation Act, rather than within Article 116". It seems to me with great respect to the learned Chief Justice that he seems to be under a misapprehension as the case did fall under Articles 75 and 116. Article 116 extended the time whereas the other Article 75 provided the period from which limitation would run. The other cases of this Court relied upon are, first, the case of *Ganga Bishun Marwari* v. *Lala Raghunath Prasad*(2) which was a case of a decree payable by instalments and under a different Article from that which I have to consider. Again in the case of *Raghunandan Singh* v. *Kishun Singh*(3) my Lord the Chief Justice and Varma, J. had to decide a question arising under a mortgage bond, and their decision is in conformity with the latest decision of their Lordships of the Judicial Committee.

I only propose to make one more observation with regard to this matter and that is on the construction of Article 75 which, as I said, provides for the period of limitation where there is a defeasance clause. Article 74 provides for a period of limitation on an instalment bond where there is no defeasance clause, and, as one of the distinguished Judges very pertinently put it, if the legislature intended the creditor to have a choice as between suing when the instalment was in default or waiting till the whole became due, then why was it necessary to enact Article 75 at all? Article 75 strictly speaking becomes nugatory, and in my judgment the Article seems to me to be plain beyond doubt. The period of limitation under this Article dates from when the default was made, in other words [as in the English case of *Reeves* v. *Butcher*(4) to which their Lordships of the Privy Council referred] when the cause of action arose. I would refer to one more English authority on Statute of Limitations, being the case of *Hemp* v. *Garland*(5) in which Lord Denman held in a case where there was a defeasance clause, that the action was barred by limitation and observed: "If he chose to wait till all the instalments became due, no doubt he might do so; but that which was optional on the part

(1) (1906) 11 Cal. W. N. 903.
(2) (1930) I. L. R. 10 Pat. 173.
(3) (1935) I. L. R. 15 Pat. 1.
(4) (1801) 2 Q. B. 509.
(5) (1843) 4 Q. B. 519.

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of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time that the plaintiff had a right to maintain it. The Statute of Limitations runs from the time the plaintiff might have brought his action."

Here in this case the Statute of Limitations runs from the date when there was a default, in other words, when the plaintiffs might have brought their action.

With these somewhat lengthy observations I would refer this case to a Division Bench for decision.

The appeal then came on for hearing before Wort and Manohar Lall, JJ. who referred it to a Full Bench.

On this reference—

Rai Guru Saran Prasad (with him *T. K. Prasad*), for the appellants:

The finding of the lower appellate Court as to waiver is wrong. The fact that the plaintiffs had abstained from suing on the happening of the default cannot in law imply a waiver on their part. Likewise, the acceptance of a *portion* of the overdue instalment does not amount to a waiver—*Mohesh Chandra Banerji* v *Prosanna Lal Singh*(1), *Sukh Lal* v. *Bhoora*(2), *Kanhai* v. *Amrit*(3). *See* also the observation of Fazl Ali, J. in *Mukhdeo Singh* v. *Harakh Narayan Singh*(4). Moreover, on the pleading itself the plaintiffs cannot be allowed to set up the plea of waiver. [Reference was made to *Easin Khan* v. *Abdul Wahab Sikdar*(5)]. The present case is governed by Article 75 of the Limitation Act. The starting point of limitation is the date of the first default. In the absence of a clear waiver, no other starting point is available to the plaintiffs. The

(1) (1903) I. L. R. 31 Cal. 83.
(2) (1934) I. L. R. 57 All. 561.
(3) (1925) I. L. R. 47 All. 552.
(4) (1931) I. L. R. 11 Pat. 112.
(5) (1910) 15 Cal. W. N. 10.

principle governing all such cases as relate to mortgage instalment bonds cannot apply to simple bonds payable by instalments.

[MANOHAR LALL, J.—You suggest that the former class of cases will be governed by Article 132 and the latter class by Article 75, the starting point of limitation as given in these articles being different.]

Yes. As was observed by their Lordships of the Judicial Committee in *Lasa Din* v. *Gulab Kunwar*(1), Article 75 is in very special terms. It differs very materially from Article 132. Under Article 132 the mortgagee can wait till the mortgage money under the bond has "become due", that is to say, till the latest day fixed by the bond. But where a case is covered by the first column of Article 75 and on the first default the entire money has become payable and due, then there can be no escape from the position that the creditor has to bring a suit within three years from the date of default. As was put by Sulaiman, C.J. in the Full Bench decision in *Jawahar Lal* v. *Mathura Prasad*(2), "the creditor cannot, by merely saying that he chooses to give up a part of the whole amount due, fall back on Article 74 and say that he will now claim only instalments and take advantage of a different starting point of limitation". I also rely on *Sukh Lal* v. *Bhoora*(3). The case of *Sri Ramchandra Nayek Kalia* v. *Gharbharan Ahir*(4) merely follows *Ramsekhar Prasad Singh* v. *Mathura Lal*(5) which was a case relating to a mortgage instalment bond. That being the basis of the decision, I submit it is wrongly decided.

S. N. Bose, for the respondents: The question as to whether or not there has been a waiver is not a mere question of law. Its decision would depend

(1) (1932) L. R. 59 Ind. App. 376.
(2) (1934) I. L. R. 57 All. 108, F. B.
(3) (1934) I. L. R. 57 All. 561.
(4) (1930) 11 Pat. L. T. 866.
(5) (1925) I. L. R. 4 Pat. 820.

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on variety of circumstances and the Court will have to decide whether having regard to the evidence in each case a waiver had been established or not. The finding of the lower appellate Court is a finding of fact which should not be interfered with in second appeal.

[WORT, J.—It is a mixed question of law and fact.]

But it depends on the circumstances of each case. The acceptance of a portion of the overdue instalment amounts to a waiver, for the simple reason that by accepting the amount the creditor waives the benefit of the defeasance clause.

[MANOHAR LALL, J.—How can you ask us to infer waiver when you have not pleaded it in your plaint? The allegations in the plaint, which have been found to be untrue, negative the plea of waiver. On your pleading, there was nothing to waive.]

But all the same it has been found as a fact that there was waiver. My next submission is that Article 75 does not apply to my case. This Article applies only where the creditor wants to avail himself of the default clause and chooses to bring a suit on the happening of the first default. But where the creditor waives the benefit of the default clause and chooses to wait, Article 75 has no application, and the only Article that will then apply is Article 74. The default clause is for the benefit of the creditor and he may elect not to take advantage of it—*Chhajju* v. *Nanak Bakhsh*(1). In *Lalta Prasad* v. *Gajadhar Shukul*(2) it was held, in similar circumstances, that time does not begin to run from the date of the first default.

[WORT, J.—But Article 74 does not deal with instalment bonds containing a default clause.]

(1) (1933) A. I. R. (Lah.) 849.
(2) (1933) A. I. R. (All.) 285.

This Article is generally worded: it applies to all sorts of instalment bonds. Where a suit is not based on the default clause, the case at once attracts the operation of Article 74.

[WORT, J.—Then Article 75 would become nugatory.]

I submit not. It will apply as soon as the creditor chooses to enforce the default clause. I rely on the decision of Mukherji, J. in *Jawahar Lal* v. *Mathura Prasad*(1). The description of the suit in Article 75 " is not merely of the bond on which the suit is based but is also a description of the nature of the relief which is sought in the suit." I rely on *Sri Ramchandra Nayek Kalia* v. *Gharbharan Ahir*(2) and *Rup Narain Bhattacharya* v. *Gopi Nath Mondol*(3). So far as a default clause is concerned, a simple instalment bond stands on the same footing as a mortgage instalment bond. The stipulation in both cases is for the benefit of the creditor and not for the benefit of the debtor. Therefore, all those cases which relate to mortgage bonds payable by instalments apply with equal force to simple bonds. [Reliance was placed on *Lasa Din* v. *Gulab Kunwar*(4). *Ramsekhar Prasad Singh* v. *Mathura Lal*(5) and *Pancham* v. *Ansar Hussain*(6)]. In the case of a mortgage bond also, the whole money will be deemed to have ' become due ' on the happening of a default. But it has been pointed out by their Lordships of the Judicial Committee that the mortgagee can waive the benefit of the stipulation which is to his advantage and can wait as if no default had occurred. The same principle applies to the case of a creditor under a simple bond payable by instalments. That being

(1) (1934) I. L. R. 57 All. 108, F. B.
(2) (1930) 11 Pat. L. T. 866.
(3) (1906) 11 Cal. W. N. 903.
(4) (1932) L. R. 59 Ind. App. 376.
(5) (1925) I. L. R. 4 Pat. 820.
(6) (1926) L. R. 53 Ind. App. 187.

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so, the case of *Sri Ramchandra Nayek Kalia* v. *Gharbharan Ahir*(1), based as it is on *Ramsekhar Prasad Singh* v. *Mathura Lal*(2), is correctly decided and should be followed for the purpose of deciding this case.

Rai Guru Saran Prasad, not called upon in reply.

Cur. adv. vult.

S. A. K.

WORT, J.—I do not propose to add much to what I stated in the judgment under which this case was in the first instance referred to a Division Bench. The facts of the case were set out in that judgment and I do not propose to repeat them.

The first question which arose was whether there had been a waiver within the meaning of the third column of Article 75 of the Limitation Act; the waiver alleged was the payment of Rs. 25 as a part-payment of the instalment or instalments then due. I content myself by repeating the observation of Fry, J. as he then was, in the case of *Keene* v. *Biscoe*(3) to this effect: "Where a right has accrued it can be waived, but to amount to waiver there must be something done which is inconsistent with the continuance of that right. Now, the right here was to immediate payment of £400 and interest, and the receipt of a portion of that sum is in no way inconsistent with that demand." I refer to the facts of this case. The question may be asked. Could the acceptance of Rs. 25 in any way prevent or be an answer to the cause of action which the creditor might have had to the other amount? There can be only one

(1) (1930) 11 Pat. L. T. 866.

(2) (1925) I. L. R. 4 Pat. 820.

(3) (1878) 8 Ch. Div. 201.

answer to that question and that answer is in the negative.

From one point of view the conclusion that there was no waiver disposes of the matter; but Mr. Bose, who appears on behalf of the plaintiff-respondents, developed his argument before us and that argument requires consideration. His contention was, although perhaps not expressed in these words, that Article 74 of the Limitation Act was an omnibus Article providing a period of limitation for promissory notes or bonds payable by instalments both in those cases in which there was a default clause, and in those in which default clause was absent, and that if the creditor chose to sue on the default clause for the full amount, then and then only Article 75 came into operation. In my judgment that is an argument which cannot be accepted and if what Mr. Bose contends were correct, in my opinion Article 75 would be redundant. Mr. Bose relies for his argument upon the decision of their Lordships of the Judicial Committee of the Privy Council in *Lasa Din* v. *Gulab Kunwar*(1). There their Lordships were dealing with a default clause in a mortgage bond and were considering Article 132 in coming to the conclusion that the expression "when the money sued for becomes due" in the third column of Article 132 had reference to the period for which the money was lent and had no reference to the earlier date under the default clause. The case was relied upon by Mr. Bose for the observation of Sir George Lowndes to the effect that the default clause was put in for the benefit of the mortgagee. But it is to be observed that their Lordships of the Judicial Committee considering this matter referred to the earlier case, being the decision of Lord Blanesburgh in *Pancham* v. *Ansar Hussain*(2), in which it was observed that the default clause is both for the benefit of the mortgagee and the mortgagor. It is to be noticed that their Lordships of the Judicial

(1) (1932) L. R. 59 Ind. App. 376.
(2) (1926) L. R. 53 Ind. App. 187.

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Committee in *Lasa Din's* case(1) referred to the decision in *Reeves* v. *Butcher*(2)—an authority to which reference was made in my earlier judgment—and observed that the question which there was decided, had that fallen to be decided in India, would have come under Article 132 and not under Article 75 of the Limitation Act " which " say their Lordships " is in very special terms " and it is the terms of Article 75 which we have to construe in this case.

Mr. Bose also relied upon the decision of Sir Francis Maclean and another Judge in *Rup Narain Bhattacharya* v. *Gopi Nath Mandol*(3). But the learned Chief Justice's decision there was that " it was open to the creditor, if default were made, to sue at once for the whole amount or if he so elected to waive the benefit of the proviso ". The learned Chief Justice made this observation during the course of his judgment: " Speaking for myself, if the matter had been *res integra* I would have felt some doubt whether the case did not fall within Article 75 of the second schedule of the Limitation Act rather than within Article 116 ". It is to be observed, therefore, that he had some doubt as regards the Article but thought himself bound by decisions of the Court two of which I propose to refer to. But it will be seen that the case gives no assistance to Mr. Bose's argument. As the Court in that case decided, there had been a waiver, and if there had been a waiver there can be no dispute that the plaintiff-respondents in this case would not be barred by the six years' period provided by the third column of Article 75 dating from the first default. I say there can be no doubt about that, but as I have already observed, it cannot be said in this case that there was a waiver. There is one observation I should have made at the time that I dealt with that point and that is this that even assuming that Mr. Bose is right in his contention that it is a question of fact, the

(1) (1932) L. R. 59 Ind. App. 376.
(2) (1891) 2 Q. B. 509.
(3) (1906) 11 Cal. W. N. 903.

plaintiff could not be heard in this case to say that there had been a waiver because the circumstance which he alleged, namely, that all the instalments to date had been paid was inconsistent with that plea. But I do not accept the argument that it is purely a question of fact and the observation of Fry, J. to which I made reference a moment ago is sufficiently conclusive on that point.

Now, dealing with the two cases upon which Sir Francis Maclean relied, one was the decision in *Nobocoomar Mookhopadhya* v. *Siru Mullick*(1). The decision there was that the suit to recover money due on a registered bond is a suit for compensation and is governed by Article 116. Garth, C. J. was there dealing with the question whether in 'ordinary legal parlance' (to use his expression) a suit to recover money upon a bond could be properly described as a suit for compensation and indicating the view held that a suit for compensation meant a suit for unliquidated damages. Nonetheless he decided that Article 116 applied. The other case to which I propose to refer is *Nilmadhub Chuckerbutty* v. *Ramsodoy Ghose*(2). Again the decision there was that the execution creditor (it was a case in execution it is to be observed) must be considered to have waived his right to execute the decree for the whole amount. Neither the decision of Sir Francis Maclean nor the two cases to which reference was made in his judgment assist the argument of Mr. Bose.

It remains to make one observation with regard to Article 75 itself:

"On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due".

The period of limitation is three years and read with Article 116 six years. The third column reads:

"When the default is made unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver."

(1) (1880) I. L. R. 6 Cal. 94.
(2) (1883) I. L. R. 9 Cal. 857.

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"When the default is made" can have reference only to the default referred to in Article 75. In my judgment it is impossible to get away from the construction that if the default clause appears in the bond, apart from the question of waiver, the cause of action arises at the first default. And referring to these matters their Lordhips of the Judicial Committee of the Privy Council in the case to which I have referred and upon which Mr. Bose places reliance, observes that Article 132 deals not with the cause of action but the date upon which the money becomes due, whereas the Imperial Statute of James I which was being considered by way of comparison dealt with the date of the cause of action.

I referred in the course of my previous judgment to the decision of Ross and Scroope, JJ. in *Sri Ramchandra Nayek Kalia* v. *Gharbharan Ahir*(1) and shall make no further observation with regard to that case other than the one I made on the previous occasion, namely, that it relied upon a previous decision in *Ramsekhar Prashad Singh* v. *Mathura Lal*(2)—a case which was not under Article 75 but was a case similar to the case in *Lasa Din* v. *Gulab Kunwar*(3), namely, on a mortgage bond governed by Article 132. I need only add that Ross, J. made no reference to the terms of the Article but came to the conclusion that the case was completely covered by the earlier decision to which I have referred. Now, it is perfectly clear, if I may be allowed to say so with respect to Ross, J. that their Lordships of the Judicial Committee of the Privy Council, whatever their decision might be if the matter came before them, declined to consider that the provisions of Article 132 and Article 75 are in any way similar. As I have already observed, the Judicial Committee has said that Article 75 of the Limitation Act 'is in very special terms'.

(1) (1930) 11 Pat. L. T. 866.

(2) (1925) I. L. R. 4 Pat. 820.

(3) (1932) L. R. 59 Ind. App. 376.

In my judgment on the plain reading of the Article and having regard to the fact that there was no waiver, the action of the plaintiff was barred by limitation and the appeal, therefore, should be allowed and the action of the plaintiff dismissed with costs throughout.

VARMA, J.—I agree. The facts are very simple and in order to make my meaning clear I shall just narrate shortly as to what the suit was about. There was a registered money bond executed on the 6th of February, 1922, under which payment was to be made by ten equal instalments of Rs. 75 and the last instalment was of Rs. 50 only. The first four instalments were paid and there is no difficulty with regard to that. The trouble seems to have begun from the fifth and the sixth instalments. The fifth instalment was not paid at all, and while the term of the sixth instalment was running a sum of Rs. 25 was paid on the 18th of March, 1928. The suit out of which this appeal arises was filed on the 23rd of March, 1935. The whole question is whether the suit is barred by limitation and whether Article 75 of the Indian Limitation Act is applicable. The trial Court held that Article 75 read with Article 116 was applicable and that, therefore, the suit was barred by limitation. But the lower appellate Court referring to the payment of Rs. 25 held that there was a case of waiver and therefore decreed the suit and allowed the appeal.

Although the sum of Rs. 25 was paid on the 18th of March, 1928, it is not clear from the document or the findings of fact as to which instalment it was paid for—whether for the fifth or the sixth instalment—and the question is whether the payment of Rs. 25 and the acceptance thereof by the plaintiff amounted to a waiver by the plaintiff.

Now, it is clear on the authority of *Keene* v. *Biscoe*(1) that a part-payment of this nature does not

(1) (1878) 8 Ch. Div. 201.

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amount to a waiver. I shall deal specially with one aspect of Mr. Bose's argument advanced on behalf of the respondents—an argument evidently based upon the dissentient judgment in *Jawahar Lal* v. *Mathura Prasad*(1). The contention of Mr. Bose seems to be (if I have understood him rightly) that unless the suit is based on a default clause Article 75 does not apply, and, as this suit was filed after all the instalments fell due, it was not a suit based on a default clause and, therefore, Article 75 would not apply. This argument does not commend itself to me, because it presupposes that non-filing of a suit in the case of an instalment bond amounts to a waiver. But there are clear authorities on the point that non-filing of a suit does not amount to a waiver : for instance, I would refer to the decision in *Kanhai* v. *Amrit*(2) and the authorities cited thereunder. In *Mohesh Chandra Banerji* v. *Prosanna Lal Singh*(3) Rampini and Pargitor, JJ. held that where an instalment bond gives the creditor the right to sue for the whole amount due under the bond on default of payment of a single instalment, there is no waiver of that right by acceptance of part of an overdue instalment, or by receipt of interest. As a matter of fact it is doubtful whether this question of waiver could be raised by the plaintiff in this suit in view of the statements made by him in the plaint. The plaint said that all the instalments for which the plaintiff was suing had already been paid.

The next point to be considered is whether the decision in *Sri Ram Chandra Nayek Kalia* v. *Gharbharan Ahir*(4) expresses the correct view of the law on this point. That decision refers, as has been pointed out by my learned brother in his previous judgment, to an earlier decision in *Ramsekhar Prasad Singh* v. *Mathura Lal*(5). In the case of *Sri Ram*

(1) (1934) I. L. R. 57 All. 108, F. B.
(2) (1925) I. L. R. 47 All. 552.
(3) (1903) I. L. R. 31 Cal. 83.
(4) (1930) 11 Pat. L. T. 866.
(5) (1925) I. L. R. 4 Pat. 820.

Chandra Nayek Kalia v. *Gharbharan Ahir*(1) it has been simply held that the case was covered entirely by the previous decision in *Ramsekhar Prasad Singh* v. *Mathura Lal*(2). The decision ignores the basic difference between the two suits that this Court was dealing with : in the latter decision the learned Judges were dealing with a money instalment bond while in the previous one they were (as will appear from the judgment) dealing with a mortgage bond. There was essential difference between these two cases, one was governed by Article 132 and the other by Article 75 of the Indian Limitation Act. The nature of the difference has been fully explained by the Privy Council in *Lasa Din* v. *Gulab Kunwar*(3).

The difference in the language employed in the third column of Article 74 and Article 75 of the Indian Limitation Act has been pointed out in many cases. The third column of Article 74 provides

> "The expiration of the first term of payment as to the part then payable; and for the other parts, the expiration of the respective terms of payment";

whereas that of Article 75 lays down

> "When the default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver."

In conclusion I agree with the previous judgment of my learned brother that this appeal should be allowed with costs.

MANOHAR LALL, J.—The question in this case is whether the claim of the plaintiffs to recover some only of the instalments provided by a registered instalment bond after two defaults had occurred is hit by the provisions of Article 75 of the Indian Limitation Act. A large number of cases have been cited before us, some of which are difficult to reconcile. The confusion has arisen by applying the considerations, which are correctly applicable to mortgage instalment bonds, to ordinary instalment bonds also. In view

(1) (1930) 11 Pat. L. T. 866.
(2) (1925) I. L. R. 4 Pat. 820.
(3) (1932) L. R. 59 Ind. App. 376.

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of the recent decision of the Privy Council in *Lasa Din* v. *Gulab Kunwar*(1) it is now authoritatively established that where a mortgage bond provides for a due date of payment of the principal and also for the payment of principal and interest in certain instalments with a default clause the Article which applies is Article 132 and limitation would run not from the date of each default but from the due date, that is, when the principal amount is stipulated to be repaid although the plaintiff has an option to bring his suit earlier if he so chooses. If this is kept in view a good deal of the apparent contradiction in the decided cases can be dissolved. Again, it must be kept in view that there is a well-defined distinction between Articles 74 and 75 of the Indian Limitation Act. Article 74 applies to an instalment bond which does not contain any default clause and, therefore, in such cases the plaintiff is entitled, by the very terms of his bond, to sue only for such instalment as remains unpaid. No question of waiver of default can ever arise in such a case. But where the document provides that in the case of a default (which may be due to non-payment of one instalment or more than one instalment as provided in the bond) the obligee has the right to sue for the whole of the sum then remaining due, it is obvious that the promisor has a right *eo instanti* to pay the full amount and the obligee a corresponding right to receive and recover it. Article 75 provides in the third column how the starting point of limitation should be calculated in such a case; the starting point of limitation is in the first instance the date of the default but this starting point can be carried forward only if the default is waived. Now waiver must obviously be a mixed question of law and fact in each case and, therefore, the Article of the Limitation Act under consideration cannot be looked into to decide when the default has been waived as was sought to be argued. The weighty observations of Lord Denman

(1) (1932) L. R. 59 Ind. App. 376.

and Fry, J. quoted in the order of reference correctly indicate how this question should be determined. It is there laid down that mere failure to sue or inaction by the creditor is not a waiver of the default. something else must be established to show that the promisee has waived his rights. For instance. his acceptance of an overdue instalment or his communicating to the promisor for a consideration that he will not insist upon his rights which have already accrued to him on the default which has taken place. or, it may be that the promisor himself approaches the promisee or writes to him to stay his hands and not to proceed to demand the full amount and if the promisee agrees to such request, these will ordinarily amount to a waiver. In such cases it is clear that some overt act has been established from which the Court of fact can draw the conclusion that the obligee has waived the default. In some cases it will be easy to decide this question by looking at the frame of the suit and to find from the plaint the manner in which the allegations have been made. When the plaintiff alleges, for instance, that all the previous instalments have been paid he proceeds on the footing that there has been no default and no waiver, and if his allegations are, in the course of the trial, found to be false, in my opinion, it is not open to the promisee to turn round and ask the Court to infer any waiver. Some High Courts have held that a mere acceptance of an overdue instalment cannot be treated as waiver of the default in the view that the promisee is merely taking what was due to him. But the Calcutta High Court has consistently held that an acceptance of an overdue instalment amounts in law to a waiver of the default. As this High Court has adopted the view that where there is a cursus curiae of the Calcutta High Court they will ordinarily adopt the same as a rule of law binding upon this Court. I am inclined to agree with the view that where the promisee has accepted an overdue instalment it must be held that he has waived his rights which accrued to him on that default and that the starting point of limitation

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would be from the next default, if not waived. The same cases of the Calcutta High Court also lay down, in agreement with the decision of the English Courts, that an acceptance of a portion of the instalment which was overdue or the acceptance of the interest only on the overdue instalment cannot be held to be a waiver of the default. To the same effect are the observations of this Court in *Mukhdeo Singh* v. *Harakh Narayan Singh*(1) where Fazl Ali, J. observed as follows: "Now there is a good deal of conflict in the decisions of the various High Courts in this country as to what would constitute a waiver and what would not. It has been held in several cases that mere abstaining from bringing a suit does not amount to a waiver, and some of these cases were relied on by the learned Advocate for the appellant. All those cases, however, were decided under Article 75 of the Limitation Act and it is clear that if it is held in cases falling under that Article that mere abstention from suing amounts to a waiver, that would nullify the main provision in that Article which is to the effect that the time would ordinarily begin to run from the date of the first default". Now, if these considerations are kept in view the whole scheme of the Act becomes quite clear and plain and Article 75 retains its place as a workable Article and is not rendered nugatory as has been held by some of the learned Judges of the Allahabad High Court; otherwise every instalment bond with or without a default clause would be covered by Article 74. Indeed it was so argued strenuously by Mr. Bose, the learned Advocate for the respondents, but I do not agree with his contention.

I now turn to some of the cases of this Court cited before us, namely, *Ramsekhar Prasad Singh* v. *Mathura Lal*(2) and *Ram Chandra Nayek Kalia* v. *Gharbharan Ahir*(3). The latter case professes to

(1) (1931) I. L. R. 11 Pat. 112.
(2) (1925) I. L. R. 4 Pat. 820.
(3) (1930) 11 Pat. L. T. 866.

follow the earlier case but does not give any reason in law of its own and, therefore, is no authority for deciding the question before us. The earlier case related to a set of circumstances in which the question was whether the mortgage bond payable by instalment could be enforced only from the date of the default clause or from the due date as well and the learned Judges decided that case on the same lines as has now been decided by the Privy Council in *Lasa Din* v. *Gulab Kunwar*(1). The case, however, is no authority for the proposition that in cases where Article 75 is applicable the date of default unwaived should not determine the starting point of limitation. The cases relied upon by the learned Judges in *Ramsekhar* Prasad *Singh's* case(2), namely, *Rup Narain Bhattacharya* v. *Gopi Nath Mondal*(3), *Narna* v. *Ammani Amma*(4) and *Ganga Bishun Marwari* v. *Lala Raghunath Prasad*(5), were noticed by the Privy Council in the case of *Lasa Din* v. *Gulab Kunwar*(1) but their Lordships of the Judicial Committee deliberately refused to pronounce any decision on that matter for the simple reason that the question as to the applicability of Article 75 did not arise before them. But Sir George Lowndes threw out an observation, which is very apposite, wherein he pointed out that Article 75 deals with special terms of its own and therefore the considerations which prevail in that Article should not be allowed to be used in construing Article 132 in order to find the starting point of limitation in suits to enforce mortgages. The exhaustive judgment of Sulaiman. C.J. in *Jawahar Lal* v. *Mathura Prasad*(6) supports me in my view. In that case a

(1) (1932) L. R. 59 Ind. App. 376.

(2) (1925) I. L R. 4 Pat. 820.

(3) (1906) 11 Cal. W. N. 903.

(4) (1916) I. L. R. 39 Mad. 981.

(5) (1930) I. L. R. 10 Pat. 173.

(6) (1934) I. L. R. 57 All. 108, F. B.

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very large number of cases have been reviewed. The learned Chief Justice took great pains to point out the distinction between Article 75 and Article 132. It is true that the question of waiver was not specifically decided by the learned Chief Justice in that case, but he decided that very question specifically in *Sukh Lal* v. *Bhoora*(1). The learned Advocate for the respondent relied strongly on the dissentient judgment of Mukherji, J. in *Jawahar Lal* v. *Mathura Prasad*(2) but with great respect I am unable to agree with the reasoning which commended itself to that learned Judge. At page 133 the learned Judge takes the view that the description in Article 75 " is not merely of the bond on which the suit is based but is also a description of the nature of the relief which is sought in the suit " and proceeds to fortify his conclusion by some examples. But the answer is that the wishes of the obligee under the bond with a default clause or the manner in which he frames his plaint are superseded by the fiat of the legislature which has unmistakably laid it down that if you wish to recover money due or payable under an instalment bond with a default clause you must come within a prescribed period starting from the date of the first default unwaived. With the wisdom of this enactment this Court is in no way concerned. Again at page 135 the learned Judge appears to lay down that it was open to the plaintiff to enforce or refuse to enforce the penalty clause provided for in the bond upon which he sues and therefore he could always get rid of the difficulty set up by Article 75. If this view of the learned Judge were correct there would be no distinction between Article 74 and Article 75 of the Limitation Act. I venture to answer that the creditor may well show the indulgence, which he wants to show to his debtor, by giving up his claim for the full amount due, for example, he can limit his claim to a smaller sum out of the remaining total

(1) (1934) I. L. R. 57 All. 561.
(2) (1934) I. L. R. 57 All. 108, F. B.

then due but he must institute his suit within a stated period starting from the date when the default has occurred and not waived. I do not see any hardship to any body in this view. It is always open to a creditor to show unmistakably that he has in law and fact waived the default of his debtor.

The real question in all these cases is to find out from the document sued upon and the attendant circumstance as to when the default has taken place giving rise to a right to sue for the whole unpaid balance and once that is determined the suit must be instituted within the period fixed by Article 75 (see section 3). In cases governed by Article 74, i.e., bonds without any default clause, the bond itself provides for the payment of each instalment and, therefore, the third column provides that where each instalment has remained unpaid the period of limitation shall be three years—or six years if the bond is registered—from the date when each instalment is unpaid. When we come to bonds with a default clause, the bond itself provides that where a default has happened the whole amount has become due. Therefore it is no longer in the option of the creditor, unless he waives the default, to stop the period of limitation under Article 75 from running.

Now, keeping these principles in view the solution of the question in the present case is free from difficulty. The plaintiff framed his plaint upon the allegations that all the previous instalments were paid to him in full and that the overdue instalments were received by him along with damages at Rs. 13-8-0 and he alleged that the default took place by non-payment of the instalment which was due in March, 1929, and, therefore, the suit instituted in March, 1935, was within time. But these allegations have been found to be false. It has been established in the case that the 4th instalment was paid, though beyond time; but the 5th instalment was never paid. Now, in view of the decisions of the Calcutta High Court,

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which I have accepted as correct, although the default occurred when the 4th instalment was not paid in time but the default was waived by the acceptance of that overdue instalment on the 16th March, 1926, and, therefore, the period of limitation for the suit did not begin in March, 1926. Inasmuch as the 5th instalment was not paid at all the default took place in March, 1927, and the present suit having been instituted beyond six years of that default the suit is beyond time. But it was argued that as the plaintiff accepted the sum of Rs. 25 against the 6th instalment in March, 1928, he must be held to have waived the previous default of the 5th instalment as well as the default of the 6th instalment. I have already held that the acceptance of a portion of an overdue instalment cannot amount in law to a waiver of the default and, therefore, the acceptance of Rs. 25 against the 5th or the 6th instalment (there is no evidence as to which overdue instalment was being paid in part) cannot be taken to have established that the default which had already occurred in 1927 and which again occurred in 1928 was ever waived. Whichever view is taken as to this payment of Rs. 25 the plaintiff gets no help. If this payment is attributed to the 5th instalment the 5th instalment still remains unpaid in full and the 6th instalment has never been attempted to be paid; this makes the suit beyond six years of the due date even of the 6th instalment. If, on the other hand, the payment of Rs. 25 is attributed to the 6th instalment the 5th instalment has never been paid and the payment itself keeps the 6th instalment still unpaid in full. The result is that the suit is still more beyond the period of limitation.

I, therefore, conclude (*1*) that in the circumstances of the present case it is not open to the plaintiff to ask the Court to decide that he has waived the default when his case has been all along that no default ever took place (*2*) that if this question is open to be decided by us I am coerced to hold that the defaults committed in March, 1927, and March, 1928,

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have never been waived, (3) that the case of *Ramsekhar Prasad Singh* v. *Mathura Lal*(1) is correctly decided, but the decision is of no assistance in deciding the present case and (4) that the observations, at page 129, in *Mukhdeo Singh* v. *Harakh Narayan Singh*(2) are absolutely correct but the case of *Sri Ramchandra Nayek Kalia* v. *Gharbharan Ahir*(3) has been incorrectly decided.

For these reasons I agree that this appeal should be allowed and the suit of the plaintiffs dismissed with costs throughout.

S.A.K. *Appeal allowed.*

APPELLATE CRIMINAL.

Before Varma and Rowland, JJ.

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March, 16, 17, 23, 24.

KING-EMPEROR

v.

NEHAL MAHTO.*

Penal Code, 1860 (*Act XLV of* 1860), *sections* 33 *and* 302—*murder—assault with the intention of causing death—body subsequently placed on railway line—death due to decapitation—accused, whether guilty of murder—test.*

Where an accused person commits two (or more) acts, closely following upon and intimately connected with each other, they cannot be separated and assigned, the one to one

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*Death Reference no. 3 of 1939, and Criminal Appeal no. 20 of 1939. Reference made by Sadhu Charan Mahanti, Esq., Sessions Judge of Manbhum-Singhbhum, in his letter no. 143, dated the 25th January, 1939.

(1) (1925) I. L. R. 4 Pat. 820.

(2) (1931) I. L. R. 11 Pat. 112.

(3) (1930) 11 Pat. L. T. 866.

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intention and the other to another, but both must be ascribed to the original intention which prompted the commission of those acts and without which neither could have been done.

Where, therefore, the accused assaulted a woman with the intention of causing death, and thereafter placed her body on the railway line where she was run over by a train and the medical opinion favoured the view that the actual cause of death had been decapitation but there was no evidence that the accused, when he carried the body to the railway line, was under the belief that the woman was dead and that he was handling a dead body, *held*, that the accused was guilty of murder.

Kaliappa Goundan, In re(1), *Emperor* v. *Gajjan Singh*(2), *Emperor* v. *Khubi*(3), *Gour Gobindo Thakur, In re*(4) and *Queen-Empress* v. *Khandu Valad Bhavani*(5) (judgment of Parsons, J.), followed.

Emperor v. *Dalu Sardar*(6) and *Palani Goundan* v. *Emperor*(7), distinguished.

Reference under section 374 of the Code of Criminal Procedure, 1898.

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

S. M. Gupta, for the appellant.

The Advocate-General, for the Crown.

ROWLAND, J.—This is a reference by the Sessions Judge of Manbhum-Singhbhum under section 374 of the Code of Criminal Procedure for confirmation of the sentence of death passed under section 302 of the Indian Penal Code on Nehal Mahto charged with the

(1) (1933) I. L. R. 57 Mad. 158.
(2) (1930) 32 Cr. L. J. 483.
(3) (1923) 25 Cr. L. J. 703.
(4) (1866) 6 W. R. 55 (Cr.).
(5) (1890) I. L. R. 15 Bom. 194.
(6) (1914) 18 Cal. W. N. 1279.
(7) (1919) I. L. R. 42 Mad. 547, F. B.

murder of Nisi Mahtain. The crime is said to have been committed on 16th August, 1938, after sunset while the deceased was returning from Balarampur *hat* to her own village Maldih in company with Duli Mahatain, P. W. 3. The deceased and the accused were in a way related, the deceased Nisi being the widow of Aklu whose mother Panu was the sister of the grandmother (Pelu) of Nehal and Gahan and of Gangi, mother of Rathu. Nehal, Gahan and Rathu were the accused persons in the case of whom Gahan and Rathu have been acquitted and Nehal convicted. The witness Duli is a sister of Rathu and another witness Giri is her son. I have mentioned Aklu, the husband of Nisi, and may state that P. W. 1, Badi, is father's brother of Aklu. Between the deceased Nisi and the accused persons there was indisputably ill feeling from some time past. Nisi had a claim to certain landed property by virtue of a deed of gift executed by Aklu's grandmother Sounri. The validity of this deed was disputed by the other side. There was a criminal proceeding which terminated in some sort of compromise. Subsequently Nisi pleaded that the compromise was not voluntarily agreed to by her with knowledge of its terms but was fraudulently induced and brought a pauper suit in 1937 claiming to recover the lands from which, she stated, she has been dispossessed. The suit was contested by Rathu, Uday and Ridu (Ridu being the father of Nehal, the appellant) and was fixed for hearing on the 15th September, 1938. The motive assigned for the crime is enmity against Nisi and for the purpose of stifling her litigation. She has left a daughter Fulmani, aged about 10 years, and it has been suggested for the accused that the motive is weak because the litigation could be continued on behalf of Fulmani even after the death of Nisi. But we have had in evidence that the suit in fact has collapsed and this result probably could be expected as a reasonable consequence of Nisi's death. In my opinion an adequate motive existed.

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The prosecution story regarding the event of the 16th August, 1938, is that Duli and Nisi had gone from Maldih to Balarampur *hat* to make purchases. After attending the *hat* they started to return home. On the way they were seen near a tank not far from Balarampur by P. W. 2. Mohammad Ali and P. W. 11, Jadu. Thereafter they continued their way and had reached the field of Lalu Mahto, Nisi walking in front and Duli following, when Nehal attacked Nisi with blows of a lathi on the neck and head. Nisi fell down. Duli who was approaching was threatened by Nehal who told her to run away and tell no one or else he would kill her and her son. Duli began to run away. Looking back she heard Nehal shouting to the other accused to join him. She saw the other accused and they began to drag Nisi away. Looking round she dropped and fell and broke her lantern which she had brought that day in Balarampur *hat*. She went home and she says became unconscious. Her son Giri returning that night found her unconscious. In the morning she told him what she had seen. That is the direct evidence as to the murder. The other part of the prosecution case relates to the recovery of what is said to be the dead body of Nisi. About 6-30 A.M. the Engine Driver of 57 Down Adra-Chakradharpur Passenger Train saw between the up line rails near the Urma Railway Station an object lying and being attacked by dogs. He reported this at Urma. The Station Master sent a man to guard the body which was the headless body of a female, the arms as well as the head having been severed from the trunk and the head being found lying at a short distance away at the foot of the embankment. Information was sent to the Government Railway police, Purulia, from which place a Sub-Inspector came at about 4 P.M. Meanwhile news of the gruesome discovery had reached the village Maldih where the absence of Nisi had already been noticed. In fact on the previous evening at about 7 or 8 P.M. the little daughter Fulmani was crying and was taken by the

witness Dhonu, the father of Ludhai, the chaukidar, to the house of P. W. 1 Badi, where the child spent the night. In the morning Badi went early to Bamhanjora and returned at about 9-30 A.M. not having found Nisi there. Bamhanjora is a village one *kos* from Maldihi and is the home of Mussammat Nisi's father. When he returned at what is called besham time, i.e., about 9-30 A.M. news reached the village that a woman was lying dead. On this he and Ludhai chaukidar went to the railway line and saw a body which they both claim to have been able to recognise as the body of Nisi. Post mortem examination was held on the remains which appeared to be the head and body of one person, the Civil Surgeon being of opinion that the injury might have been caused by being run over by a train and that it could be inferred from extravasation of blood in the tissues over the shoulder blades that the train might have run over the woman during her life. On this the case of the prosecution is that Nisi was seriously assaulted in the presence of Duli, that she was dragged or carried from that place to the railway line and placed on the line in an unconscious and helpless condition to be run over by the next train.

Mr. Gupta, who has argued the case with ability and thoroughness on behalf of the accused, has contended that there is not sufficient evidence to prove that Nisi has been murdered, that the body and head discovered are not proved to have been hers, their condition being such as to render certain identification impossible; secondly, that the direct evidence of Duli as to the assault on Nisi ought not to be accepted because of some discrepancies and improbabilities in her statements and because of the delay that elapsed before she disclosed to the world what she at the trial claims to have seen; and, finally, that if the prosecution has succeeded in establishing the facts that an assault was made by the accused as deposed to by Duli, that Nisi was carried away thereafter and left

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on the line where a train ran over her, the persons who left her on the line might have done this in the belief that she was already dead and that an act done to a dead body or to what is believed to be a dead body is not an offence against the person within Chapter XVI of the Indian Penal Code. Therefore, in his contention, the accused could not have committed murder of Nisi by placing her on the railway line and, on the other hand, they did not commit murder of her by the assault on the field because that assault itself did not cause death. These contentions I shall examine in order.

As regards the condition of the body the medical evidence shows that portions had been eaten by wild animals, the face bones were crushed into several fragments and greater parts of the soft parts were missing. The right side of the skull and the base was broken into several fragments, membranes were lacerated, brain was liquified and was coming out. The left side of the scalp, however, seems to have been present and on dissection clotted blood was found within it and between it and the skull about 4 inches in diameter around the parietal eminence. I shall have to refer to this injury later. It has been argued that on this description recognition could not be possible but the Civil Surgeon himself does not express a definite opinion as to this. The clerk in charge at Urma Railway Station, Babu Nritya Gopal Banerji, P. W. 10, who saw the body before it was removed from the railway line has, however, stated that there was nothing in the head by seeing which the person could be recognised by appearance. Of the two witnesses who claimed to identify it Ludhai is hardly cross-examined as to the possibility of identification and he speaks in chief of having seen the body and recognised it. He adds that he recognised the body by seeing the tatoo marks on the legs and the only question asked in cross-examination on this point elicited that there are tatoo marks on the legs and

arms of some other women of the village. The other witness Badi says he recognised the dead body to be that of Nisi and in cross-examination he says that he recognised it by the tatoo marks on the leg and by the face. He says further that although one of the cheeks had been eaten by wild animals the other portions of the head had not been damaged. The hair and scalp presumably was there and one gathers from the medical report that one cheek was present. It is perhaps not necessary to say, whether, if this evidence of identification stood absolutely alone, it would be considered sufficient. Actually it is to be considered along with and in light of other evidence in the case the decision of which turns on the question whether the evidence taken as a whole carries the conviction to a reasonable certainty as to the events which have happened.

Now I turn to the story told by Duli and the criticism on it that the disclosure of the facts of which she deposed has been unduly delayed. According to her son Giri she told him what she had seen at cock crow on the morning of the 17th August. It is stated by Duli and by the child Fulmani that Duli told Fulmani on the morning after the *hat* day that Nehal had killed her mother. But when Dhonu Harhi questioned Mussammat Duli at about besham time that morning she apparently told him that she had returned alone from the *hat* and had not seen Mussammat Nisi. Duli has explained her silence at first by saying that she was terrified of the consequences of giving out to the public what she had seen and there is some confirmation in the evidence of Giri, her son. He was out at work till the evening of the 16th about 8 P.M. When he came to the door of the house he found it shut and his mother did not respond on being called. The door was opened by his nephew, a small boy, and he found his mother unconscious. She did not respond when spoken to. Seeing her unconscious he rubbed oil on her body and did not disturb her further. It

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seems to me to be the truth that Duli was suffering from the effect of some violent shock and fright. Giri further deposed that he found a broken lantern chimney which his mother had brought home from the *hat* and this fits in with her explanation that she had bought the lantern but that its chimney was broken when she fell in running away at the time of the occurrence. We find that it had become known in the village that Duli and Nisi had been in company on the previous day. Badi informed Ludhai on Wednesday. Badi who went to the police station and lodged the first information at 4 P.M. mentioned that Nisi and Duli had gone to the *hat* together and mentioned his suspicion against the accused because of the motive. On the arrival of the Sub-Inspector in the village he examined Duli and Giri that same evening and Duli disclosed the substance of the facts known to her as already stated by me. The Sub-Inspector forthwith went to the alleged place of occurrence as indicated by Duli and there found paddy plants disturbed and marks of violence. It was dark and closer search could not be made at that time; but he went again to the place on the following morning and found at two points marks of blood. Scrapings were taken and one was found to be blood of which the origin could not be proved and the other was found to be human blood. The delay on the part of Duli in disclosing her knowledge of the occurrence can I think be explained by her fear of consequence to herself should she say anything against the accused before the arrival of some public authority who would be in a position to protect her. On the question of whether she was present when the assault on Nisi was made the fact that immediately on her statement the Sub-Inspector found marks of a struggle at the alleged place of occurrence is strong corroboration of her having been present and being a genuine witness. There is also the evidence of P. W. 2 Mohammad Ali, a witness who appears entirely disinterested and who saw Nisi and Duli together near

a tank on the way home from the *hat*. The alleged discrepancies in her evidence mostly consist of matters of detail which appeared in her later statement and are not present in the first disclosure. These are not in themselves proofs of fabrication and do not in my view discredit her testimony on the main point. If she was there, as she says, there is no reason why she should not have been able to correctly identify the principal assailant Nehal. The witness would appear to have favourably impressed the Sessions Judge and the assessors whose opinion was unanimous and agrees with the view at which I have arrived independently. I would accept Duli's testimony on this point.

Now we have to consider whether it is safe to put together the two parts of the prosecution case, namely, the disappearance of Nisi and the recovery of the body and to say that the facts point to the one conclusion that the missing woman is the body found. To some extent the two parts of the case are mutually corroborative. If the body belonged to some other person it is probable that evidence would be forthcoming of the disappearance of some such person. The coincidence in time between disappearance and the finding very strongly suggests that there is identity between the two. Along with this we have to see the motive which as already pointed out is fully adequate. In all the circumstances I feel no doubt that the identification which was made by the two witnesses and that not without reference to a definite mark of identification of tatooing should be accepted and I hold it established that Nisi was attacked, rendered unconscious and taken to the railway line. One more coincidence may be referred to before leaving this part of the case. Duli has stated in her evidence that the attack began with a lathi blow from behind on the back of the head and neck. The extravasation of blood in the parietal region of the scalp may well be the result of just such a blow.

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Now it remains to consider the point of law urged, namely, that the offence committed by the accused cannot be said to amount to murder. For this contention reliance is placed on the decisions in *Queen-Empress* v. *Kandu*(1), *Emperor* v. *Dalu Sardar*(2) and *Palani Goundan* v. *Emperor*(3). In the first of these cases which was decided by a majority out of three Judges the facts were that the accused had struck the deceased on the head with a stick and rendered him unconscious and then believing that he was dead set fire to the hut in which he was lying with a view to remove all evidence of the crime. The blows struck were said to be insufficient to cause death and not the cause of death. Death was caused by injuries from burning; but the intention with which the accused set fire to the shed was not to cause death or to make the deceased's death certain but to do away with evidence. In the result it was held on the facts of that case that the offence committed by the accused was only an attempt to murder. In *Emperor* v. *Dalu Sardar*(2) it was held that the accused was not guilty of murder on a finding that he had first assaulted the deceased without any intention of causing death, and subsequently, believing her dead, had suspended her body by the neck by a piece of string tied to the roof of the house. It was found that in fact death was not caused by the previous assault but by the hanging. A conviction was had under section 325. These cases were considered by a Full Bench of the Madras High Court in *Palani Goundan* v. *Emperor*(3). In this case, as in the last case referred to, the finding was that the accused had assaulted his wife not intending to cause death, and subsequently, believing her dead, he suspended the body by a rope intending it to be believed that she had

(1) (1890) I. L. R. 15 Bom. 194.

(2) (1914) 18 Cal. W. N. 1279.

(3) (1919) I. L. R. 42 Mad. 547, F. B.

committed suicide. It may be noticed that in the Calcutta and Madras cases there was at the outset, as found, no intention to cause death. Herein these cases differ in the facts from the Bombay case. The correctness of the decisions in *Emperor* v. *Dalu Sardar*(2) and *Palani Goundan* v. *Emperor*(3) it is not necessary to question. I feel no doubt that unless the intention to cause death or a bodily injury sufficient to cause death has been present, the offence of murder is not committed. The majority in the Bombay case, however, have gone further than this and have held that even if the original assault was made with the intention of causing death, then if that assault did not cause death, the assailant is guilty in respect thereof of attempt to murder, and the subsequent disposal of what is believed to be a dead body was not considered to add anything to the crime. Parsons, J. dissented from this view and was of opinion that the acts so closely following upon and so intimately connected with each other could not be separated and assigned, the one to one intention and the other to another, but must both be ascribed to the original intention which prompted the commission of those acts and without which neither would have been done. With great respect to the majority of the Judges who decided that case I am of opinion that the view taken by Parsons, J. is the correct view. It is curious that none of the Judges in dealing with either of the cases which I have cited has referred to section 33 of the Indian Penal Code which runs thus:—

> "The word 'act' denotes as well a series of acts as a single act: the word 'omission' denotes as well a series of omission as a single omission."

In an earlier case of the Calcutta High Court, *Gour Gobindo Thakoor In re*(1), where a Magistrate had recorded a conviction of causing hurt, commitment

(1) (1866) 6 W. R. 55 (Cr.).

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proceedings were ordered on the homicide charge in a case in which the deceased had first been assaulted and then hung up to a tree to make it appear that he had committed suicide. Norman, J. said—

"It would be a very serious matter if an offender were to be allowed to escape because a too critical Court could not determine at what precise point in the course of a series of acts of violence, each capable of producing death, an unfortunate man expired under the hands of those who were ill-using him.", while Seton-Karr, J. seems to have thought that it might be a question of fact whether the accused believed the victim to be dead before they hung him up. In the Allahabad High Court in *Emperor* v. *Khubi*(1) the opinion was expressed that the view taken by Parsons, J. in the Bombay case was the correct one, and in *Emperor* v. *Gajjan Singh*(2) it was held that where the action was continuous and it was impossible to resolve the two incidents into two wholly separate actions, inspired by different motives and committed for different reasons, the accused must be treated as having done one act with the intention of causing death and as having succeeded in carrying out his object, and he was, therefore, guilty of murder. In this case the accused had struck his victim several times on the head so that he lost consciousness. Then, with the assistance of a boy Jagannath, he carried the victim a short distance and threw him, face downwards, into a pool. Gajjan then robbed the body and covered it with branches. Subsequently, Gajjan and the boy carried the body to the canal into which they threw it. In my opinion section 33 of the Indian Penal Code, though not referred to by the Judges, would fully have supported the treatment of the whole incident as one series of acts, and therefore within the meaning of the Code, as an act. These cases were considered in *Kaliappa Goundan, In re*(3) in which

(1) (1923) 25 Cr. L. J. 703.
(2) (1930) 32 Cr. L. J. 483.
(3) (1933) I. L. R. 57 Mad. 158.

the facts were strikingly analogous to those before us now. The two accused persons it seems had assaulted a woman, the wife of one of them, with the intention of causing death, and thereafter, intending to cause evidence of the offence to disappear, placed her body on the railway line with the intention of screening themselves from legal punishment. The Sessions Judge, following *Queen-Empress* v. *Khandu Valad Bhavani*(1) had recorded a conviction under section 307 of the Indian Penal Code and imposed a sentence of transportation for life. Medical evidence, as in the case before us, favoured the view that the actual cause of death had been decapitation. The cases in *Palani Goundan* v. *Emperor*(2) and *Emperor* v. *Dalu Sardar*(3) were distinguished on the ground that in those cases there had not been at the outset, or at any time, the definite intention of causing death. But where, as in the Bombay case, that intention is present it was held that Parsons, J. was right in regarding the incident as composed of two acts committed by the accused which together have caused death and must both be ascribed to the original intention. The result was that the accused were convicted of murder and dissent was definitely expressed from the view of the majority in the Bombay case. I am of opinion that the law is correctly stated in this decision. I wish to make it clear that we have not to deal with such a case as was before the Judges in *Palani Goundan* v. *Emperor*(2) or *Emperor* v. *Dalu Sardar*(3) where the original intention was not to cause death. So far as the evidence indicates, the intention of the accused was from the outset to cause death of the victim in pursuance of a preconceived plan. It is also to be noticed that there is no evidence whatever that the

(1) (1890) I. L. R. 15 Bom. 194.

(2) (1919) I. L. R. 42 Mad. 547, F. B.

(3) (1914) 18 Cal. W. N. 1279.

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accused, when they carried Nisi to the railway line, were under the belief that she was dead and that they were handling a dead body. Mr. Gupta asked us to infer that they were under that impression from the fact that Duli, the eye-witness, said in her deposition that she saw Nisi lying dead and Nehal still assaulting her. But the inference which Duli looking from a distance and under circumstances of great agitation may have drawn does not give us reason to suppose that a similar belief was induced in the accused persons who were actually handling the person of the victim. They had full and complete means of observation. They could notice whether she was breathing, whether she had a pulse, and it is no part of the defence set up by the accused themselves that they removed her body under any misapprehension as to whether she was alive or not.

In my opinion the Sessions Judge and the four assessors have correctly held that the accused is guilty of murder, and for a crime of this nature it can hardly be suggested that the extreme penalty of the law is excessive. I would accept the reference, dismiss the appeal, and confirm the sentence of death.

VARMA, J.—I agree.

Reference accepted.

Appeal dismissed.

S. A. K.

APPELLATE CIVIL.

Before Dhavle and Rowland, JJ.

1939.

April, 17.

BHUBNESHWAR PRASAD NARAIN SINGH

v.

KHEMCHANDRA.*

Hindu Law—decree against a member of joint Hindu family—execution—family property attached and ordered to be sold—death of judgment-debtor before sale—effect—judgment-debtor's share at the time of death, whether liable to be sold.

Where in execution of a money decree against a member of a joint Hindu family, the property of the joint family had been attached and ordered to be sold, and thereafter the judgment-debtor died and the sale was objected to by the other co-parceners on the ground that the attachment of the property in the life-time of the judgment-debtor ceased to be of any effect on his death and that they took the whole of the property attached by survivorship:

Held, (*i*) that the execution proceedings had gone so far as to constitute in favour of the judgment-creditor a valid charge upon the property to the extent of the judgment-debtor's undivided share and interest therein which could not be defeated by his death before the actual sale.

Suraj Bunsi Koer v. *Sheo Prasad Singh*(1) and *Faqir Chand* v. *Sant Lal*(2), followed.

(*ii*) that the decree-holder was entitled to proceed against what would have been the judgment-debtor's share at the time of his death, and that any subsequent happenings could not, in view of the attachment and the death, either increase or reduce that share.

Appeal by the judgment-debtors.

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

L. K. Jha and *R. Chaudhury*, for the appellants.

*Appeal from Original Order no. 260 of 1938, from an order of Babu Gobind Saran, Subordinate Judge at Motihari, dated the 14th May, 1938.

(1) (1878) I. L. R. 5 Cal. 148, P. C.
(2) (1925) I. L R. 48 All. 4.

1930.

BHUBNESHWAR PRASAD NARAIN SINGH v. KHEMCHANDRA.

B. N. Mitter (with him *Ajit Kumar Mitter* and *K. P. Upadhaya*), for the respondents.

DHAVLE AND ROWLAND, JJ.—We do not think that there is any substance in this appeal. It arises out of a proceeding in execution of a decree, which was passed against Lachmi Prasad Narain Singh on compromise after his son and two grand-sons, who had originally been impleaded as defendants 2 to 4 and had put in written statements challenging the debt of Lachmi Prasad Narain Singh as immoral and not binding upon them, had been discharged from the suit. In March, 1938, notices under Order XXI, rule 22, were served and attachment under Order XXI, rule 54, effected. On the 30th of that month, the 6th of June, 1938, was fixed for the sale of the attached properties. On the 17th of April, 1938, Lachmi Prasad Narain Singh died. The original defendants 2 to 4 were then brought on the record as Lachmi Prasad's representatives and objected to execution against the property attached, while the decree-holders went on urging that at least eight annas, the share of the deceased father in that property of the joint family, ought to be put to sale. Ultimately this contention of the decree-holders was accepted by the Court below.

Defendants 2 to 4, who, as we have already stated, were brought on the record again after the death of Lachmi Prasad Narain Singh, appeal, and the first point urged on their behalf is that the attachment of the property in the life-time of Lachmi Prasad Narain Singh ceased to be of any effect on his death, and that they, the appellants before us, took the whole of the property attached by survivorship. This contention must plainly be overruled. In somewhat similar circumstances it was decided by their Lordships of the Judicial Committee in *Suraj Bunsi Koer* v. *Sheo Persad Singh*(1) that the execution proceedings under which a mauza belonging to the joint

(1) (1878) I. L. R. 5 Cal. 148, P. C.

family had been attached and ordered to be sold "had gone so far as to constitute in favour of the judgment-creditor a valid charge upon the land to the extent of the judgment-debtor's undivided share and interest therein which could not be defeated by his death before the actual sale". Mr. Lachmi Kant Jha has urged that that decision is distinguishable because the decree in that case was a mortgage decree. But the property was attached in execution of the decree and the decision plainly turns not on the interest created by the mortgage but on the attachment and possibly also the order for sale—elements which are both present in the case before us. *See* also *Faqir Chand* v. *Sant Lal*(1), where the attachment was in execution of a money decree and it does not appear whether the order for sale was made in the life-time of the judgment-debtor in question. It has also been contended on behalf of the appellants that if the father's interest continues to be available to the decree-holders by reason of the attachment, notwithstanding the judgment-debtor's death, what should be put up to sale in execution is not the father's specified share, but his right, title and interest, such as it may be, in the property attached. This is rested on the well-known dictum that in a joint Hindu family the share of no individual member can be predicated at any moment except at the time of partition. But that dictum has no application to the facts of the present case. The decree-holders are entitled to proceed against what would have been Lachmi Prasad Narain Singh's share at the time of his death, and it cannot be pretended that any subsequent happenings could, in view of the attachment and the death, either increase or reduce that share. It has also been urged on behalf of the appellants that as the decree-holders attached the entire property as the property of the joint family, it is not competent to them now to put up to sale the eight-annas share of

(1) (1925) I. L. R. 48 All. 4.

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the judgment-debtor. But the greater includes the less, and it is impossible to accept the contention.

The appeal is dismissed with costs.

S. A. K. *Appeal dismissed.*

FULL BENCH.

DHAVLE AND ROWLAND, JJ.

Before Harries, C.J., James and Agarwala, JJ.

MAHANTH DWARKA DASS

v.

BHEKHU MAHTON.*

1939.

March, 20, April, 17.

Landlord and Tenant—occupancy holding—mafi on condition of rendering services as Jeth raiyat—landlord, whether entitled to dispense with the services—tenant's holding, whether a service tenure and a grant burdened with services—tenant's claim to remission on dispensation with services, whether tenable—decision as to annual rent payable or dispute regarding tenant's status—second appeal, maintainability of—Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *section* 153.

In the record-of-rights the tenant was recorded as a settled raiyat of the village liable to pay a certain rent. There was an entry to the effect that at the end of the year the raiyat received Rs. 12 as *haqajri* on condition of rendering services as a *jeth* raiyat, assisting the landlord in the collection of rent. The holding was subsequently partitioned into three holdings, one occupier having taken half of the original holding and two others a quarter each. The landlord instituted three suits for rent claiming a proportionate amount from each of the tenants who, however, contended that the right to deduct Rs. 12 was an incident of the tenancy, so that each of them was entitled to a proportionate remission

*Appeals from Appellate Decrees nos. 655 to 657 of 1936, from a decision of Babu Dwarika Prashad, Subordinate Judge of Muzaffarpur, dated the 28th March, 1936, confirming a decision of Babu Kamini Kumar Banarji, Munsif of Muzaffarpur, dated the 12th September, 1935.

in the rent. The landlord, who had in the meantime dispensed with the services of the *jeth* raiyat, claimed that he was entitled to the full rent of the holding. The lower Courts upheld the contention of the defendants and the landlord having preferred a second appeal a preliminary objection was taken that the appeal was barred by the provisions of section 153 of the Bihar Tenancy Act, 1885:

Held, (*i*) that the *jeth* raiyat having been relieved of his duties by the landlord, the question of whether the defendants were liable to pay the full amount of rent or a reduced sum, must be treated as "a dispute regarding the amount of rent annually payable by the tenants", and that the lower Courts having found that the tenants held under a grant burdened with service, the dispute regarding the status of the tenants raised a question relating to an interest in land which had been decided by the decrees under appeal;

(*ii*) that, therefore, the second appeal was not barred by the provisions of section 153 of the Bihar Tenancy Act, 1885;

Sheikh Safait Hossain v. *Sheikh Waizuddin*(1), distinguished.

(*iii*) that the facts of the case did not warrant the inference that the occupancy holdings were of the nature of service tenures, or that the settlement of the original holding was a grant of land burdened with services;

(*iv*) that the landlord was entitled to dispense with the services of the *jeth* raiyats, and having done so, he was entitled to recover the rent of the subdivided holding at the rate which was shown as payable in the record-of-rights and the tenants were no longer entitled to claim remission which they enjoyed on condition of rendering service to the landlord.

Radha Prashad Singh v. *Budhu Dushad*(2), followed.

Raja Venkata v. *Raja Sobhandari*(3), distinguished.

Appeal by the plaintiff.

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(1) (1916) 1 Pat. L. J. 504.
(2) (1895) I. L. R. 22 Cal. 938.
(3) (1905) L. R. 33 Ind. App. 46.

1989.

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

The appeals were first heard by Manohar Lall, J. who referred them to a Division Bench by the following order:

"In my opinion, this case should be referred to a Division Bench. In the case of *Sheikh Safait Hossain* v. *Sheikh Waizuddin*(1) in circumstances similar to those in the present case it was held that no second appeal lay to the High Court. But my attention has been drawn to the case of *Jagdish Misser* v. *Rameshwar Singh*(2) where the learned Chief Justice apparently accepted the distinction that where a tenant claimed deduction of a *mafi* as an incident of his tenure (not merely as a set off against the rent claimed) a second appeal will lie. I am doubtful if the latter proposition of law is correct and also whether the case of *Sheikh Safait Hossain* v. *Sheikh Waizuddin*(1) could be said to have been overruled by a mere remark in *Jagdish Misser's* case(2). Again if a second appeal lies then the question which arises for decision is whether upon the facts found in this case it can be held as a matter of law that the claim of the defendant-tenants to a deduction from rent is an incident of the tenancy.

For these reasons I think it is desirable that this case should be decided by a Division Bench."

The appeals then came on for hearing before Harries, C. J. and Agarwala, J. who referred them to a Full Bench by the following order:

"These appeals raise a question of importance.

Originally the appeals came before Manohar Lall, J. who referred them to a Division Bench. The cases have been argued at considerable length before us, and it appears to us that there is a conflict of authority upon the points involved.

The question in issue in these cases is whether the defendant-respondents are entitled to get the *jeth* raiyati *mafi*, claimed as a permanent incident of their tenancy, deducted from the rent, or is such *mafi* determinable by notice dispensing with the services of the defendant-respondents. We are doubtful whether the decision in *Jagdish Misser* v. *Rameshwar Singh*(2) can be reconciled with an earlier decision of this Court in *Sheikh Safait Hossain* v. *Sheikh Waizuddin*(1). Further we are doubtful whether the *jeth* raiyati *mafi* can ever be claimed as a permanent incident of a tenancy. As there is this conflict of opinion in this Court, we direct that these cases be laid before a Bench of three Judges for disposal."

(1) (1916) 1 Pat. L. J. 504.

(2) (1920) 57 Ind. Cas. 621.

On this reference.

A. K. Mitter, for the appellant.

Rai T. N. Sahay and *Girjanandan Prasad*, for the respondents.

HARRIES, C. J., JAMES AND AGARWALA, JJ.—In the record-of-rights of Ghanipur in Muzaffarpur district the occupier of the land covered by khatian no. 254 is recorded as a settled raiyat of the village liable to pay rent at Rs. 53-2-6 a year. There is an entry to the effect that at the end of the year the raiyat receives Rs. 12 as *haqajri* on condition of his having worked for the landlord. The record-of-rights does not specify the nature of the duty; but it is agreed that the duties which were rendered were those of a *jeth* raiyat, assisting the landlord in the collection of rent. The holding has now been partitioned with the result that there are three holdings. one occupier having taken half of the original holding and two others a quarter each. The landlord instituted three suits for rent claiming the proportionate amount of Rs. 53-2-6 from each of the tenants; but the tenants contended that the right to deduct Rs. 12 was an incident of the tenancy, so that the occupier of the half holding was entitled to deduct Rs. 6 and the other two raiyats were entitled to deduct Rs. 3 each. The landlord had dispensed with the services of the *jeth* raiyat and he, therefore, claimed that he was entitled to the full rent of the holding. The Munsif held that as the right to deduct Rs. 12 was entered in the record-of-rights in a column which contained the incidents of the tenancy, this right must be considered an incident of the tenancy, which must be treated as a grant burdened with service, of which the tenants were entitled to take advantage so long as they were willing to render the services, whether the landlord required the services or not. The decision was affirmed on appeal by the Subordinate Judge; and the landlord has now come to this Court in second appeal.

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HARRIES, C. J., JAMES AND AGARWALA, JJ.

A preliminary ground of objection to the appeals is taken on behalf of the respondents that the provisions of section 153 of the Bihar Tenancy Act bar a second appeal in this case. The respondents rely on the decision in *Sheikh Safait Hossain* v. *Sheikh Waizuddin*(1) wherein it was held that *mafi* allowed to a *jeth* raiyat in lieu of wages was not rent, and that a dispute as to whether the *mafi* could be claimed or not was not a dispute relating to the amount of rent payable for the holding. It does not appear from the judgment in that case that the *jeth* raiyat had been relieved of his duties or that the right to pay lower rent was claimed irrespective of whether the duties had been performed or not. In the present case where the *jeth* raiyat has been relieved of his duties by the landlord, the question of whether the tenants are liable to pay at the rate of Rs. 53-2-6 or at Rs. 41-2-6 should in our judgment be treated as a dispute regarding the amount of rent annually payable by the tenant. It is also to be observed that the claim of the tenants which has been allowed by the Courts below amounts to a claim that their holding is something other than an occupancy holding, that they hold under a grant burdened with service; and the dispute regarding the status of the tenants raises a question relating to an interest in land which has been decided by the decrees under appeal. We consider, therefore, that this appeal is admissible under section 153 of the Bihar Tenancy Act.

It is pointed out on behalf of the appellant that the Courts below are in error when they regard the entry in the record-of-rights as describing this right to deduct Rs. 12 on condition of rendering of services as an incident of the tenancy. The learned Munsif has remarked that this *mafi* is not entered in the column of rent, and he goes on to say that if that had been so the natural conclusion would have been that a certain amount of rent was to be deducted in lieu

(1) (1916) 1 Pat. L. J. 504.

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of wages; but in fact the entry is in the column which has been provided for giving particulars regarding the rent, although that column also contains special conditions and incidents, if any, of the tenancy. It certainly cannot be said that the entry in the record-of-rights describes this right to *mafi* unequivocally as an incident of the tenancy. The question remains of whether in these circumstances the Courts below could properly come to the conclusion that this tenancy was a service tenure, a grant of land burdened with service.

Mr. A. K. Mitter on behalf of the appellant relies upon the decision of the Privy Council in *Raja Venkata* v. *Raja Sobhandari*(1) wherein it was held that the grant of village as a service *mokhasa* to a naik who undertook to be present with fourteen peons at harvest-time, and to accompany the zamindar carrying spears, muskets and other weapons when he went hunting, was a grant burdened with service; and that it was not resumable when the zamindar dispensed with the services because he found that the inconvenience arising from the expense of maintaining this following was greater than the services were worth. The tenure described in that case was a tenure of a feudal nature, having no proper analogy with the case of a zamindar who appoints a considerable raiyat of the village to give him some assistance in his collection, and allows him to deduct his wages from his rent, thereby saving the raiyat from the trouble of recovering his wages in the zamindar's office. The services to be rendered in the cases with which we are concerned here have more analogy with the services of a *gorait*, the nature of which was discussed in *Radha Prashad Singh* v. *Budhu Dushad*(2). In that case the *gorait* held a jagir which had descended from father to son; the son had been allowed to retain possession without rendering

(1) (1905) L. R. 33 Ind. App. 46.
(2) (1895) I. L. R. 22 Cal. 938.

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services to the zamindar, and the zamindar could not prove the terms of the grant. It was held by the Calcutta High Court that the facts found did not legitimately lead to the inference that the tenure was of a permanent character, and it was held that the zamindar was entitled to resume on dispensing with the services of the *gorait*. In the present case the facts apparent from the entries in the record-of-rights from which the inference has been drawn that the zamindar is not liable to resume are as follows. The defendants' ancestor was an occupancy raiyat; he did not hold a service tenure but an occupancy holding the rent of which was settled at Rs. 53-2-6 annually. He was appointed *jeth* raiyat and on condition of rendering such services he was permitted to deduct Rs. 12 from the amount of rent payable. This is not described in the record-of-rights as an incident of the tenure, but the mode in which the rent is now payable has been fixed; and the entry cannot properly be treated as indicating that the holding is something other than an occupancy holding, or that it is a *jeth* raiyati tenure. There is nothing in the entry from which it can be deduced that this holding is a *jeth* raiyati jagir; or that it is anything but an ordinary occupancy holding of which the annual rental including cess is Rs. 53-2-6. The Courts below in coming to the conclusion that this was a grant burdened with services have also omitted to notice the very important fact that the holding has been partitioned. They have divided up the amount allowed as remuneration to the *jeth* raiyat on condition of his performing services, so that one of the tenants is treated as being half of a *jeth* raiyat and each of the other two as a quarter. This is altogether inconsistent with the theory that the holding is something other than an occupancy holding and that it is in the nature of a jagir for a village servant. It is also to be observed that throughout the case there has been no suggestion that the *jeth* raiyat occupied any position like that of a village servant such as a chaukidar, or that the

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services which he rendered were anything but purely personal services to the zamindar. The zamindar is ordinarily entitled to dispense with such services at his pleasure, as was held in *Radha Pershad Singh* v. *Budhu Dushad*(1).

We consider that it must be held that the facts found do not warrant the inference that these occupancy holdings are of the nature of service tenures, or that the settlement of the original holding was a grant of land burdened with services. The zamindar has dispensed with the services of the *jeth* raiyat and having done so, he is entitled to recover the rent of the subdivided holding at the rate which is shown as payable in the record-of-rights; and the tenants are no longer entitled to claim remission which they enjoyed on condition of rendering service as *jeth* raiyat to the landlord.

The result is that the appeals must be allowed and the decisions of the Courts below are set aside. The plaintiff's suit is decreed with costs throughout.

S. A. K. *Appeals allowed.*

FULL BENCH.

Before Harries, C.J., Wort and Dhavle, JJ.

1939.

March, 21, April, 19.

LAL SADANAND SINGH

v.

MADAN MOHAN SAHU GAONTIA.*

Central Provinces Land-Revenue Act, 1881 (*Act XVIII of* 1881), *section* 65-A—*protected thikadar, whether, liable to ejectment for non-payment of rent—sub-section* (7), *meaning and significance of.*

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*Letters Patent Appeals nos. 22 to 24 of 1937 (Cuttack), from a decision of Mr. Justice Rowland, dated the 22nd April, 1937.

(1) (1895) I. L. R. 22 Cal. 938.

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A landlord is not entitled to obtain a decree for ejectment against a protected thikadar, within the meaning of section 65-A of the Central Provinces Land-Revenue Act, 1881, on the ground of the latter's failure to pay the thika rent.

All that sub-section (7) of section 65-A of the Act means is that nothing in the previous sub-sections is to affect the landlord's right to eject a protected thikadar on the grounds given in sub-clauses (a) and (b) of the sub-section, provided such a right is given to him by any substantive law for the time being in force which is not inconsistent with the provisions of the Act. The sub-section gives the landlord no new right but merely saves rights in certain instances which he may have under the general law for the time being in force.

Nruplal Singh Gartia v. *Mahadeb Naik*(1) and *Komal Singh* v. *Jagannath Murat Singh*(2), followed.

Rai Lal Rajendra Singh Bariha Bahadur v. *Sukha Pujhari*(3) and *Iswar Naik* v. *Raja Lal Rajendra Singh*(4), distinguished.

Mohunt Buloram Doss v. *Jogendro Nath Mullick*(5) and *Mumtaz Bibee* v. *Grish Chunder Choudhry*(6), referred to.

Appeal by the plaintiff.

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

The appeals were in the first instance heard by Wort and Dhavle, JJ. who referred them to a Full Bench by the following order of reference:

WORT, J.—In the circumstances of this case I propose to say as little as possible about the matter having regard to the order which we propose to make in the case. The appeal is by the appellant-landlord against the decision of a Judge of this Court reversing the decision of the lower appellate Court in the following circumstances.

Shortly stated, the plaintiff-appellant landlord claimed to eject the defendants, who were protected thicadars within the meaning of the Central Provinces Land-Revenue Act (Act XVIII of 1881), from their tenure on the ground of non-payment of rent. The learned Judge of the

(1) (1919) S. A. no. 27 of 1918 (Unreported).
(2) (1918) A. I. R. (Nag.) 66.
(3) (1927) M. A. 17 of 1926 (Unreported).
(4) (1934) C. R. 99 of 1934 (Unreported).
(5) (1873) 19 W. R. 349.
(6) (1874) 22 W. R. 376.

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trial Court granted a decree to the plaintiff which decree was confirmed on appeal by the learned Subordinate Judge. Rowland, J. before whom the appeal from the decision of the Subordinate Judge was, came to the conclusion that by reason of a decision of a Bench of this Court consisting of Adami and Coutts, JJ. (unreported Second Appeal no. 27 of 1918), it was necessary before the plaintiff could succeed in the suit to remove the protection accorded to the thicadar as protected thicadar under section 65-A of the Central Provinces Land-Revenue Act.

It is contended by Mr. P. R. Das on behalf of the landlord appellant that under sub-section (7) of section 65-A the protection given to the thicadar did not disentitle the plaintiff to a decree for ejectment as he was entitled to such a decree "in accordance with the law for the time being in force and not inconsistent with this Act" within the meaning of section 65-A, sub-section (7). I do not propose to discuss the matter having regard to the decision to which I have referred, namely, that of Adami and Coutts, JJ. and another decision of this Court being an unreported decision of Mullick and Allanson, JJ. in Miscellaneous Appeal no. 17 of 1926. It was contended by Mr. P. R. Das that the decision of Mullick, J. was a decision in his favour to the extent that the conclusion at which the learned Judge in that case arrived was consistent with the existence of what I may describe as a common law right of re-entry by the landlord for non-payment of rent. Sir Manmatha Nath Mukherji who appears on behalf of the respondents, however, contends, and in my judgment rightly contends, that the decision to which I have just referred is explicable on the ground that it was a decision relating to execution and execution of a compromise decree under which the parties—the landlord on the one hand and the thicadar on the other hand—had agreed that on the non-payment of rent after the term of grace the landlord would have a right to re-enter. As regards the decision of Adami and Coutts, JJ. however, a difficulty arises. That was a case in which the landlord had claimed to eject his thicadar after a notice to quit had been served upon the thicadar, and one of the contentions that was raised by the defendant in appeal before this Court was that the right of re-entry had been waived, or, to put it in the terms of the judgment, there had been a waiver of the forfeiture on the ground that the landlord had applied under section 116 of the Central Provinces Land-Revenue Act to remove the protection accorded to the thicadar under section 65-A. That argument was not accepted and the learned Judge in the course of the discussion of that point made this observation: "The learned Subordinate Judge says that the forfeiture has not been incurred as the denial was not followed by any act of the plaintiff. I do not think he is correct in this, for it is admitted that the plaintiff applied for a cancellation of the protection certificate and this was the first step to be taken in the proceedings for the ejectment of the thicadar. The learned Subordinate Judge has erroneously in my opinion, treated this application as an acknowledgment of the defendant's tenancy. Taking all the circumstances into consideration I am unable to agree with the lower Court". The argument was that the landlord had recognized the fact that the tenancy was still in existence although there were circumstances which had created a forfeiture. Now, this is the observation upon which my learned brother relies in coming to a decision on

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what is now on appeal before us. But the decision of Mullick, J. does definitely imply that there is a rule of the general law which would entitle the landlord to eject the thicadar for non-payment of rent; and, having regard to the view which we are inclined to hold with regard to the matter, in order to deal with the decision to which I have referred it will be necessary to refer the case to a Full Bench.

This decision governs L. P. A. nos. 22 to 24 of 1937.

DHAVLE, J.—I agree.

On this reference.

Dr. D. N. Mitter (with him *G. P. Das*), for the appellant: Where a protected thikadar defaults in the payment of thika rent, the landlord is entitled to eject him in execution of a decree for ejectment. The power so to eject is conferred by section 65-A (7) of the Central Provinces Land-Revenue Act, 1881. Sub-section 4 (*a*) of section 65-A expressly takes away the right of the landlord to obtain a decree for sale of the tenure of a protected thikadar, or to put up the tenure for sale in execution of a decree. That is one of the reasons why the right to eject has been given by sub-section (7). The words "in execution of a decree for ejectment passed in accordance with any law for the time being in force", in sub-section (7), only mean that the decree for ejectment should have been obtained under the provisions of some law prescribing the procedure for such ejectment. This has reference to the Code of Civil Procedure. I rely on the observations of Mullick, J. in *Rai Lal Rajendra Singh Bariha Bahadur* v. *Sukha Pujhari*(1).

[CHIEF JUSTICE.—The words "in accordance with any law" do not mean "procedural law". If your contention be correct, there was no necessity for adding all these words to the sub-section. Every decree which is capable of execution must have been passed in accordance with the Code of Civil Procedure.]

The words "passed in accordance with" sufficiently indicate that the words "any law" which follow immediately must mean procedural law.

(1) (1927) M. A. 17 of 1926 (Unreported).

[CHIEF JUSTICE.—Is an unprotected thikadar liable to ejectment?]

The Act is silent, but some assistance may be had from the observations of Adami, J. in *Nruplal Singh Gartia* v. *Mahadeb Naik*(1).

[CHIEF JUSTICE.—In the absence of express provision in the Act it must be held that an unprotected thikadar is not liable to ejectment. If that is so, then your argument makes the position of a protected thikadar much worse than that of an unprotected thikadar.]

My submission is that inasmuch as the Act expressly imposes liability to ejectment on the protected thikadar, it follows *a fortiori* that an unprotected thikadar is all the more liable.

[CHIEF JUSTICE.—But the Act does not expressly impose liability to ejectment on an unprotected thikadar.]

[WORT. J.—Then sub-section (5) of section 65-A would be redundant. Is it conceivable that the thikadar would make his position worse by applying for stay?]

[DHAVLE, J.—The position, according to your submissions, would be anomalous. So long as a thikadar remains unprotected, he is not liable to ejectment under the Act, but as soon as protection is applied for and given, he incurs a self-imposed liability to ejectment. Is that position tenable?]

But, with great respect, I submit that this argument assumes that an unprotected thikadar is not liable to ejectment. I have already submitted that the very fact that a protected thikadar is not immune from ejectment makes it quite clear that an unprotected thikadar is all the more liable.

(1) (1919) S. A. no. 27 of 1918 (Unreported).

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[CHIEF JUSTICE.—In sub-section (7) the words "any law" refer to substantive or general law. If the words "any law" be taken to mean procedural law, then the words "and not inconsistent with this Act" become meaningless because the Central Provinces Land-Revenue Act is not a procedural law. On the other hand, there can be a decree passed in accordance with some substantive law but it may at the same time be inconsistent with the Central Provinces Land-Revenue Act. For instance, there may be a decree for ejectment in pursuance of a contract to pay enhanced rent with a proviso for re-entry where the enhancement is contrary to section 65-A (4), clause (*e*) of the Act.]

I adopt the reasoning of Mullick, J., in *Rai Lal Rajendra Singh Bariha Bahadur* v. *Sukha Pujhari*(1). [Reference was also made to the decisions in *Nruplal Singh Gartia* v. *Mahadeb Naik*(2) and *Iswar Naik* v. *Raja Lal Rajendra Singh*(3).]

[CHIEF JUSTICE.—In *Rai Lal Rajendra Singh Bariha Bahadur* v. *Sukha Pujhari*(1) the decree had been passed on the basis of a compromise. Therefore the decree was passed in accordance with substantive law.]

Sir Manmatha Nath Mukherji (with him *G. C. Das* and *S. S. Rakshit*), for the respondents: The words "decree passed in accordance with any law for the time being in force" occurring in section 65-A (7) of the Act, mean a decree passed in accordance with general law. The sub-section only protects pre-existing rights of the landlord, either on the basis of a contract or in pursuance of the substantive law. There is no common law of the land by which the landlord has got the right to eject the thikadar for non-payment of rent. Sub-section (7) of section 65-A does not create any new right in the thikadar or impose any liability on the tenant. It is merely a saving clause.

(1) (1927) M. A. 17 of 1926 (Unreported).
(2) (1919) S. A. 27 of 1918 (Unreported).
(3) (1934) C. R. 99 of 1934 (Unreported).

If the contention of the appellant that "any law" means procedural law be correct, then the succeeding words of the sub-section would be meaningless. The Legislature must always be taken to have used words in the body of an enactment with a definite purpose and to have refrained from saying anything which was redundant.

Then again sub-section (5) would make the position of a protected thikadar worse than that of an unprotected thikadar, if the contention of the appellant were to be accepted.

[Reliance was placed on *Komal Singh* v. *Jagannath Murat Singh*(1).]

In the case of *Rai Lal Rajendra Singh Bariha Bahadur* v. *Sukha Pujhari*(2) the decree was based on a compromise. The Court was bound to give effect to the contract between the parties—Order XXIII, rule 3, Civil Procedure Code. The question whether sub-section (7) of section 65-A created any right in the landlord did not arise in that case. In any case the observation of Mullick, J., is not warranted by the terms of sub-section (7). If the legislature has denied to the landlord the ordinary right of sale, it cannot be argued that he has been given a far greater right to eject. In the case of sale the thikadar would have had the right to the surplus proceeds, whereas he would have no such right if he were to be ejected.

Dr. D. N. Mitter, in reply.

Cur. adv. vult.

S. A. K.

HARRIES, C. J.—These are three connected Letters Patent appeals from a decision of Rowland, J. The suits out of which the appeals arise were instituted by Lal Sadanand Singh against the three respondents. The latter are protected thikadars and the plaintiff

(1) (1918) A. I. R. (Nag.) 66.
(2) (1927) M. A. 17 of 1926 (Unreported).

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claimed in each suit arrears of rent due from the defendants and in default of payment he prayed that he should be entitled to eject them from their villages and the sir lands appertaining thereto. The learned Munsif, who heard the cases in the first instance, decreed the plaintiff's claims and ordered that in default of payment of the thika jama decreed within a certain period the plaintiff would be entitled to eject the defendants. The defendants appealed to the Court of the learned Subordinate Judge. They failed to pay the thika jama decreed within the time allowed and prayed that such time be extended. The learned Subordinate Judge came to the conclusion that he had no jurisdiction to extend the time and dismissed the appeals which involved the ejectment of the defendants. The defendants appealed to this Court and the appeals were heard together by Rowland, J. He came to the conclusion that the plaintiff was not entitled to eject the defendants and accordingly he allowed the appeals and set aside the decrees for ejectment passed by the learned Subordinate Judge.

The appeals came in the first place before a Bench of this Court consisting of Wort and Dhavle, JJ. The learned Judges were of opinion that the authorities of this Court were conflicting and as the matter was one of importance they referred the appeals to the Chief Justice for the constitution of a Full Bench. The matter has accordingly been argued before this Bench.

The plaintiff is the landlord proprietor of three villages whereas the defendants are protected thikadars of the villages concerned. The only point which has to be considered is whether a landlord is entitled to obtain a decree for ejectment against a protected thikadar in the Sambalpur district upon the ground of the latter's failure to pay the thika jama.

The legal position of a protected thikadar is dealt with in section 65-A of the Central Provinces Land-Revenue Act (XVIII of 1881). That section enables

a Settlement Officer to declare certain thikadars, gaontias or farmers to be "protected" for the purposes of that section, and when a thikadar, farmer or gaontia is declared to be protected the Settlement Officer may, at the request of the proprietor of the village, determine the amount of the thika jama which shall be payable by such thikadar, gaontia or farmer. Sub-section (*3*) of the section provides that any thikadar, farmer or gaontia who has been ejected or dispossessed may, in certain circumstances, obtain protection and be replaced in possession of the village.

Sub-section (*4*) sets out the incidents of a tenure of a thikadar, farmer or gaontia who has been declared to be protected under the section. The tenure is heritable but not transferable by sale, gift, mortgage or dower, and it is expressly declared that it is not saleable in execution of any decree, nor can any decree be passed for the sale thereof. On the death of a thikadar leaving more than one heir bearing the same relationship to him, the eldest of such heirs is to succeed. This sub-section contains other provisions relating to renewals of the holding on the termination of a lease or an agreement, settlement of disputes relating to the amount of the thika jama, enhancement of thika jama and such like.

Sub-section (*5*) is an important sub-section and is in these words:—

"In any proceedings before a Court for the ejectment of a thikadar, gaontia or farmer, if it appears that the thikadar, gaontia or farmer has filed an application before a Revenue Officer to obtain a declaration that he is protected, or if he files such an application before the Court, the Court shall stay proceedings until the application has been disposed of in accordance with the provisions of this Act, and shall, if the application is filed before itself, forward such application to the Deputy Commissioner or Settlement Officer for disposal."

This sub-section undoubtedly contemplates that a protected thikadar, gaontia or farmer should receive a measure of protection against ejectment. It expressly provides that where an application for protection has been made or if an application is made before the Court

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in which ejectment is sought all proceedings must be stayed until the Deputy Commissioner or Settlement Officer has decided whether the thikadar is entitled to protection. It is only after such a decision is given by the Deputy Commissioner or Settlement Officer that the case can proceed.

Sub-section (7) deals with the liability of a protected thikadar, farmer or gaontia to be ejected. The precise terms of the sub-section are as follows :—

"Nothing in this section shall affect the liability of any protected thikadar, farmer or gaontia to ejectment in execution of a decree for ejectment passed in accordance with any law for the time being in force and not inconsistent with this Act, on the ground—

(a) that he has failed to pay the thika jama legally payable by him;

(b) that he has diverted the culturable land of the village to non-agricultural purposes, or is chargeable with some act or omission which renders him liable to be ejected."

Both the learned Munsif and the learned Subordinate Judge were of opinion that this sub-section expressly gave the landlord proprietor a right to eject a protected thikadar when the latter had failed to pay the thika jama due from him. Rowland, J., however, was of opinion that as long as the thikadar remained protected, he could not be ejected for mere non-payment of the thika jama. The learned single Judge was of opinion that before the thikadar could be ejected steps would have to be taken to remove the protection given to him and such could be done under the provisions of sub-section (6).

It has been argued before us by Dr. Dwarka Nath Mitter on behalf of the appellant that section 65-A (7) of the Central Provinces Land-Revenue Act gives the landlord in terms a right to eject a protected thikadar for non-payment of the thika jama. Counsel has relied upon a decision of this Court, namely, *Rai Lal Rajendra Singh Bariha Bahadur* v. *Sukha Pujhari*(1), decided by Mullick and Allanson, JJ., on the 1st of

(1) (1927) M. A. 17 of 1926 (Unreported).

April, 1927. This case is unreported, but we have had the advantage of reading the judgment of Mullick, J. with which Allanson, J. concurred. In that case a suit was brought by the proprietor landlord against a protected thikadar for ejectment of the latter. During the progress of the suit a compromise was effected whereby it was agreed that the protected thikadar should pay to the plaintiff a sum of Rs. 85 and the costs of the suit by the 4th of August, 1925, and in default of such payment the plaintiff should get possession of the thikadari property. The protected thikadar failed to make payment on the due date and asked for an extension of time. This was refused by the learned Munsif though on appeal the learned Subordinate Judge appeared to think that the learned Munsif could have extended the time. The learned Subordinate Judge, however, was of opinion upon other grounds that the appeal failed, and it was accordingly dismissed. A second appeal was preferred to this Court and in that appeal it was argued that the proprietor landlord had no right under section 65-A (7) of the Central Provinces Land-Revenue Act to eject protected thikadar. This Court held that as the parties had compromised and had argreed that in default of payment of the amount due on a certain date the thikadar should be ejected the Courts below were right in ordering the ejectment of the protected thikadar.

If the legislature intended by section 65-A (7) of the Central Provinces Land-Revenue Act to give the landlord proprietor a right to eject a protected thikadar for non-payment of rent, then the sub-section has been drafted in a somewhat strange manner. The form of the sub-section suggests that the legislature intended to save existing rights rather than to create new ones. The sub-section begins as saving sections usually do:

"Nothing in this section shall affect....."

However, the manner in which the section is drafted in no way concludes the matter, and its terms must be carefully examined. It provides that

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nothing in the section is to affect the liability of any protected thikadar to ejectment in execution of a decree for ejectment passed in accordance with any law for the time being in force and not inconsistent with this Act on the ground, inter alia, that the thikadar has failed to pay the thika jama payable by him.

On behalf of the appellant it has been argued that what this section means is that nothing in the previous sub-sections shall affect the liability of a protected thikadar to be ejected in execution of a decree for ejectment based on any of the grounds set out in (*a*) or (*b*) of the sub-section, provided such a decree has been passed in accordance with the legal procedure in force for the time being and which is not inconsistent with the Act. In short the sub-section gives the landlord a right to sue for ejectment on either of the grounds set out in (*a*) and (*b*) and to eject the thikadars if he has obtained a decree on any such grounds in accordance with the procedural law then in force. On the other hand, it has been argued on behalf of the respondents that all that this sub-section means is that nothing in the previous sub-sections is to affect the landlord's right to eject a protected thikadar upon the grounds given in (*a*) and (*b*) of the sub-section, provided such a right is given to him by any law for the time being in force which is not inconsistent with the provisions of the Central Provinces Land-Revenue Act. According to the respondents, the sub-section gives the landlord no new right but merely saves right in certain instances which he may have under the general law for the time being in force.

The whole controversy has turned on the meaning of the words "decree for ejectment passed in accordance with any law for the time being in force and not inconsistent with this Act". According to the appellant, the sub-section gives the landlord a right to eject the tenant on any of the grounds in (*a*) or (*b*) of the sub-section provided he obtains a decree according to the procedural law in force for the time being and not

inconsistent with the Act. This was the view of Mullick, J. in the unreported case to which I have already made reference. In the course of his judgment he observed :—

" Section 65-A on a proper reading would seem to mean that a protected thikadar is liable to ejectment for non-payment of rent provided that the decree for ejectment is obtained under the provisions of some law prescribing the procedure for such ejectment. The decree for ejectment in this case was made under the provisions of the Code of Civil Procedure and it has not been shown that it was incompetent or that it was inconsistent with the Central Provinces Land-Revenue Act ".

From this observation it seems clear that Mullick, J. appeared to think that the words " decree for ejectment passed in accordance with any law for the time being in force and not inconsistent with this Act " meant a decree for ejectment passed in accordance with the law of procedure for the time being in force and which was not inconsistent with the provisions of the Act. The decision, however, in that particular case can be sustained upon a very different ground. There had been a compromise between the parties by which the landlord was given the right to eject the tenant in case the latter failed to pay the thika jama by a certain date. It may well be argued that the landlord had in such circumstances a right by the substantive law of the land to eject the tenant and, therefore, the decree for ejectment had been passed in accordance not only with the procedural law but also with the substantive law for the time being in force and which was not inconsistent with the Act.

In my view it is impossible to construe section 65-A (7) of the Central Provinces Land-Revenue Act as giving the landlord a right to eject the protected thikadar merely for non-payment of thika jama or upon the grounds mentioned in (b) of that sub-section. It must

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be remembered that sub-section (5) of this section provides that all proceedings before a Court for ejectment of a thikadar must be stayed in cases where an application has been or is made by the thikadar for protection, and it is clear that such proceedings for ejectment cannot be continued until the application for protection has been disposed of. This sub-section clearly contemplates that the liability of a protected thikadar to be ejected is something less than the liability of an unprotected thikadar to be so ejected. Otherwise, there would be no purpose whatsoever in staying the proceedings until the thikadar's right to protection had been determined.

Thikadars, gaontias or farmers in the Sambalpur district hold an interest very similar to that of a permanent tenure. It has not been seriously contended that apart from the terms of the lease or agreement under which he holds a thikadar, gaontia or farmer can be ejected merely for non-payment of the thika jama. It has been held repeatedly that holders of interests similar to that of a thikadar, gaontia or farmer cannot be ejected solely on the ground of non-payment of rent: *see Mohunt Buloram Doss* v. *Jogendro Nath Mullick*(1) and *Mumtaz Bibee* v. *Girish Chunder Chowdhry*(2). In the latter case it was expressly held that Act VIII (B. C.) of 1869, section 52, did not apply to the case of a talukdar who has power to transfer his land and is liable, under the terms of his kabuliyat, to immediate ejectment in the event of default. The question whether a talukdar is liable to ejectment must be determined by the provisions of his lease. In other words, these two early cases show that holders of interests of the nature of a permanent tenure could not be ejected for non-payment of rent unless the terms of their leases so provided. In short there could be no ejectment for non-payment of rent unless the lease or

(1) (1873) 19 W. R. 349.
(2) (1874) 22 W. R. 376.

agreement contained something in the nature of a proviso for re-entry.

Counsel for the appellant has failed to show that there is any special provision of law or that there is any custom in the Sambalpur district giving a landlord a right to eject an unprotected thikadar, farmer or gaontia for non-payment of rent without there being a term in the lease or agreement giving him such a right. The landlord has, in my view, no common law right in India to eject a tenure-holder for non-payment of rent. His right to obtain ejectment depends in each case upon the terms of the agreement or lease. Where a right to eject the tenure-holder is not given by the agreement or lease, mere failure to pay the thika jama does not entitle the landlord to eject the thikadar.

Reference has been made to an unreported Bench decision of this Court in *Iswar Naik* v. *Raja Lal Rajendra Singh*(1), decided by Courtney Terrell, C. J. and Saunders, J. A decree for ejectment had been passed against a thikadar in that case for non-payment of rent and it would appear that such was an unprotected thikadar. This case is no authority for the proposition that an unprotected thikadar can be ejected for non-payment of rent apart from any term in the lease or agreement permitting ejectment. The point was never raised nor discussed and no objection appears to have been taken to the decree on this ground.

If in the absence of any provision in the lease for ejectment a landlord is not entitled to eject a thikadar for non-payment of rent, then if the appellant's contention be accepted, the protected thikadar is in a worse position than the unprotected thikadar. As I have stated, the appellant contends that sub-section (7) of section 65-A of the Central Provinces Land-Revenue Act gives the landlord, apart from the

(1) (1934) C. R. 99 of 1934 (Unreported).

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terms of the lease or agreement, a right to eject a protected thikadar on the ground of non-payment of rent, whereas the general law does not give the landlord a right to eject an unprotected thikadar for such non-payment except where the lease or agreement so provides. If the effect of sub-section (7) is to give the landlord a right against the protected thikadar which he did not possess previously against an unprotected thikadar, then I am wholly unable to understand why sub-section (5), section 65-A, of the Central Provinces Land-Revenue Act was ever enacted. Why should all proceedings in ejectment against an unprotected thikadar be stayed in cases where application has been or is being made by the thikadar for protection? If the appellant's contention be sound, the only result of obtaining protection would be that in cases where there was no proviso for re-entry the thikadar would render himself liable to ejectment under sub-section (7) whereas no such liability would exist if he remained unprotected. In my view all that sub-section (7) does is to save for the landlord any rights which he might have under the law for the time being in force and which is not inconsistent with the Act to eject the thikadar on certain grounds. According to the general law, a thikadar could be ejected by the landlord in all cases provided for in the lease or agreement. Sub-section (7) limits the landlord's rights in the case of protected thikadars to decree obtained on either of the grounds mentioned in (*a*) and (*b*). If the lease or agreement permitted a landlord to eject a thikadar on grounds other than those stated in (*a*) and (*b*) then such rights are taken away by sub-section (7). On the other hand, if the agreement for lease gives the landlord a right to eject the thikadar for non-payment of the thika jama, he will have such right though the thikadar has become protected. If the lease or agreement does not provide for re-entry in the case of non-payment of rent, then the landlord has no

right under sub-section (7) to eject his thikadar. All that sub-section (7) does is to save any rights which the landlord might have in accordance with the law for the time being in force and not inconsistent with the Act to eject his thikadar on either of the grounds mentioned in (*a*) and (*b*). If by the general law he has no such right, then the protected thikadar cannot be ejected.

To construe the words "decree for ejectment passed in accordance with any law for the time being in force" as meaning a decree for ejectment passed in accordance with the law of procedure for the time being in force is open to a further objection. Following those words are the words "and not inconsistent with this Act". Counsel for the appellant has failed to show us any provisions in the Central Provinces Land-Revenue Act dealing with procedure relating to ejectment. As there are no such provisions, I cannot understand how the words "not inconsistent with this Act" were introduced if all that was intended was that the decree for ejectment should be passed in accordance with the procedural law then in force. If the Act does not deal with procedure for suits for ejectment, how could the procedural law in force at any time be inconsistent with the Act? If these words are construed as meaning a decree for ejectment passed in accordance with the substantive law for the time being in force, then the addition of the words "and not inconsistent with this Act" is intelligible, because the substantive law for the time being in force might well be inconsistent with one or more of the provisions of section 65-A of the Central Provinces Land-Revenue Act.

Dr. Mitter has also argued that sub-section (7) of section 65-A should be construed as giving the landlord a right to eject a protected thikadar for non-payment of rent because the landlord would otherwise have no remedy against the protected

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thikadar. As I have already pointed out, the interests of a protected thikadar are not saleable in execution of any decree and no decree can be passed for the sale thereof. Dr. Mitter has argued that if the thikadari property is not saleable and no decree for its sale can be passed, the legislature must have intended the landlord to have a right to eject the protected thikadar for non-payment of rent. In my view no such inference can be drawn. If the landlord could sell the property in order to obtain his rent, the protected thikadar would at least have the difference between the sale price and the amount of the thika jama and costs due to the landlord. Such, however, is forbidden by sub-section 4(*a*) of the Act, and I do not see why the landlord should be given a far greater right, that is of ejecting the thikadar from the property for non-payment of the thika jama and retaining the property himself though the value of the property might far exceed the amount of the thika jama in arrear. It appears to me that the legislature intended to give the protected thikadar protection not only against the sale of his property in execution but also against ejectment except where the law allowed it on certain particular grounds.

A Bench of this Court in *Nruplal Singh Gartia* v. *Mahadeb Naik*(1), decided by Coutts and Adami, JJ., on the 18th of July, 1919, seems to have taken the view that section 65-A (7) of the Central Provinces Land-Revenue Act did not give the landlord a right to eject a thikadar merely on the ground of non-payment of rent. In that case the plaintiff had applied for cancellation of the protection certificate, and Adami, J., who delivered the judgment of the Court, observed :—

"it is admitted that the plaintiff applied for cancellation of the protection certificate and this was

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the first step to be taken in the proceedings for the ejectment of the thikadar ".

From these observations it would appear that Adami, J. was of opinion that as long as the protection continued the protected thikadar could not be ejected for mere non-payment of rent.

A view similar to that which I have expressed was taken by a single Judge of the Judicial Commissioner's Court, Nagpur, in the case of *Komal Singh* v. *Jagannath Murat Singh*(1). At page 67, Mittra, A. J. C. observed :—

" It is urged for the respondents that the decree for ejectment was illegal, as there is no Statute applicable to the case which provides for such ejectment. Section 65-A, sub-section (7), Land-Revenue Act, however, though not expressly providing for ejectment on the ground that the thikadar has failed to pay the thika jama, recognizes the validity of an agreement providing for the re-entry of the landlord on default of payment of thika jama ".

Whether the plaintiff-appellant in this case can eject the respondents if he obtains a cancellation of the protection, will depend upon whether the lease or agreement gives the plaintiff-appellant a right to eject in the case of non-payment of rent. This matter is not before this Court and it is, therefore, unnecessary to discuss it any further. It may be that the landlord's only remedy is to obtain cancellation of the protection and then proceed by way of execution to sell the property which would no longer be protected from such a sale.

For the reasons which I have given, I hold that the plaintiff-appellant had no right to eject the respondents and that Rowland, J. was right in

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allowing the appeals and setting aside the decrees for ejectment. I would, therefore, dismiss these three appeals with costs.

WORT, J.—The question in this appeal is whether a protected thicadar can be ejected on the ground of non-payment of rent. It has been held by Rowland, J., from whose judgment this appeal is preferred, that he cannot be without first removing the protection under sub-section (*6*) of Section 65-A of the Central Provinces Land-Revenue Act (XVIII of 1881). The question is to be determined on the construction of Section 65-A, sub-section (*7*), of the Act. The protection granted to a thicadar is stated in sub-section (*4*): the tenure is not transferable by sale, gift, mortgage or dower, nor can it be sold in execution of any decree, nor can a decree be passed for the sale thereof, nor can it be partitioned excepting in the circumstances with which in this case we have nothing to do. A further advantage is stated in sub-section (*3*) of the same section, namely, that he may be reinstated if he has been ejected by the proprietor or lost possession "otherwise than by transfer or voluntary surrender".

It is the contention of Dr. Mitter on behalf of the proprietor that sub-section (*7*) of section 65-A gives to the proprietor substantive rights against the thicadar to eject him in execution of a decree passed on his failure to pay the thica jama, or if—

"he has diverted the culturable land of the village to non-agricultural purposes, or is chargeable with some act or omission which renders him liable to be ejected."

The main clause of the sub-section is as follows:—

"Nothing in this section shall affect the liability of any protected thicadar, farmer or gaontia to ejectment in execution of a decree for ejectment passed in accordance with any law for the time being in force and not inconsistent with this Act;"

then the grounds are stated and are those to which I have already referred. At this stage it is to be noticed that under sub-section (5) of section 65-A—

"in any proceedings before a Court for the ejectment of a thicadar.....if it appears that the thicadar has filed an application before a Revenue Officer to obtain a declaration that he is protected, or if he files such an application before the Court, the Court shall stay proceedings until the application has been disposed of in accordance with the provisions of this Act."

The certificate of protection is provided for by the first clause of the section.

Dr. Mitter contends in the first place that the expression 'in execution of a decree for ejectment passed in accordance with any law for the time being in force and not inconsistent with this Act' is a clause referring to procedure: in other words, if the decree is obtained in conformity with the law of procedure "then in force" the proprietor is entitled to a decree if such decree was obtained on one or other of the grounds set out in the sub-section, amongst them being non-payment of rent. This appears to have been the view taken by the late Mr. Justice Mullick in *Rai Lal Rajendra Singh Bariha Bahadur* v. *Sukha Pujhari*(1). The learned Judge expressed himself in these words: "But it does not appear that the learned Subordinate Judge's statement that there is no law authorising the ejectment of a protected thicadar is correct. Section 65-A on a proper reading would seem to mean that a protected thicadar is liable to ejectment for non-payment of rent provided that the decree for ejectment is obtained under the provisions of some law prescribing the procedure for such an ejectment". The words 'in execution of a decree for ejectment passed in accordance with law', taken by themselves, cannot be restricted in their meaning. The words 'passed in accordance with law' mean in accordance with the substantive or adjective law. But the words must be taken in

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conjunction with the other words in the sub-section; the words are " and not inconsistent with this Act ". The Act, as it will be seen, deals with substantive rights and does not deal with matters of procedure. It would seem, therefore, to be evident that the expression " in execution of a decree for ejectment passed in accordance with any law for the time being in force " refer to law other than that contained in the statute : in other words, sub-clauses (*a*) and (*b*) do not give substantive rights apart from the general law but are conditions to be applied in testing the question whether a decree has been passed in accordance with the law. At common law there is no right to eject for non-payment of rent although at one stage of the argument it was faintly suggested that in India such a right existed. Without a covenant or proviso to that effect , which admittedly does not exist in this case, no such claim could be made.

It seems that the learned Judge, from whose judgment this appeal has been preferred, might be understood to mean that the removal of the protection under sub-section (*6*) would be a first step entitling the proprietor to obtain a decree in ejectment against the thicadar. But it is manifestly clear that if there is no common law or customary right to eject apart from a covenant or proviso, no such claim can be made by the proprietor. The removal of the protection would appear to leave the tenure open to the perils stated in sub-clause (*a*) of sub-section (*4*). I would, therefore, guard myself against accepting the view to which I have just referred. Although for somewhat different reasons I come to the conclusion that the decision of the learned Judge is right, it must be affirmed and the appeal dismissed. This order governs L. P. A. 22 to 24 of 1937.

DHAVLE, J.—The question raised in this appeal is whether a landlord in the district of Sambalpur is entitled to a decree for ejectment of a protected

thekadar for the failure of the latter to pay the theka jama due from him. It is urged on behalf of the landlord appellant that section 65-A (7) of the Central Provinces Land-Revenue Act, Act XVIII of 1881 (by which the case is governed), gives this right in terms; and reliance is placed on the observations of Mullick, J. (with the concurrence of Allanson, J.) in *Rai Lal Rajendra Singh Bariha Bahadur* v. *Sukha Pujhari*(1), decided on the 1st April, 1927:—

".....it does not appear that the learned Subordinate Judge's statement that there is no law authorising the ejectment of a protected thekadar is correct. Section 65-A on a proper reading would seem to mean that a protected thekadar is liable to ejectment for non-payment of rent, provided that the decree for ejectment is obtained under the provisions of some law prescribing the procedure for such an ejectment. The decree for ejectment in this case was made under the provisions of the Code of Civil Procedure, and it has not been shown that it was incompetent or that it was inconsistent with the Central Provinces Land-Revenue Act....."

Section 65-A gives power to the Settlement Officer, "notwithstanding any contract to the contrary" to declare thekadars to be "protected" for the purposes of the section. The protection is given whether the thekadar holds under a written lease or a verbal agreement. Sub-section (4) of the section prescribes the incidents of the tenure of a thekadar who has been declared to be protected. To specify some of these, the tenure becomes heritable but not transferable by a sale, gift, mortgage or dower;

"it shall not be saleable in execution of any decree, nor shall any decree be passed for the sale thereof";

and it becomes impartible [clause (*a*)]; there is a right to a renewal of the lease (whether written or verbal)

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on its expiry, on the protected thekadar agreeing to farm his village at a fair and equitable theka jama [clause (*c*)]; not more than one enhancement of the theka jama is to be imposed during the currency of a settlement [clause (*e*)]; the protected thekadar shall comply with the rules made under section 124-A for the management of malguzari forests [clause (*g*)]. The sub-section thus gives the liabilities no less than the rights of the protected thekadar; and it is to be observed that while liability to sale is expressly negatived no reference is made to the liability or otherwise of a protected thekadar to ejectment. In the next sub-section the Court before which any proceedings for the ejectment of a thekadar may be pending is required to stay them until the disposal by the Revenue authorities of an application filed or to be filed by him for a declaration that he is protected. This plainly implies that the liability of an unprotected thekadar to ejectment may be affected in some way favourable to him (which is however not indicated) if he receives protection. Sub-section (*6*) empowers the Settlement Officer or Deputy Commissioner to declare a thekadar who contravenes "the condition of his tenure as contained in clause (*a*) or clause (*b*) of sub-section (*4*)" or grossly mismanages the village held by him in lease to have forfeited the protection previously conferred on him under this section. One result of the withdrawal of protection under this provision would be to make the tenure saleable in execution (or otherwise) and to permit a decree for sale; but the section does not up to this point lay down positively anything about liability to ejectment and about the bearing of the withdrawal of protection on it. We next have sub-section (*7*) which runs—

"Nothing in this section shall affect the liability of any protected thekadar, farmer or gaontia to ejectment in execution of a decree for ejectment passed in accordance with any law for the time being in force and not inconsistent with this Act, on the ground—

(*a*) that he has failed to pay the theka-jama legally payable by him;

(b) that he has diverted the culturable land of the village to non-agricultural purposes, or is chargeable with some act or omission which renders him liable to be ejected."

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The form of this provision seems to be against the contention that it confers any right on the landlord or imposes any liability on the protected thekadar. As nothing has been said in the previous sub-sections about the liability dealt with here, this provision might just as well read "Protection under this section shall not affect the liability....."; and all that it purports to do is to leave unaffected the liability of a protected thekadar, etc., to ejectment in certain circumstances, namely, (*i*) that the ejectment must be in execution of a decree for ejectment, and (*ii*) that the decree for ejectment must be "passed in accordance with any law for the time being in force and not inconsistent with this Act" on the grounds stated. Liability to ejectment is presupposed and restricted, particularly by the words "not inconsistent with this Act" qualifying the decree for ejectment. On the principle *expressio unius est exclusio alterious*, the provision may be taken to involve that no protected thekadar shall be ejected except in execution of a decree of the kind specified, and may, from this point of view, be compared with section 89 of the Bengal Tenancy Act, according to which

"no tenant shall be ejected from his tenure or holding except in execution of a decree."

This part of the statutory protection may also be read with sub-section (*3*) of section 65-A, which enables a thekadar, if ejected by the proprietor at a time when he had earned a claim to be protected, to recover possession by applying to the Settlement Officer within two years. A thekadar on whom protection has been or is conferred may not, therefore, be validly ejected by the landlord even if it should have been agreed between the parties that the landlord would be at a liberty to re-enter at will without the intervention

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of the Court. Besides this implied exclusion of ejectment without a decree, the sub-section is confined to certain decrees only—viz. decrees for ejectment passed (*i*) in accordance with any law for the time being in force and (*ii*) not inconsistent with the Act, on the grounds stated. No reference is made in these grounds to any agreement between the parties, and the concluding words " some act or omission which renders him liable to be ejected " will no doubt cover denial of the landlord's title, the common law ground for forfeiture to which effect was given in *Nruplal Singh Gartia* v. *Mahadeb Naik*(1), decided by Adami, J. (sitting with Coutts, J.) on 18th July, 1919. The illustration already referred to—a protected thekadar holding under a lease reserving liberty to the landlord to re-enter at will—is again relevant; if it were to be supposed that such a landlord obtained a decree for ejectment on the basis of the express stipulation, the sub-section would operate to prevent him from obtaining ejectment in execution as the ground on which the decree is based would not be within this sub-section. The specific question before us is whether ground (*a*)—failure to pay the thekajama legally payable— is only mentioned in the sub-section as one ground which may sometimes (e.g. when there is an agreed provision for re-entry in case of such failure) warrant a decree for ejectment, or whether the sub-section ought to be read as providing that ejectment may be decreed on this ground in all cases. Now, re-entry for such failure is not (unlike forfeiture for denial of the landlord's title) implicit in contracts of tenancy. Apart from express agreement, it must rest on custom or statute. Dr. Mitter contended that it was at one time very common for the landlords of Sambalpur to eject their thekadars. That may be, but he could not seriously maintain that it amounted to a custom of ejectment for non-payment of rent. It was not urged that any such custom ever came before

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the Courts or that any evidence of it was given in the present cases. Nor did the learned Advocate claim that there is anything in the Tenancy Act or any other law in force in Sambalpur entitling the landlord to eject a thekadar for default in the payment of the thika jama. The contention for the appellant thus had to be that sub-section (7) itself creates the liability; and it does seem to receive some support from the observations of Mullick, J. in *Rai Lal Rajendra Singh Bariha's* case(1), which have been already quoted. The learned Judge, however, indicated no reason for such a view except that the words qualifying the decree "passed in accordance with any law for the time being in force and not inconsistent with this Act" were taken to mean a decree obtained under the provisions of some law prescribing the procedure for such ejectment and not inconsistent with the Act. In the case before him the decree for ejectment had been passed on a compromise, which under Order XXIII, Rule 3, Civil Procedure Code was sufficient and indeed decisive. For, according to the compromise the landlord was to get possession of the thekadar's property if the thekadar defendant failed to pay his dues by a certain date, and as there was nothing in this opposed either to the Act under consideration or to any law in force in Sambalpur, the Court was bound to record the compromise and pass a decree in accordance therewith. The question whether section 65-A (7) authorises a decree for ejectment for failure to pay the thekajama even if there should be no agreement to that effect did not arise in that case; and the liability to ejectment under the decree, supported as it was by the compromise, was not affected by the sub-section in any view of this provision. The sub-section is designed to deal with protection in relation to liability to ejectment, and does so by leaving such liability unaffected only in cases where it arises under decrees of the kind

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specified and by implying that the protected thekadar will not be liable to ejectment in any other case. Protection by limiting liability to ejectment to specified cases is easily intelligible, but not protection by extending it to cases where apart from the sub-section in question it does not exist. The interpretation of the expression 'any law for the time being in force' as some law relating to the procedure of ejectment may possibly be suggested by the words "passed in accordance with" which precede it, but would mean ignoring the fact that a decree cannot be passed on mere procedure. What the words of the sub-section seem to require is a decree which is good under the general law and not inconsistent with this Act. It is not the appellant's case that any section of the Act other than section 65-A has any bearing on the matter under consideration; and the section plainly does not contain the whole of the substantive law regarding the ejectment of thekadars or protected thekadars, if only in view of the concluding words "chargeable with some act or omission which renders him liable to be ejected." Sub-section (7) contrasts "any law" with "this Act". It follows from these two considerations that the expression "any law" must include the general substantive law. I cannot also see any possible reason for the Legislature to limit "any law" to the law of procedure and to distinguish it from "this Act" which deals with the liability to ejectment in this sub-section only and does so by *restricting* it to certain cases. The words of the sub-section, moreover, point to a liability under the general law, not inconsistent with "this Act"; the latter is thus not thought of as *imposing* any liability to ejectment. A possible example of a decree in accordance with the general law but inconsistent with this Act was given by my Lord the Chief Justice during the discussion—a decree for ejectment for non-payment of the thekajama on the basis of a contract of enhancement with a proviso for re-entry, if the enhancement be contrary to clause (*e*) of section

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65-A(4). With all respect to Mullick, J. it seems to me impossible to read this sub-section as creating a liability to ejectment in certain cases (if this is what he meant) or as restricting "any law" to the law of procedure; such a reading of the provision is opposed to the idea of protection. An even stronger reason against the construction contended for by the learned advocate is furnished by sub-section (5). This sub-section deals with the ejectment of a thekadar who has filed or files an application for protection, while sub-section (7) deals with a thekadar who has already been protected. If the Legislature be taken by sub-section (7) to make the protected thekadar liable to ejectment for failure to pay the theka jama in all cases, sub-section (5) will become absurd, for the thekadar there dealt with, though he may not have been originally liable to ejectment for non-payment, will become so on the success of his application. And yet it is plain that sub-section (5) was intended for his benefit, while it is beyond question that the ejectment he will incur under this construction of sub-section (7) will generally mean a more severe penalty than the sale of the tenure from which the protection, if granted, will save him, as the sale will at least leave him the surplus proceeds. This also meets Dr. Mitter's argument that as the Legislature has denied to the landlord the sale of the tenure of a defaulting protected thekadar and could not have intended to leave the landlord without some adequate relief, it must have intended to give him ejectment. As a matter of fact, decrees are obtained against the holders of certain well-known tenures which do not admit either of sale or of ejectment, and their execution in other ways is by no means uncommon in this province. The protected thekadar is further liable to have his protection withdrawn; and when this is done, the tenure will become saleable in execution. But I do not think that the withdrawal of protection is an essential preliminary to ejectment in execution of a

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decree for ejectment for non-payment of the theka jama. In the case of *Nruplal Singh Gartia* v. *Mahadeb Naik*(1) to which I have already referred, Adami, J. spoke of cancellation of a protection certificate as the first step to be taken in proceedings for the ejectment of the thekadar. This observation has been quoted and applied by Rowland, J. in the judgment under appeal, but has no bearing on the point before us. It was made in a case of ejectment for forfeiture by denial of the landlord's title. The Subordinate Judge had held that forfeiture had not been incurred because the denial was not followed by any act of the plaintiff. Adami, J. pointed out that this was not correct because the landlord had applied for cancellation of the protection certificate, and it was in this connection that the learned Judge observed that the application for cancellation was the first step to be taken in the proceedings for the ejectment. I take it from the context that the learned Judge only meant that the application for cancellation was an "act showing his intention to determine the lease" (to adopt the words of section 111(*g*) of the Transfer of Property Act as they stood before the amendments of 1929) which is required to complete the forfeiture. That observation has no application to ejectment for failure to pay the theka jama, but I agree with Rowland, J. that "one must first look for some powers to pass a decree in ejectment and then it will follow that section 65-A, sub-section (7), will permit that power to be exercised. The section does not itself create such a power". So far as Mullick, J. may have taken the view that sub-section (7) itself created a liability to ejectment, apart from the agreement of the parties, I am of opinion that the sub-section was misconstrued, and that, as held in *Komal Singh* v. *Jagannath*(2), the sub-section merely recognizes the validity of an agreement providing for

(1) (1919) S. A. 27 of 1918 (Unreported).

(2) (1918) A. I. R. (Nag.) 66.

the re-entry of the landlord on default of payment of theka jama.

It follows that the landlord appellant, having no proviso for re-entry in his favour, is not entitled to any decrees for ejectment. The appeals thus fail.

Appeals dismissed.

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APPELLATE CIVIL.

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Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXXII, rule* 3(5)—*minor defendant attaining majority during pendency of suit—no steps taken to proceed against the defendant as major—decree, whether is a nullity.*

There is no provision in law which makes it incumbent upon a plaintiff to keep himself informed as to the date when a minor defendant, who was sued as such, became a major and then to apply to have the guardian discharged and to proceed with the suit against the defendant as a major.

A minor defendant who comes of age may, if he thinks fit, come on the record and conduct the defence himself. If, however, he does not do so and allows the case to proceed as though he was still a minor without bringing to the notice of the Court the fact of his having attained majority, then he must be deemed to have elected to abide by the judgment or adjudication by the Court with respect to the matters in controversy on the basis of the suit at the time.

Therefore, a decree by a competent Court against a minor, who had during the pendency of the suit attained

* Appeal from Original Order no. 138 of 1938, from an order of Rai Sahib Bansidhar, Subordinate Judge of Deoghar, dated the 16th May, 1938.

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majority but who continued to be shown on the records as a minor represented by a guardian, is not a nullity.

Lanka Sanyasi v. *Lanka Yerran Naidu*(1) and *Drupad Chandra Naskar* v. *Bindumoyi Dasi*(2), followed.

Daulat Singh v. *Maharaj Raja Ramji*(3), distinguished.

Appeal by one of the judgment-debtors.

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

A. P. Upadhaya and *Choudhury Mathura Prasad*, for the appellant.

S. C. Chakravarty, for the respondent.

KHAJA MOHAMAD NOOR, J.—This miscellaneous appeal arises out of a proceeding for execution of a mortgage decree for sale obtained by the respondent Bridhi Chand Shoroff against Baijnath Marwari and his two sons, one of them being the appellant Ratan Prasad Marwari, who was admittedly a minor when the suit was instituted and attained majority after the passing of the preliminary decree but before the date of the final decree. He was represented in the suit by his guardian ad litem Babu Baidyanath Banerji who continued to act as such till the final decree was passed, though, as I have said, the appellant was a major then. The decree-holder took out execution describing the appellant as minor. The execution record is not before us, but from the fact that the notice under Order XXI, rule 22, for the appellant was served on Babu Baidyanath Banerji it is clear that the appellant was proceeded against under the guardianship of that gentleman. It appears that later on Babu Rati Nath, a pleader, was appointed guardian ad litem. As the whole record is not before us, it is not clear how the guardian was changed; but it must have been done because Babu

(1) (1928) A. I. R. (Mad.) 294.
(2) (1926) A. I. R. (Cal.) 1053.
(3) (1926) I. L. R. 48 All. 362.

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Baidyanath Banerji did not enter appearance and perhaps the decree-holder or the Court thought it desirable to discharge him and appoint a new guardian. The execution proceeded against all the judgment-debtors, the appellant being represented through Babu Rati Nath, pleader. Later on the appellant appeared and filed objection under section 47 of the Civil Procedure Code in which he questioned the validity of the final decree and of the execution proceeding. He urged that the final decree was a nullity inasmuch as at the time when it was passed the appellant had already attained majority and, therefore, could not be represented at that stage through a guardian ad litem. On the same ground he questioned the validity of the execution proceeding, that is to say, he urged that as he was a major, the execution proceeding in which he had been described as a minor was ineffective and the properties could not be sold in such a proceeding. The objection was disallowed and he has preferred this appeal.

It appears that after the institution of the appeal the appellant applied for an order staying the sale of the mortgaged properties. That application was rejected and we are informed that the properties have been sold and purchased by the decree-holder.

The objection raised by the appellant before the learned Subordinate Judge has been repeated before us in appeal. The first contention of the learned advocate for the appellant has been that the final decree was a nullity on account of the mis-description of the appellant. No authority has been placed before us in support of this contention. The learned advocate referred us to the case of *Daulat Singh* v. *Maharaj Raja Ramji*(1). That case has absolutely no application to the present one. There a defendant, who was a minor, was described as a major, and the case proceeded against him without the appointment

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of a guardian ad litem. It was held that the decree passed under such circumstances was a nullity. But here when the suit was instituted the appellant was admittedly a minor and was properly represented through a guardian and this state of affairs continued up to the time of the passing of the preliminary decree. The question is whether the final decree, which was passed without the removal of the guardian ad litem and without describing the appellant as major, is a nullity. Now, there is no provision in law which makes it incumbent upon a plaintiff to keep himself informed as to the date when a minor defendant, who was sued as such, became a major and then to apply to have the guardian discharged and to proceed with the suit against the defendant as a major. Sub-rule (5) of Order XXXII, rule 3, as amended runs as follows:—

> "(5) A person appointed under sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional court and any proceedings in the execution of a decree."

The effect of this rule is that a guardian ad litem does not cease to function automatically on a minor defendant attaining his majority. He is to be discharged, and as the minor who has attained majority is the best person to know the date of his attaining majority, it is, I think, for him to come to Court and apply for the discharge of the guardian and to take up defence of the suit personally. I am supported in this view by the authority of two decisions which have been relied upon by the learned Subordinate Judge. The first is *Lanka Sanyasi* v. *Lanka Yerran Naidu*(1) where it was laid down that no provisions have been made in the Civil Procedure Code, in respect of a minor defendant attaining majority. Therefore, the minor defendant who comes of age may, if he thinks fit, come on the record and conduct the defence himself. If, however, he does not do so and allows the

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case to proceed as though he was still a minor without bringing to the notice of the Court, the fact of his having attained majority, then he must be deemed to have elected to abide by the judgment or adjudication by the Court with respect to the matters in controversy on the basis of the suit at the time. A similar view has been taken by the Calcutta High Court in the case of *Drupad Chandra Naskar* v. *Bindumoyi Dasi*(1). Therefore, I am clearly of opinion that the final decree for sale was a perfectly good decree.

Coming to the validity of the execution proceeding, the same considerations arise. As I have stated before, under the amended rule 3 of Order XXXII the guardian ad litem appointed in the suit continues even in the execution proceeding. Therefore, the execution was rightly taken out against the appellant through the guardian who was appointed in the suit and notice was properly served upon him. Then, I presume that on the guardian not appearing in the execution for some reason which is not clear from the record, a fresh guardian was appointed. Then apart from all the considerations the appellant himself appeared in the execution proceeding and beyond questioning the validity of the execution he raised no objections about the merits of the execution itself. Had he any objection to raise about the merits of the case it was open to him to assert it. He could have taken up the conduct of the case in his own hands and could have raised any objections which he wanted to raise. He did not do so, and, as I have said, the only thing he did was to raise some technical objection about the execution. The debt for which the decree was passed was incurred by the appellant's father, and though he was made a defendant in the suit, the only defence that he could raise in the suit was that the debt was incurred for illegal or immoral purposes or that the mortgage was not executed for legal necessity. No such defence seems to have been raised

(1) (1926) A. I. R. (Cal.) 1053.

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in this case. In my opinion the objection was taken simply with a view to gain time and put off the satisfaction of the decree. There is no merit in it. I may also mention that the decree-holder who has purchased the mortgaged property is willing to give up his rights under the sale if the decretal amount be paid to him within a short time. To this the learned advocate for the appellant did not seem to agree.

I would dismiss this appeal with costs.

ROWLAND, J.—I agree.

Appeal dismissed.

S. A. K.

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January, 3, 4, 5, 6, 12, 13, 16, 26, 27, 30, 31. *February*, 3, 6, 7, 8, 9, 10. *April*, 25.

APPELLATE CRIMINAL.

Before Khaja Mohamad Noor and Dhavle, JJ.

AMBICA THAKUR

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 145, 423 *and* 439—*order under section* 145, *effect of—forcible or surreptitious possession by unsuccessful party, whether amounts to dispossession of successful party—party restrained, whether can be allowed to assert possession unlawfully retained or obtained—High Court, power of, to convert an order of acquittal into one of conviction.*

Where a person, against whom an order under section 145, Code of Criminal Procedure, 1898, is passed, is able on some occasions either surreptitiously or forcibly to cultivate the lands, the subject-matter of the proceeding, these could be no more than isolated acts of trespass (and offences punishable under section 188 of the Penal Code, 1860) but not acts amounting to a dispossession of the party in whose favour the order is made.

The possession of the party which succeeds in a proceeding under section 145 cannot be put an end to by the unsuccessful party by mere violence or surreptitious invasion.

*Criminal Appeal no. 172 of 1938 (with Criminal Revision no. 110 of 1939), against a decision of Rai Sahib Nidheshwar Chandra Chandra, Additional Sessions Judge of Shahabad, dated the 26th July, 1938.

When there has been no change in the position of the parties since the order under section 145, Code of Criminal Procedure, 1898, the party prohibited from interfering with the possession of another party cannot be heard to say against that party that he has disobeyed the order and has been able to retain or obtain possession.

Dinomoni Chowdhrani v. *Brojo Mohini Chowdhrani*(1), relied on.

Rakhal Dolui v. *Makham Lal Ghose*(2), dissented from.

Raghunandan Pandey v. *Kishan Mohan Singh*(3), *Jainath Pati* v. *Ramlakhan Prasad*(4) and *Indradeo Singh* v. *Kesho Singh*(5), referred to.

Query: Whether the High Court under its combined appellate and revisional powers can convert an acquittal (under section 302, read with section 149, Penal Code) into a conviction (under section 326/149) and then pass a sentence where none was passed by the lower Court?

Chunbidya, In re(6), *Kishan Singh* v. *King-Emperor*(7), *K. Bali Reddi, In re*(8), *Emperor* v. *Sheodarshan Singh*(9), *Emperor* v. *Shivputraya Durdundaya*(10), *Sarda Prasad* v. *Emperor*(11), *Mehdi* v. *Emperor* (12), *On Shwe* v. *King-Emperor*(13), *Appana* v. *Pithani Mahalakshmi*(14), *Subba Chukli, In re*(15), *Queen-Empress* v. *Jabanulla*(16), *Hanuman Sarma* v. *King-Emperor*(17), *Wazir Kunjra* v. *King-Emperor*(18) and *Mahangu Singh* v. *King-Emperor*(19), referred to.

(1) (1901) L. R. 29 Ind. App. 24.
(2) (1927) 104 Ind. Cas. 443.
(3) (1920) 10 Pat. L. T. 685.
(4) (1929) 10 Pat. L. T. 689.
(5) (1937) 18 Pat. L. T. 886.
(6) (1934) L. R. 62 Ind. App. 36.
(7) (1928) I. L. R. 50 All. 722, P. C.
(8) (1913) I. L. R. 37 Mad. 119.
(9) (1922) I. L. R. 44 All. 332.
(10) (1924) I. L. R. 48 Bom. 510.
(11) (1936) 168 Ind. Cas. 17.
(12) (1933) A. I. R. (Lah.) 661.
(13) (1923) I. L. R. 1 Rang. 436.
(14) (1910) I. L. R. 34 Mad. 545.
(15) (1925) I. L. R. 50 Mad. 259.
(16) (1896) I. L. R. 23 Cal. 975.
(17) (1932) 36 Cal. W. N. 1152.
(18) (1928) I. L. R. 7 Pat. 579.
(19) (1917) 3 Pat. L. J. 565.

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Appeal on behalf of the accused persons, and application in revision on behalf of the complainant.

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

Sir Manmatha Nath Mukherji (with him *Naqui Imam*, *R. J. Bahadur* and *S. Mehdi Imam*), for the appellants.

Mahabir Prasad and *A. B. N. Sinha*, for the petitioner.

C. P. Sinha, for the Crown.

KHAJA MOHAMAD NOOR AND DHAVLE, JJ.—The appellants have been convicted by the Additional Sessions Judge of Shahabad and sentenced as follows:—

1. Ambika Thakur ...	One and a half years' rigorous imprisonment under section 147, Indian Penal Code.
2. Ramprasad Thakur ... 3. Sheoprasad Thakur ... 4. Nawab Thakur ... 5. Kuer Thakur ... 6. Nagina Pandey ... 7 Sheodahin Thakur ... 8. Maina Thakur ...	One year's rigorous imprisonment under section 147, Indian Penal Code.
9. Beni Madho Thakur 10. Lalchand Thakur ... 11. Jagarnath Thakur ... 12. Chhabila Thakur ... 13. Kawal Thakur *alias* Ramkawal Thakur. 14. Chaman Thakur ... 15. Rajdayal Thakur ... 16. Jamuna Prasad Thakur.	One and a half years' rigorous imprisonment under section 148, Indian Penal Code.

Seven more persons tried along with the appellants were acquitted.

Lalchand Thakur (no. 10 above) was also charged under section 302, Indian Penal Code, with causing the death of one Ramnarain, and the remaining appellants under section 302/149, Indian Penal Code in respect of that murder. They were acquitted of these charges. Rajdayal Thakur who was further charged under section 324, Indian Penal Code, with causing simple hurt by a dangerous weapon to the same Ramnarain was acquitted of this charge.

Beni Madho Thakur, Kawal Thakur *alias* Ram Kawal Thakur, Jamuna Prasad Thakur, Jagannath Thakur and Chaman Thakur were similarly charged under section 324, Indian Penal Code, the first three with causing simple hurt by dangerous weapons to one Lalmohar Rai, and the last two to one Ujagir Rai. All of them were acquitted of this charge.

One of the accused, Guraman Ahir (acquitted), was charged (among other sections) under section 436, Indian Penal Code (arson), with setting fire to a hut, and Ambika Thakur and Rajdayal Thakur were charged with abetting that offence under section 436/114, Indian Penal Code. These charges were withdrawn during the trial.

The trial commenced with five gentlemen as jurors in respect of the charges relating to arson and as assessors in respect of the remaining charges. When the charge of arson was withdrawn, the trial proceeded with the same gentlemen as assessors only. All of them were of opinion that the accused were not guilty of any offence.

The first informant, Ramkewal Rai, has presented an application in revision praying that the appellants be convicted of the offences of which they were acquitted by the learned Additional Sessions

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Judge or, in the alternative, that their sentences be enhanced. We postponed the passing of orders on this application till the appeal had been heard. Sir Manmatha Nath Mukherji who appeared on behalf of the appellants intimated to us that in case we decided to issue notice in the revision application, he would accept it so as to make it unnecessary to send out notices to the appellants personally.

After the conclusion of the hearing of the appeal we called upon Mr. Naqui Imam, who was then appearing on behalf of the appellants, to take notice of the revision application and show cause, if any, why it should not be allowed. We heard Mr. Naqui Imam in this connection and will deal with that matter in this judgment after disposing of the appeal itself.

The occurrence in question took place on the morning of the 5th February, 1938, over the possession of some diara lands which had alluviated from the river Ganges. Such occurrences are not uncommon; when a large area of land alluviates, there is generally a struggle for possession, and all who can by any stretch of imagination do so lay claims to the land, and riots attended with murder often take place. The present is one of a series of such riots between the parties.

Before we deal with the facts of the riot, it is necessary to describe the position of the disputed land. In doing so, we must clear up some confusion (which has been noticed before now) in the directions, (north, east, south, west) given by the witnesses and mentioned in a number of documents produced in the case.

The general course of the river Ganges in the district of Shahabad is from west to east along the northern border of the district, but at the particular place where the present occurrence took place the

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Ganges has taken a turn, and runs from north to south on the east of the lands involved in the case. Notwithstanding this, the Ganges is locally regarded as lying to the north; and the consequent shift is reproduced both in the oral and in the documentary evidence, the popular directions being 90 degrees ahead of the true or magnetic directions. The learned Additional Sessions Judge in his judgment has used the popular directions, with the result that his north is the magnetic east, his east the magnetic south, his south the megnetic west and his west the magnetic north. We prefer to use the magnetic directions, which were followed in the cadastral survey map and are thus more convenient for our purposes.

There are four mauzas lying one after another from north to south, to the west of the Ganges in this locality. The northern-most is Rajapur, a Government Khasmahal; south of it is Dubha, next comes Gangauli, and the southernmost is Kharatanr, the last three belonging to the Maharaja of Dumraon.

Each of these four mauzas has its mal lands, that is, lands which appertained to it from the beginning and, so far as Dubha, Gangauli and Kharatanr are concerned, were permanently settled with the Maharaja of Dumraon. Each of them also has taufir (accreted) lands which have become attached to the main lands of the mauza by alluvion. A portion of these taufir lands was surveyed at the time of the cadastral survey in 1908-09, doubtless because it had by then become firm and was under cultivation. The rest of the taufir lands were not surveyed then, and are known as " unsurveyed ", though the lands of Dubha Taufir have been surveyed in 1935, and a record-of-rights prepared. It is the taufir land of Dubha which is the subject-matter of the riot in the present case, that is, the land which accreted to the main lands of mauza Dubha and was not surveyed in 1908-09.

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East of mauzas Dubha, Gangauli and Kharatanr, we have Shivpur (or Sheopur) Diara lying in the district of Ballia in the United Provinces. Some of the litigation, to which we shall have to refer, has thus been in that district.

The prosecution case is that under leases granted by the Maharaja of Dumraon 10 tenants of village Rajapur were in possession of all the unsurveyed portion of the Dubha taufir lands with the exception of 77 bighas (which have admittedly been in the possession of Lalmohar deceased, father of the appellant Ambika and uncle of the appellant Nawab). They had grown crops on the land and erected a hut for the accommodation of those who were set to guard the crops. On the morning of the 5th February, 1938, about half a *ghari* after sun-rise, some of the lessees and their relations and partners, in all 11 men, were in the said hut, when they heard shouts of " Mahabir Ki Jai ". They came out of the hut and saw a mob of about 100 (including the appellants) with lathis and spears, at a distance of about 10 *bans* on the south (magnetic west) of the hut. The appellant Ambika was riding a mare and had a whip in his hand. He and the appellant Rajdayal ordered assault and burning of the hut. All the occupants of the hut fled away, but Ramnarain, Lalmohar (P. W. 3) and Ujagir (P. W. 6) were surrounded. Ramnarain was hit in the chest with a spear by the appellant Lal Chand and was killed. Lalmohar fell down unconscious, having been hit with spears, by Ramkawal, Beni Madho and Jamuna, and with a lathi by Shiv Prasad. Ujagir also fell down senseless, having been hit by the spears of Jagannath, Chhabila and Chaman and by a lathi of Ramprasad. Thereafter Jurawan (acquitted) set fire to the hut. Then the mob proceeded towards Gangauli, the village where all the appellants lived. Ramnarain was removed from the place where he had fallen. Three cots were procured from the basti of Rajapur Taufir; and on them the dead body of Ramnarain

and the two injured persons were carried towards the Dumraon police-station 12 miles away. When the party reached a tank in Dumraon, they met the Sub-Inspector (P. W. 38) who was on his way to the place of occurrence on receipt of some information from the chaukidar of Gangauli. At that very spot, a short distance from the police-station, the Sub-Inspector drew up the first information report on the statement of Ramkewal, one of the leaseholders (P. W. 1). This was at about mid-day (12.15). The body of Ramnarain was sent for post mortem examination to Buxar, and the injured persons were also sent there for medical examination and treatment. After doing some preliminary investigation the Sub-Inspector deputed constables Agin Singh (P. W. 2), Muhammad Kifait (P. W. 17) and Pahlu Singh (P. W. 18) to the place of occurrence to keep a watch on it. He himself reached the spot at night. After investigation the accused persons were sent up for their trial.

The defence is that all the Dubha taufir lands had all along been in the possession of Lalmohar Thakur (now dead) and are now in the possession of the members of his family. No part of them is directly in possession of the Maharaja of Dumraon or of any of his settlement holders. The appellants denied taking part in any occurrence whatsoever. Their case was that in the early hours of the morning of the day in question, several hours before the time of the occurrence given by the prosecution, an attempt was made by Ramnarayan and other settlement-holders to put up a hut as a proof of their possession of the lands, and Gangauli guards (*rakhwaras*) who lived in another hut on the 77-bigha block, admittedly in the possession of the Gangauli Thakurs (Lalmohar's family), saw this and went up to oppose, and a scuffle ensued in which some persons were injured at the hands of the *rakhwaras* and Ramnarayan might have received his fatal injury. In other words, the appellants denied the possession

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of the other side and claimed to be in possession themselves and denied that there was any hut in existence at about the time of the occurrence and said that they had heard of an attempt to put up a new hut which was resisted by the men set to guard their crops and living in a hut in the 77-bigha block.

Both the parties have adduced documentary evidence in connection with the previous litigation in order to prove their respective possession. Sir Manmatha Nath Mukherji who appeared on behalf of the appellants has addressed us at great length and has asked us to hold that whatever might have been the decisions of the Courts from time to time (and we will refer to them later), the deceased Lalmohar and the members of his family had in actual fact been in uninterrupted possession of all the Dubha taufir lands up to the date of the present occurrence. In our opinion this question of possession is important only for the purpose of appreciating the evidence of the occurrence as deposed to by the prosecution witnesses. If the prosecution case is believed, there is no case of a right of private defence, and the question of possession is not very important in relation to the charges framed against the appellants. Sir Manmatha Mukherji, however, contended that one of the common objects mentioned in the charges of rioting being

> "by means of criminal force to Ramnarain Rai and his party to take possession of the lands in Dubha Taufir, police-station Dumraon, held under the pattas granted by the Maharaja of Dumraon".

these charges must fail if the prosecution fail to prove their possession. But there is another common object mentioned in the charge, namely,

> "to assault Ramnarain Rai and others of the same party,"

which has little to do with actual possession. But the defence assertion of actual possession in the face of repeated decisions adverse to these Thakurs of Gangauli implies lawlessness, and we propose to

examine the question of possession in some detail, as we have come to the conclusion that it is high time they were bound over to keep the peace.

It is, however, not necessary for the purposes of even the first part of the charge to decide whether all the unsurveyed lands of Dubha Taufir were in the possession of the prosecution party on the day of occurrence. If they were in possession of some substantial area out of those lands, and the appellants went there in force to dispossess them, this part of the charges would be brought home to them.

The learned Sessions Judge has carefully detailed the previous litigation about these lands. It is therefore not necessary for us to give more than a short history in order to determine the question of possession. * * * *
* * * * *

The facts stated above practically exhaust the documentary evidence of possession. The following appears clear from them :—

The Thakurs of Gangauli were originally raiyats of lands in the Dubha as well as the Gangauli and Kharatanr Taufirs. Their names were recorded as such in the Diara Survey Record of 1892. This is abundantly clear from the judgment (exhibit R) of the suit instituted by the Maharaja against the Thakurs of Gangauli for ejecting them from the 77 bighas of land. In this judgment reference has been made to the plaint of the Maharaja in Title Suit no. 193 of 1916 against the Shivpur Babus and to his written statements in Title Suit no. 247 of 1911 which Lalmohar had brought against the Shivpur Babus for recovery of 244 bighas of land. In both of them the raiyati interest of Lalmohar and others in the Dubha Taufir lands was admitted. The lands must have gone under water for some time thereafter, and most of them were not fit for cultivation during the cadastral survey of 1908-09 as only 22.06 acres of taufir

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lands of Dubha were then cadastrally surveyed, and the rest only dealt with topographically. But some portion of these unsurveyed lands would appear to have become fit for cultivation as there was a scramble for possession between the old raiyats, the Thakurs of Gangauli, on the one hand, and the Babus of Shivpur on the other, the latter claiming the lands as reformation *in situ* of their old Shivpur lands in the district of Ballia. In this fight the Thakurs of Gangauli lost all the Dubha taufir lands and the Babus of Shivpur got possession of them on the 30th November, 1913, after the civil suit of Lalmohar and others against them was dismissed by the appellate Court. The Shivpur Babus not only succeeded in dispossessing the Gangauli Thakurs from the Dubha taufir lands, but by an order under section 145, Criminal Procedure Code, passed by the Magistrate of Buxar, they got possession of the taufir lands of Gangauli and Kharatanr as well. This was the situation when the Maharaja of Dumraon brought this Title Suit for recovery of possession of all the taufir lands of the three villages. Regarding the 244 bighas which, as we have said, later became known as 258 bighas, the Maharaja claimed khas possession as his raiyats Lalmohar and others had lost not only their possession but also whatever rights they had. Regarding the Gangauli and Kharatanr lands in which his raiyats had not lost their rights, he claimed possession through them. The suit of the Maharaja was reinforced by a suit on behalf of the Gangauli Thakurs in respect of Gangauli and Khara Tanr lands only. Both the suits, as we have said, were decreed, and possession was given to the Maharaja according to his prayer on the 30th April, 1925.

Lalmohar and others who had lost all the taufir lands of the three villages and subsequently recovered possession of Gangauli and Kharatanr lands did not

take any settlement from the Maharaja of the Dubha taufir lands which they had completely lost and which were only recovered through his efforts, but attempted to take possession of the lands by sheer force.

In the meantime Lalmohar was declared to be in possession of a block of 77 bighas in another part of the Dubha Taufir which was at that time believed to be a part of Rajapur; but this was in a domestic dispute between the members of his own family. Lalmohar then attempted to obtain possession of the 244 or 258 bighas of land which he had altogether lost, and this resulted in the first 145 Criminal Procedure Code case decided by the Subdivisional Officer, Rai Sahib Sukhdeo Narayan, on the 1st September, 1931. This Magistrate declared the Maharaja to be in possession of 258 bighas and Lalmohar Thakur in possession of the 77 bighas, and in order to decide the question of possession for our purposes we propose to start from this judgment of 1931. We may recall the following dates:—

Decision of the 1st 145 case—1st September, 1931.

Lands attached in the 2nd 145 Criminal Procedure Code case—1st August, 1933.

Lands released from attachment—11th June, 1936.

Present occurrence—5th February, 1938.

The 335 bighas of land which formed the subject-matter of dispute in the 145 Criminal Procedure Code case decided by Rai Sahib Sukhdeo Narayan in 1931 lay in two blocks—one of 177 bighas north of a *chhaur* which ran east to west (magnetic), and the other of 158 bighas south of it. Lalmohar claimed to be in possession of all this area—of 77 bighas as the land over which possession was

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maintained in the 145 Criminal Procedure Code proceeding between him and Dadul Thakur, of 100 bighas as an accretion to that block and of 158 bighas as having all along been in his possession. We have said before that the learned Magistrate declared the possession of Lalmohar over the 77 bighas and of the Maharaja over the 100 bighas east of it and the 158 bighas south of the *chhaur*. He held that these 259 bighas were in fact the 244 bighas, of which the Maharaja had got khas possession from the civil court in his suit against the Shivpur Babus. The building Sub-Inspector, Abdus Shakur (P. W. 13), located signs of the destroyed hut and the place where Ujagir Rai and Lalmohar Rai were injured in survey plot no. 349, and the place where Ramnarain was killed and where his dead body was found in plot no. 350. According to the survey map prepared during the settlement operations, plot no. 350 is within the 100 bighas the possession of which was declared to be with the Maharaja, and plot no. 349 is just outside that area but within the lands found by the Settlement authorities to be accretions to the 258 bighas. Neither of the two plots is in the 77 bighas the possession of which had been declared in favour of Lalmohar. The records-of-rights have been finally published and must be presumed to be correct unless the contrary is proved by evidence adduced. There is no such evidence. It is thus clear that the place where the occurrence took place and the lands near about it are unconnected with Lalmohar's block of 77 bighas but are either part of or connected with the area to the possession of which the Maharaja was declared to be entitled as far back as 1931, Lalmohar and his party being on that occasion prohibited from interfering with the Maharaja's possession. That order is in full force till now.

It was, however, urged before us, as in the lower Court, that the lands of which possession was declared in favour of the Maharaja were unidentifiable and that the order of 1931 under section 145 did

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not apply to any particular plot of land, that the Maharaja and his lessees did not know the lands and, therefore, were never in possession of them and that Lalmohar and others continued in possession of them in spite of the order. This we cannot accept at all. It does not lie in the mouth of Lalmohar or his descendants and relatives to say that the 258 bighas of the Maharaja was unknown to them. These lands are the same as Lalmohar had lost in the 145 Criminal Procedure Code case against the Babus of Shivpur in the Court of the Magistrate of Ballia, though at that time they were known as 244 bighas. It was for these very lands that Lalmohar had brought his civil suit against the Shivpur Babus and lost. These very lands were also included in the subject-matter of the 145 Criminal Procedure Code case before the Magistrate of Buxar (Rai Sahib Sukhdeo Narayan). Lalmohar never alleged in that case that these lands were unidentifiable. He filed a written statement and claimed 100 bighas of them as accretions to his 77 bighas and also claimed possession of the remaining 158 bighas which lay just north of the surveyed Dubha taufir lands. He himself supplied the boundaries of the disputed lands. In his revision application also to this Court he asserted his possession and did not allege that the lands were unknown.

* * * * *

In the case of *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani*(1) their Lordships of the Judicial Committee held that though an order under section 145, Criminal Procedure Code, confers no title, the fact of possession remains and the person in possession can only be evicted by a person who can prove a better title to possession himself. Assuming,

(1) (1901) L. R. 29 Ind. App. 24.

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therefore, that after the order of 1931 Lalmohar and others were able on some occasions either surreptitiously or forcibly to cultivate the lands, these would be no more than isolated acts of trespass—and offences punishable under section 188 of the Indian Penal Code—but not acts amounting to the dispossession of the other side and constituting the juridical possession of the offenders unless the other side refrain from asserting their possession for a sufficiently long period and give up the protection of the order under section 145 in their favour. In our opinion the possession of the party which succeeds in proceedings under section 145, Criminal Procedure Code, cannot be put an end to by the unsuccessful party by mere violence or surreptitious invasion.

Sir Manmatha Nath Mukharji, however, drew our attention to the case of *Rakhal Dolui* v. *Makham Lal Ghose*(1) in support of the proposition that an order under section 145 of the Criminal Procedure Code is only a piece of evidence to be taken into consideration when the question of possession arises between the parties on a subsequent occasion and that though it would go to show that the party in whose favour it was passed was in possession on the date of the order, it is open to the other party to prove that, in spite of the order, he was actually in possession or regained possession. In that case the party in whose favour an order under section 145, Criminal Procedure Code had been passed prosecuted the other party for the removal of crops. The trial court held the complainant to be in possession not only on the basis of the order under section 145, Criminal Procedure Code, but also on the evidence in the case. On appeal the Additional Sessions Judge declined to go into the evidence of possession and maintained the conviction on the basis of the order under section 145, Criminal Procedure Code. Cuming, J. was of opinion that

(1) (1927) 104 Ind. Cas. 443.

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the question of actual possession ought to have been gone into, and accordingly ordered a remand, observing that an order under section 145 was merely a piece of evidence to be taken into consideration in determining who is in possession. This judgment of Cuming, J. appears to have been given in Court without much consultation with his colleague Graham, J. who on that date observed as follows :—

"With great respect for my learned brother's opinion as to the effect of the order under section 145, Criminal Procedure Code, I feel at present some doubt upon the point. I propose, therefore, to reserve my judgment. As Monday and Tuesday next will be holidays, I propose to deliver my judgment on Wednesday next."

This doubt of the learned Judge continued, but as his colleague wanted to remand the appeal for re-hearing, Graham, J. did not stand in the way and said as follows :—

"I have further considered this case and speaking for myself, I must confess that I feel considerable doubt as to the effect of the order under section 145, Criminal Procedure Code, and as to whether in all the circumstances the possession claimed by the accused in this case can be said to have been lawful possession, or possession which the Court could in any way recognise as a defence to the charges. As the order which my learned brother proposes to make, however, is to send the case back for re-hearing the appeal, and as it appears from the judgment of the trial Court that there is evidence as to possession apart from the order under section 145, Criminal Procedure Code, I do not feel disposed to deliver a dissenting judgment, and I concur in the order which has been made."

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With all respect to Cuming, J., we are unable to agree in his view of an order under section 145. The whole object of the section is to stop a breach of the peace by deciding which party is to remain on the land and which party is to seek his remedy in the civil court. Breaches of the peace will continue, and the object of the Legislature will be frustrated, if the party who has, on the finding that he is not in possession, been forbidden to disturb the possession of the successful party until eviction in due course of law is allowed to interfere with the possession of the successful party and to plead once more that whatever the order might have been, he is still in possession or has been able to regain possession by force, and thus either compel the successful party to go to the Civil Court or to force a Magistrate to proceed again under section 145, Criminal Procedure Code. This will be a definite encouragement to disobedience of orders under the section.

There has been some difference of opinion as to whether once the possession of a party has been declared under section 145, Criminal Procedure Code, a second proceeding under the section is permissible. It was held by Jwala Prasad, J. in *Raghunandan Pandey* v. *Kishan Mohan Singh*(1) that an order under section 145, Criminal Procedure Code, is binding on everybody, whether he was a party to the proceeding or not, and that a Magistrate has no jurisdiction to start a second proceeding. A similar view was taken by Wort, J. in *Jainath Pati* v. *Ramlakhan Prasad*(2). It was, however, held by one of us in *Indradeo Singh* v. *Kesho Singh*(3) that a Magistrate has jurisdiction to start a fresh proceeding, but whether he should do so or not will

(1) (1920) 10 Pat. L. T. 685.
(2) (1929) 10 Pat. L. T. 689.
(3) (1937) 18 Pat. L. T. 886.

depend upon the circumstances. In the last mentioned case, the previous proceeding under section 145, Criminal Procedure Code, was between one Indradeo Singh as the first party and the servants of the junior Rani of Deo as the second party, and the former was declared to be entitled to possession. Then there was a second proceeding under section 145, Criminal Procedure Code, between three parties. The junior Rani and her servants were one party, the senior Rani, another and Indradeo the third party. Indradeo was ordered not to go over the land in dispute. The District Magistrate of Gaya referred the case to this Court, and it was held that the proceeding was not without jurisdiction.

Though both of us agree in the view taken in this last case, the general principle which we have enunciated above remains the same. A third party, not bound by the order in a proceeding under the section is in a different position from a party who has been definitely prohibited from disturbing the possession of the successful party. It may also be that the position of the parties to a section 145 proceeding has changed since the passing of order under the section. For instance, if in a proceeding under the section, *A* was prohibited from interfering with the possession of *B* who was held to be in possession, and *A* afterwards comes forward with the allegation that he has since then obtained possession under, say, a lease or a purchase from *B*, this may be a good ground for the Magistrate to start a second 145 Criminal Procedure Code proceeding in case there be apprehension of a breach of the peace. But the party prohibited from intefering with the possession of another party cannot in our opinion be heard to say against that party that he has disobeyed the order and has thus been able to retain or obtain possession. To allow such a plea will be to defeat the object of the Legislature in enacting section 145, Criminal Procedure

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Code. There will be no end to disputes and apprehensions of breach of the peace which the section is designed to stop.

In the present case there has been no change in the position of the parties since the order of 1931, and the contention of the defence comes to this—that they ignored the order of the Magistrate passed in 1931 and in spite of it continued in possession, and that we should find their actual possession. This, in our opinion, cannot be allowed.

Let us, however, see how far the allegation of the defence that, in spite of the order under section 145, they continued in possession of all the Dubha taufir lands is true. * * * *

* * * * *

(Their Lordships then discussed the evidence and proceeded as follows:)

To sum up, our conclusions are that the order under section 145, Criminal Procedure Code, passed by Rai Sahib Sukhdeo Narayan in 1931 is still in force and by virtue of that order the Maharaja, and thereafter his lessees, must have been and in any case must be held to have been in possession of at least the 258 bighas of land which formed part of the subject-matter of that proceeding. Out of this area, a block of 100 bighas was always easily identifiable on account of its contiguity to the 77-bigha block in the unquestioned possession of the appellants and the members of their family. The situation of this 77-bigha block was neither doubtful nor in dispute; and therefore there could be no real difficulty in locating the 100 bighas at least which lay just east. Since the order of Rai Sahib Sukhdeo Narayan in September, 1931, excluding the period when the lands were under attachment, the lessees of the Maharaja must be in possession. It is true that occasionally the Gangauli Thakurs (the appellants

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party) were able to disturb their possession. In one year they looted the crops. In the cultivation season of 1937-38 they must, in spite of the denials of the prosecution, have cultivated some portion of the lands. But we are satisfied that a large area in the neighbourhood of the 77 bighas was actually cultivated and sown by the prosecution party; and the present occurrence took place in respect of it. The documentary evidence, the decrees of the Civil Courts and the orders of the Criminal Courts are in favour of the prosecution, and last but not the least, there is the statutory presumption of correctness attaching to the record-of-rights in their favour, which has not been rebutted. This disposes of the question of possession, which was very elaborately argued before us by Sir Manmatha Nath Mukharji. *

* * * * *

The question of participation by individual accused in the riot has received very careful consideration at the hands of the learned Additional Sessions Judge. We have also looked into this question and are of opinion that the learned Additional Sessions Judge has come to the correct conclusions.

There is, therefore, no merit in the appeal.

We now take up the application in revision in which the first informant asks us to convict the appellants of the offences of which they have been acquitted by the Additional Sessions Judge and to enhance the sentences passed upon them. This Court is as a rule loath to entertain such applications from private parties in ordinary circumstances. But there are in this case (as we have said before) clear indications that the accused party has been defying law and disobeying the orders, both of the Civil and of the Criminal Courts, and has been repeatedly creating trouble in the locality for many years past. We therefore decided to entertain the application in revision. The circumstances are such that even without the application we should have felt it our duty *suo motu*

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to consider whether the sentences are adequate, if not also whether the appellants were not wrongly acquitted of some of the more serious charges.

We agree with the learned Judge below that on the evidence on record the conviction of Lalchand Thakur under section 302 and of the other appellants under section 302/149 was not possible. The learned Judge has referred to the discrepancies in the evidence about the weapons used, and pointed out that the eye-witnesses could not really have seen the actual assaults which took place at some distance from them. He is similarly right in acquitting Jagannath Thakur, Kewal Thakur, Chaman Thakur, Rajdayal Thakur and Jamuna Prasad Thakur of the specific charges under section 324, Indian Penal Code. The evidence in this connection comes only from the victims Ujagir and Lalmohar and is not free from contradictions and other difficulties. We do not, however, see any good reason why the learned Judge did not convict all the appellants (excepting Lalchand Thakur) under section 326/149, Indian Penal Code, as included in the actual charge under section 302/149 framed against them. The reason given by him for not applying section 149 to the murder is that the murder was not committed in the prosecution of the common object of the unlawful assembly. In our opinion it was. But even if the contrary were to be held, attention must be paid to the second part of section 149, Indian Penal Code, which we underline below:

> "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

If a mob armed with deadly weapons goes to achieve a particular object by force or show of force, it is reasonable to infer that all the members of the assembly know that grievous hurt, if not murder, is likely to be caused in prosecution of that object. The murder and the assaults in the present case were

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not isolated acts committed by individual members of the assembly independently of the common object. It is obvious from the manner in which the riot was committed that the members of the unlawful assembly were out to terrorise the prosecution party by destroying their hut and beating them in order to deter them from remaining on the land. Among the two objects mentioned in the charge, one was to commit assault, and assaults were committed in prosecution of that object. Even if it could be properly held that the murder was not committed in prosecution of the common object of the assembly, the liability under section 149 would remain in so far as the members of the assembly knew that at least grievous hurt would be caused in the riot. We are, therefore, clearly of opinion that the appellants were wrongly acquitted of the charges under section 149 altogether. But we do not propose to convict them under section 326/149 for reasons which will now be stated.

The question arises whether this Court under its combined appellate and revisional powers can convert the acquittal (under section 302/149) into a conviction (under section 326/149) and then pass a sentence where none was passed by the lower court. Two propositions are now settled by decisions of their Lordships of the Judicial Committee. In *Chunbidya, In re*(1) their Lordships held that in the exercise of its revisional powers under section 439 of the Code of Criminal Procedure, 1898, a High Court upon having the record of a criminal proceeding brought to its notice on an appeal from the conviction therein, can call upon the appellant to show cause why the sentence should not be enhanced, and having heard and dismissed the appeal can forthwith enhance the sentence under that revisional power although precluded by section 423 from doing so in the appeal. In *Kishan Singh* v. *King-Emperor*(2) they held that High Court cannot, while exercising its revisiona.

(1) (1934) L. R. 62 Ind. App. 36.
(2) (1928) I. L. R. 50 All. 722, P. C.

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power under section 439 of the Code of Criminal Procedure, convert a finding of acquittal into one of conviction and then enhance the sentence. In this case their Lordships referred to the case of *In re Bali Reddi*(1) and pointed out that the view taken in that case, as regards section 439 (*4*), was not accepted in Allahabad in *Emperor* v. *Sheodarshan Singh*(2) and in Bombay in *Emperor* v. *Shivputraya Durdundaya*(3). The view taken in these last two cases was approved, but their Lordships, after referring to the fact that in the Madras case there was an appeal by the accused, besides a rule issued in revision by the High Court, considered it unnecessary to express any opinion whether the facts would justify the Madras decision. They were, however, definitely unable to agree that section 439(*4*) refers to cases ending in a complete acquittal and not to cases ending in conviction of a minor offence included in the offence charged. These two decisions, however, do not directly touch the question before us, viz., whether, while dealing with an appeal of a convicted person, his acquittal of some charges can be set aside and he can be convicted of them and sentenced. Since the decision of their Lordships in *Kishan Singh's* case,(4) there have been two Indian decisions, one in Allahabad and the other in Lahore, which seem to be conflicting.

In *Sarda Prasad* v. *Emperor*(5) the learned Judges of the Allahabad High Court held that a Court of appeal cannot under section 423(*1*) (*b*), Criminal Procedure Code, set aside an express order of acquittal, nor can the High Court do so in revision, having regard to section 439(*4*). The alteration of a finding within the former section was in their opinion not the same as reversal. They referred to the decision of their Lordships of the Judicial Committee in *Kishan Singh's* case(4) and concluded that neither an

(1) (1913) I. L. R. 37 Mad. 119.
(2) (1922) I. L. R. 44 All. 332.
(3) (1924) I. L. R. 48 Bom. 510.
(4) (1928) I. L. R. 50 All. 722, P. C.
(5) (1936) 168 Ind. Cas. 17.

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appellate court nor a revisional court has power to reverse the finding of acquittal and convert it into one of conviction, and that where an accused is charged with two separate offences, and the trial court convicts him of one and acquits him of the other, and the Court of Session on appeal differs from the trial Court on both points, the case must be referred to the High Court which has an unrestricted power in revision to order a retrial.

As we have said, however, their Lordships of the Judicial Committee in *Kishan Singh's* case(1) left open the question of the power of a High Court to alter findings in an appeal from a conviction.

In *Mehdi* v. *Emperor*(2) it was held that under the combined provisions of sections 423 and 439 of the Code of Criminal Procedure a High Court has power to alter a conviction under section 326 to one under section 302, Indian Penal Code. This is directly opposed to the Allahabad view in *Sarda Prasad's* case(3). The learned Judges referred to the decision of their Lordships of the Privy Council in *Kishan Singh's* case(1) and observed that in that case their Lordships had expressly stated that they did not decide the point as to the combined powers of the High Court under the two sections as decided in *In re Bali Reddi*(4).

As in our opinion also, their Lordships of the Privy Council have not decided the matter, it is necessary to examine the position in some detail.

In *On Shwe* v. *King-Emperor*(5) it was held that in an appeal from a conviction under section 304 of the Indian Penal Code (the accused person having been committed to stand his trial under section 302 of the Indian Penal Code), where in addition the High Court takes seizin of the case also in its revisional jurisdiction, the conviction for the lesser offence

(1) (1928) I. L. R. 50 All. 722, P. C.
(2) (1933) A. I. R. (Lah.) 661.
(3) (1936) 168 Ind. Cas. 17.
(4) (1913) I. L. R. 37 Mad. 110.
(5) (1923) I. L. R. 1 Rang. 436.

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can be converted into one under section 302 of the Indian Penal Code, and the sentence can be enhanced accordingly, under the combined provisions of sections 423 and 439 of the Criminal Procedure Code. This case was, however, decided before the decision of their Lordships of the Privy Council in *Kishan Singh's* case(1). We are not aware of any later decision of the Rangoon High Court on the point. And in the present case the appellants have been convicted of rioting—a conviction which we must affirm—so that there is here no question of merely altering a finding under section 423 (*1*) (*b*) (*2*) and then enhancing the sentence.

In the Madras High Court the earliest relevant case which has come to our notice is *Appana* v. *Pithani Mahalakshmi*(2). In this case the High Court held that under section 423 (*1*) (*b*) (*2*) of the Criminal Procedure Code the appellate court may alter the finding maintaining the sentence and that there is nothing to restrict the finding which may be altered to a finding of conviction. In the later case, *In re Bali Reddi*(3), already referred to, the view was taken that the acquittal referred to in section 439 is a complete acquittal, but this was expressly disapproved by the Privy Council in *Kishan Singh's* case (1). It was also held that in an appeal from a conviction, the finding can be so altered as to convict the accused of an offence of which he has been acquitted by the trial court. The correctness of this view seems to have been left open in *Kishan Singh's* case(1). But the same High Court in *Subba Chukli, In re*(4) seems to have dissented from this view. It is true that this was a case in revision and not an appeal, but the express dissent from *In re Bali Reddi*(3) is to be noted, being prior to the Privy Council decision in *Kishan Singh's* case(1).

(1) (1928) I. L. R. 50 All. 722, P. C.
(2) (1910) I. L. R. 34 Mad. 545.
(3) (1913) I. L. R. 37 Mad. 119.
(4) (1925) I. L. R. 50 Mad. 259.

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A number of Calcutta cases were placed before us, but only two of them are of some help in this case. One is *Queen-Empress* v. *Jabanulla*(1) where it was held that the appellate court can under section 423 of the Criminal Procedure Code, in an appeal from a conviction, alter the finding of the lower court and find the appellant guilty of an offence of which he was acquitted by that court ; there was, however, no question of enhancing the sentence or passing an additional sentence in respect of this conviction. In *Hanuman Sarma* v. *King-Emperor*(2), where an accused charged under section 376 and section 354 of the Indian Penal Code was acquitted of the former offence and convicted of the latter, the High Court altered the conviction to one under section 376/511 of the Indian Penal Code. Mallik, J. held that the acquittal under section 376 of the Indian Penal Code did not constitute acquittal under sections 376/511 of the Indian Penal Code, while Remfry, J. was of opinion that in spite of the acquittal the High Court could under section 423 (*b*) of the Criminal Procedure Code convert and alter the finding of acquittal into one of conviction.

All the cases which we have referred to above are cases in which a conviction of a lesser offence was converted into one of a graver offence or a conviction of one offence was substituted for a conviction of another offence, though the trial Court had recorded an acquittal on the former. None of them is a case in which while a conviction of one offence was maintained, the appellate Court added a conviction of another offence of which the appellant had been acquitted by the trial Court.

We now come to Patna cases. Here again there is practically no case which directly touches the question before us. The nearest case which can be found is *Wazir Kunjra* v. *King-Emperor*(3). In this case the accused Wazir Kunjra was acquitted by a Magistrate of an offence under section 326 of the Indian

(1) (1896) I. L. R. 23 Cal. 975.
(2) (1932) 36 Cal. W. N. 1152.
(3) (1928) I. L. R. 7 Pat. 579.

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Penal Code and convicted under section 148 of the Indian Penal Code only. On a reference made by the Sessions Judge, the High Court convicted him under section 326 and awarded a sentence in addition to the sentence imposed by the trial court under section 148 of the Indian Penal Code. This was done in March, 1928, under the revisional powers of the Court, and can no longer be regarded as good law after the later Privy Council decision in *Kishan Singh's* case(1). Other cases need not be referred to in detail, as they all relate to replacing one conviction by another, as for instance, *Mahangu Singh* v. *King-Emperor*(2). In view of the divergence of Judicial opinion before and after the Privy Council decision in *Kishan Singh's* case(1), we have considered whether it would not be desirable to refer this case to a larger Bench for an authoritative pronouncement on the point. But in the circumstances of this case the point is relatively unimportant ; the appellants have already been subjected to the cost of one long hearing, and we feel that they can be adequately dealt with without pursuing this aspect of the revisional application any further. That application will, therefore, be allowed only in respect of the sentences on the charges of which the appellants have been found guilty.

The appellants' repeated defiance of the orders of various courts, both civil and criminal, of which we must take notice, can be appropriately dealt with under section 106, Criminal Procedure Code. In affirming their convictions on the charges of rioting, we consider that the sentences passed by the lower Court are not altogether adequate and that the following sentences will suffice to meet the ends of justice :

* * * * *

S. A. K. *Appeal dismissed,*
Application allowed in part.

(1) (1928) I. L. R. 50 All. 722, P. C.
(2) (1917) 3 Pat. L. J. 565.

LETTERS PATENT.

Before Harries, C.J. and Khaja Mohamad Noor, J.

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April, 17, 18, 25.

HAFIZ MUHAMMAD ZEYAUDDIN

v.

SHAIKH DARGAHAN.*

Landlord and Tenant—lease—tenancy of unknown origin —permanency, onus of proving, on whom lies—inference from proved facts, whether question of law—land in possession for over a hundred years—substantial kuchha structure—occupation without payment of rent—tenancy, whether permanent.

Where a tenant alleges that his interest is a permanent one, the onus of establishing such an interest lies on him.

Kamal Kumar Datta v. *Nanda Lal Dule*(1), followed.

An inference as to the nature of a tenancy from proved facts is a question of law.

Dhanna Mal v. *Moti Sagar*(2), followed.

The inference of permanency of a tenancy can only be drawn where the facts point irresistibly to such a conclusion. Where the facts are equally consistent with permanency or a tenancy at will, then permanency cannot be inferred; but where the facts are inconsistent with a tenancy at will and consistent only with a permanent tenancy, the permanency of the tenancy must legally be inferred.

Where, therefore, it was found that the origin of the tenancy was unknown, the tenants and their predecessors had been in possession of the land for over a hundred years and had built upon it a substantial structure consisting of mud walls and tiled roofs, which had been in existence for very many years, the landlord at no time objecting to the construction of this building, the land together with structure had been held by the tenant's family generation after generation without let or hindrance and no rent had ever been paid to the landlord :

*Letters Patent Appeal no. 3 of 1938, from a decision of Mr. Justice Wort, dated the 22nd February, 1938.

(1) (1928) I. L. R. 56 Cal. 738.

(2) (1927) I. L. R. 8 Lah. 573; L. R. 54 Ind. App. 178

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Held, that the tenancy was permanent.

Musammat Sitara Shahjahan Begam v. *Munna*(1) and *Pramatha Nath Das Bairagi* v. *Champa Dasi*(2), followed.

Kamal Kumar Datta v. *Nanda Lal Dule*(3), distinguished *quoad hoc.*

Appeal by the plaintiff under clause 10 of the Letters Patent.

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

Sir Manmatha Nath Mukherji (with him *B. C. Mitra* and *Syed Ali Khan*), for the appellant.

Baldeva Sahay and *C. P. Sinha*, for the respondents.

HARRIES, C.J.—This is a Letters Patent appeal from a decision of Mr. Justice Wort in a second appeal reversing a decree of the lower appellate Court in favour of the plaintiff.

The suit out of which this appeal arises was brought by the plaintiff to recover possession of a small plot of land .11 acres in extent situate in the village of Shakranwan. According to the plaintiff, the land had been originally let to the defendants' predecessors upon the terms that it should be given up to the plaintiff's predecessors when the latter required it. In short, the plaintiff alleged a tenancy at the will of the landlord.. According to the plaintiff's case, this tenancy had been determined by notice and accordingly possession was claimed.

The defence was that the tenancy was a permanent one, and, therefore, the plaintiff had no right to eject the tenant.

(1) (1927) 100 Ind. Cas. 479.
(2) (1928) I. L. R. 56 Cal. 275.
(3) (1928) I. L. R. 56 Cal. 738.

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The trial Court held that the tenancy was permanent and dismissed the plaintiff's claim; but on appeal the lower appellate Court held that the tenancy was a tenancy at will and accordingly decreed the plaintiff's claim. In second appeal Wort, J. held that the tenancy was a permanent one and accordingly he reversed the decree of the lower appellate Court and restored the decree of the learned Munsif dismissing the claim in its entirety.

The origin of this tenancy is unknown. The lower appellate Court has found that the defendants' predecessors have been in possession of this land for over a hundred years and had built upon it a substantial structure consisting of mud walls and tiled roofs. This structure is found to be very old and must have been in existence for very many years. It is also found that possession of this land together with the structure thereon has been held by the defendants' family generation after generation without let or hindrance. No rent has ever been paid to the plaintiff and his predecessors for the said land and the latter has until the present proceedings made no attempt to eject the defendants or their predecessors. From these facts Wort, J. held that the inference to be drawn was that the tenancy was a permanent one. It has been argued before us that these facts do not support an inference of a permanent tenancy. It is clear that where a tenant alleges that his interest is a permanent one the onus lies upon him to establish such an interest. This is clearly laid down in the case of *Kamal Kumar Datta* v. *Nanda Lal Dule*(1). At page 741 Rankin, C.J. observed :—

"When a person claims to hold land as a tenant under a landlord it is for him to prove the existence, the nature and the extent of the interest which the owner of the full rights has granted to him."

(1) (1928) I. L. R. 56 Cal. 738.

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In the present case it is common ground that the defendants are tenants under the plaintiff, and it is for them to show the nature and the extent of the interest which they hold. This is conceded by Mr. Baldeva Sahay who appeared for the defendants.

As I have stated, the origin of this tenancy is unknown and the nature and the extent of the interest must be inferred from the facts which have been proved in this case. The inference to be drawn from the proved facts is not a question of fact but, on the contrary, is a question of law. This has been laid down by their Lordships of the Privy Council in the case of *Dhanna Mal* v. *Moti Sagar*(1). At page 185 Lord Blanesburgh observed :—

"They are well aware, moreover, that questions of law and of fact are often difficult to disentangle. It is clear, however, that the proper effect of a proved fact is a question of law, and the question whether a tenancy is permanent or precarious seems to them, in a case like the present to be a legal inference from facts and not itself a question of fact. The High Court has described the question here as a mixed question of law and fact—a phrase not unhappy if it carries with it the warning that, in so far as it depends upon fact, the finding of the Court on first appeal must be accepted. On these lines, which the High Court appear strictly to have observed, the appeal to that Court was competent, and it was in their Lordships' judgment open to the learned Judges there to entertain it as they did."

In that case the High Court had held in second appeal that an inference as to the nature of a tenancy from proved facts was a question of law, and their view was upheld by the Judicial Committee of the Privy Council. The case of *Dhanna Mal* v. *Moti*

(1) (1927) I. L. R. 8 Lah. 573; L. R. 54 Ind. App. 178.

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Sagar(1) was discussed by a Bench of the Calcutta High Court in the case of *Kamal Kumar Datta* v. *Nanda Lal Dule*(2) where it was held that whether a long standing tenancy of unknown origin is permanent or not is an inference of law to be deduced from the facts proved in each case, it being on the tenant to prove the facts leading to such inference. The Bench further held that neither possession for generations at a uniform rent nor construction of permanent structure, in itself, can be taken as conclusive proof of permanent right.

It has been urged strenuously before us by Sir Manmatha Nath Mukherji that the facts of the present case are precisely similar to the facts in the case of *Kamal Kumar Datta* v. *Nanda Lal Dule*(2) to which I have referred, and it is contended that we should follow that case and hold that the facts proved in the case before us do not warrant an inference of permanent right. In *Kamal Kumar Datta* v. *Nanda Lal Dule*(2), Rankin, C.J. observed that each case must depend upon its particular facts, and in my view there is a clear distinction between the case before this Court and the case of *Kamal Kumar Datta* v. *Nanda Lal Dule*(2). In the latter case the land in question had been used for residential purposes for sixty years at least and the tenancy was nearly a hundred years old. The tenant and his family had held the land for generations at a uniform rate of rent which had never been enhanced. The buildings, however, on the land are described as mud huts, whereas in the present case the buildings, though of kachha construction, are very substantial and can in no way be described as mud huts. The learned Subordinate Judge accepted the report of the commissioner who had inspected the constructions and that report describes the buildings as consisting of twelve

(1) (1927) I. L. R. 8 Lah. 573; L. R. 54 Ind. App. 178.
(2) (1928) I. L. R. 56 Cal. 738.

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rooms and a shop with three verandahs and three courtyards. The roof of this building was tiled, and there were various signs in the building showing that it had been repaired from time to time with bricks. It is true that the building can be described as a kachha one, but the description given by the commissioner makes it clear that it was an extremely substantial kachha construction. There is, therefore, one very marked difference between the present case and the case of *Kamal Kumar Datta* v. *Nanda Lal Dule*(1). The question, therefore, arises whether the same inference must be drawn from the proved facts in the present case as was drawn from the proved facts in the Calcutta case.

In my view it is impossible to draw the inference that the tenancy in the present case is a tenancy at will or a tenancy determinable at short notice. It appears to me that the buildings which have been constructed on this plot and maintained by generations of this family are such that no one would have built if his tenancy was a precarious one. It must be remembered that the defendants' family were weavers and the family continued to ply that trade until to-day. They were certainly in the past humble folk who could not be expected to erect pakka constructions costing a considerable amount of money. The present buildings must have meant a very considerable outlay for people of this class and from the nature of the building I am bound to hold that the tenants built it because they knew that their interest in the land was secured and permanent. Had their interest been precarious, it is inconceivable that a building of this kind would have been erected by them.

The facts, as proved, show that the landlord never at any time objected to the construction of this

(1) (1928) I. L. R. 56 Cal. 738.

very substantial building, and though it is common knowledge that the value of land in villages has risen considerably they never made any attempt to obtain any rent from these tenants.

It has been argued that the fact that no rent was paid for this land strongly suggests that the tenancy was a tenancy at will. The fact that no rent is payable is entirely consistent with a tenancy at will; but a tenancy at will cannot be inferred when it is known that the tenant who was paying no rent constructed such a substantial building as that which stands on this land. Failure to demand rent may be due to the inactivity or kindliness of the landlord; but there is nothing in this case to suggest that the landlord was either inactive or kindly disposed towards the defendants. The learned Munsif found as a fact that the plaintiff and his father had been extremely vigilant and had dispossessed the tenants of their kasht land. The lower appellate court makes no reference to this finding and, therefore, I do not base my decision upon it. However, it is clear that there is nothing in the findings of the lower appellate Court to suggest that failure to demand rent was due to anything other than the fact that no rent was payable for this land. The fact that land with a house upon it has been held for many years at a uniform or nominal rent has frequently been relied upon to support an inference of a permanent tenancy of land. In my view the fact that for a hundred years no rent has been demanded or paid is equally good ground for inferring a permanent tenancy, particularly when it is found that the land together with the buildings upon it has devolved from generation to generation of the same family.

It has been strenuously argued that an inference of a permanent tenancy should not be drawn even where substantial buildings have been erected unless

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such buildings are of pakka construction. Had the present buildings been pakka, the case would have been beyond all argument; but in my view the true test is not whether the buildings are pakka but whether the buildings are of a substantial nature. In *Kamal Kumar Datta* v. *Nanda Lal Dule*(1) the question whether the existence of pakka buildings are necessary to support an inference of permanency was discussed by Rankin, C.J. At page 745 he stated:

"In *Abdul Hakim Khan Chowdhury* v. *Elahi Baksha Saha*(2) Chakravarti, J., as a result of his analysis of previous decisions, considered that the absence of permanent pucca buildings on the land would ordinarily be fatal to a claim for permanency. What I think he meant by this statement was that unless permanent pucca buildings existed on the land the tenant would not as a rule be able to point to anything more than matters which can be explained by the reluctance of a landlord to eject a reasonable tenant, i.e., to point to any other element showing that the tenant's long occupation at a uniform rate of rent is unequivocally referable to a permanent right. In my opinion, it cannot be laid down that the existence of permanent structures is the only unequivocal or unambiguous fact for the purpose of an inference in favour of the tenant".

The necessity or otherwise of the existence of pakka structures to support an inference of permanency was also considered by Iqbal Ahmad, J. in the case of *Musammat Sitara Shahjahan Begum* v. *Munna*(3). According to the learned Judge, a pakka building is a building more permanent than a kachha one, but a mere difference in the degree of permanence could not alter the nature of the tenancy. The fact that a kachha house had been in existence for a period

(1) (1928) I. L. R. 56 Cal. 738.
(2) (1924) I. L. R. 52 Cal. 48.
(3) (1927) 100 Ind. Cas. 479.

of more than sixty years and had passed by succession to the heirs of the lessee who originally built the house, might be enough to lead to the presumption that the lease was a permanent one.

In the case of *Pramatha Nath Das Bairagi* v. *Champa Dasi*(1) a Bench inferred that a tenancy was a permanent one though there was no evidence that there had ever been any pakka building or structure erected on the land.

As I have stated earlier, each case must depend upon its particular facts. Normally the existence of unsubstantial kachha structures would not lead unequivocally to an inference of permanency; but where it is found that the structures, though kachha, are of a most substantial nature and are such as no poor man would be likely to build upon land unless his interest in the land was secured, then an inference of permanency is the only one which can be drawn. The inference of permanency can only be drawn where the facts point irresistibly to such a conclusion. Where the facts are equally consistent with permanency or a tenancy at will, then permanency cannot be inferred; but where the facts are inconsistent with a tenancy at will and consistent only with a permanent tenancy, the latter is the only inference which can be drawn and the permanency of the tenancy must legally be inferred. In my judgment the facts of the present case unequivocally and irresistibly point to a tenancy of a permanent nature, and that being so, I hold that the decision of Wort, J. is right and must be affirmed.

I would, therefore, dismiss this appeal with costs.

KHAJA MOHAMAD NOOR, J.—I agree.

Appeal dismissed.

S. A. K.

(1) (1928) I. L. R. 56 Cal. 275.

SPECIAL BENCH.

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April, 13, 14, 28.

Before Harries, C.J., Wort and Khaja Mohamad Noor, JJ.

U. C. PATNAIK, IN THE MATTER OF.*

Legal Practitioners Act, 1879 (*Act XVIII of* 1879), *sections* 13 *and* 14—*inquiry against legal practitioner—standard of proof required—failure to formulate charges, whether vitiates the proceeding—lawyer, whether should accept loan from client.*

Lawyers should not, except in very special circumstances, accept loans from their clients.

Where a lawyer has withdrawn money for a client and has been permitted to retain it, a document evidencing that transaction should in every case be drawn up. It is essential, in cases where the relationship of lawyer and client has been changed into one of debtor and creditor, that the clearest evidence of such a change should be obtainable.

No lawyer should ever borrow money from a client unless he is sure that he can repay it when the client demands repayment.

Charges of professional misconduct must be clearly proved and should not be inferred from mere ground for suspicion, however reasonable, or what may be mere error of judgment or indiscretion.

An inquiry in a serious case, such as professional misconduct on the part of a legal practitioner, should proceed on formulated charges, but failure to formulate precise charges, where it has led to no injustice, does not vitiate a proceeding under section 14 of the Legal Practitioners Act, 1879.

A, a pleader v. *The Judges of the High Court of Madras*(1), followed.

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*Civil Reference no. 2 of 1939, made by Rai Sahib R. C. Mitra, District Judge, Ganjam-Puri, in his letter no. 1, dated the 8th February, 1939, forwarding a report of Rai Sahib Charu Chandra Coari, District Munsif, Berhampur.

(1) (1930) A. I. R. (P. C.) 144.

Reference under section 14 of the Legal Practitioners Act, 1879.

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

Sir Sultan Ahmed (with him *G. C. Das* and *P. Misra*), for the legal practitioner.

G. P. Das, Public Prosecutor for Orissa, for the Crown.

HARRIES, C.J.—This is a reference by the learned Munsif of Berhampur made through the District Judge of Ganjam-Puri under section 14 of the Legal Practitioners Act.

On the 25th of April, 1938, one Kashi Nath Ratho filed a petition in the Court of the District Judge of Ganjam-Puri complaining against the conduct of the opposite party U. C. Patnaik, a pleader practising in the Courts at Berhampur. As the misconduct was alleged to have taken place in the Court of the learned Munsif, the learned District Judge sent the application to that Court. The petitioner Kashi Nath Ratho did not himself file the petition in the Court of the learned Munsif, but on receipt of the petition from the Court of the learned District Judge the learned Munsif took cognizance of it and examined Kashi Nath Ratho on oath. Notice was sent to the opposite party, U. C. Patnaik, who duly appeared and filed a written statement. The learned Munsif heard evidence on behalf of the petitioner, and the opposite party and eventually came to the conclusion that the pleader was guilty of fraudulent or grossly improper conduct in the discharge of his professional duty. The report was forwarded to the learned District Judge, who heard Counsel on behalf of the parties. He came to a different conclusion and held that the pleader was not guilty of any misconduct. The learned District Judge has forwarded the two reports to this Court, and we have heard Counsel on behalf of the pleader. The Advocate-General of Orissa,

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appeared through the Public Prosecutor for Orissa, Mr. G. P. Das. The latter informed the Court that he had been instructed to support the view taken by the learned District Judge. Consequently no argument has been addressed to us on behalf of the view held by the learned Munsif. Sir Sultan Ahmed, who appeared for Mr. U. C. Patnaik, has dealt with the case very fully and has placed quite fairly before the Court all the materials which were before the lower Courts.

The petitioner, Kashi Nath Ratho, is a professional money-lender, and in the year 1935 he had instructed the opposite party to appear for him in certain execution cases. On the 8th of May, 1935, Mr. Patnaik withdrew from Court a sum of Rs. 1,065-1-0 which has been deposited to the credit of the petitioner. On the 8th of October, 1935, Mr. Patnaik withdrew another sum of Rs. 460-15-0 which had been likewise deposited to the credit of the petitioner. These two sums had been deposited in Court by a judgment-debtor in execution case no. 76 of 1935. On the 14th of August, 1937, Mr. Patnaik withdrew from Court a sum of Rs. 30 which had been deposited to the credit of the petitioner by a judgment-debtor in execution case no. 149 of 1937. It is common ground that Mr. Patnaik did not pay these sums ever to the petitioner for some considerable time. On the 4th of November, 1935, he paid to the petitioner a sum of Rs. 400 out of the sum of Rs. 460-15-0 which he had withdrawn on the 8th of October, 1935. The next two payments were of Rs. 20 and Rs. 5 which were made on the 12th of June, 1936, and the 14th of January, 1937, respectively. It is admitted that these two payments were made to cover the travelling and other expenses of the petitioner. On the 5th of September, 1937, a payment of Rs. 100 was made by the pleader to the petitioner out of which the petitioner had appropriated Rs. 10 towards his travelling and other

expenses. According to the pleader, this was a payment towards interest; but, according to the petitioner, the whole sum was paid towards travelling expenses, though in his books Rs. 10 only are appropriated towards such expenses. On or about the 30th of October, 1937, a further sum of Rs. 20 was paid to the petitioner to cover expenses. On the 23rd of November, 1937, the pleader paid to the petitioner a sum of Rs. 400 and on the 13th of January, 1936, a further sum of Rs. 100. On the 1st of April, 1938, Mr. Patnaik paid the petitioner a sum of Rs. 614 which represented the balance due in respect of the amounts withdrawn by the pleader and a further sum of Rs. 210 which the pleader alleges was paid as interest. On this date also the petitioner acknowledged that a sum of Rs. 42 had been spent by the pleader in expenses in connection with the petitioner's litigation.

According to the petitioner, Mr. Patnaik concealed from him the fact that he had withdrawn these various sums and the petitioner only became aware of the fact as a result of the inquiries made in Court. He alleges that Mr. Patnaik wrongfully retained these sums and only made payments from time to time as a result of pressure. According to him, these monies should have been handed over immediately they were withdrawn, and consequently it was urged that the pleader had been guilty of misappropriation of the monies and wrongful detention of them for a considerable time.

The pleader's defence was twofold. With regard to the sum of Rs. 1,065-1-0 withdrawn on the 8th of May, 1935, he alleged that an agreement was entered into between the parties, whereby he was allowed to retain this sum by way of loan. On the 5th of September, 1937, he alleges that he paid a sum of Rs. 100 by way of interest on this loan; but, as I have stated, the petitioner alleges that this sum of Rs. 100 was paid to cover expenses. Admittedly a sum of Rs. 210 was paid on the 1st April, 1938, and

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this, according to the pleader, was the balance of interest due upon the loan. The petitioner admits that this sum was paid as interest; but he alleges that he was forced to accept it and to give a receipt.

The learned Munsif held that the petitioner had not established that the pleader had concealed these withdrawals from him, and this finding is upheld by the learned District Judge. In my view there is no evidence upon which a finding of concealment could be based, and in fact the evidence points to the fact that the petitioner well knew that these sums had been withdrawn. The learned Munsif, however, rejected the pleader's defence that he had been permitted to retain the sum of Rs. 1,065-1-0 as a loan. He further rejected the opposite party's plea that the balance of the monies withdrawn by him had been retained by him to meet costs to be incurred in the litigation which was proceeding. The learned District Judge, however, held that there had been no misappropriation of the monies withdrawn and that the evidence established that Kashi Nath Ratho had permitted the pleader to retain the sum of Rs. 1,065-1-0 withdrawn by him as a loan. He further held with regard to the other sum alleged to be misappropriated, namely, Rs. 90-15-0, that the pleader was allowed to retain the sum to meet current expenses.

In the first place, it was argued in this Court that the enquiry by the learned Munsif was not a proceeding under section 14 of the Legal Practitioners Act. The form of the learned Munsif's report is somewhat unfortunate. He appears to have thought that he had to make this report to the learned District Judge, whereas the report is really made for the High Court. The report is to be forwarded through the learned District Judge; but it is not in fact a report made on his behalf. The same point was taken before the learned District Judge, and in my view the latter rightly held that the proceeding before the learned Munsif was a proceeding under section 14 of the

Legal Practitioners Act. The learned Munsif found the pleader guilty of an offence under section 13(*b*) of the Legal Practitioners Act and sent his report to the learned District Judge. It would have been better, however, if the learned Munsif had not framed his report in the way he did. However, on reading the whole report, it is clear that the learned Munsif was conducting an inquiry under section 14 of the Legal Practitioners Act and as required by that Act he forwarded his report to this Court through the learned District Judge.

It was also argued that the finding of the learned Munsif cannot be sustained by reason of the fact that no precise charges were framed. It might have been better if the learned Munsif had framed charges; but in my view the failure to formulate precise charges has led to no injustice in this case. The opposite party was given full particulars of the complaint made against him and was given every opportunity to meet that complaint. At no stage in the proceedings did the opposite party complain that he had been taken by surprise, and in my view these proceedings were not illegal by reason of the failure to formulate charges.

It is to be observed that in the case of *A, a pleader* v. *The Judges of the High Court of Madras*(1), their Lordships of the Privy Council laid down that "an inquiry in a serious case (such as professional misconduct on the part of a pleader) should proceed on formulated charges, not only in fairness to the person charged with professional misconduct, but in order that evidence may relevantly bear on the particular issues, and, further, that the evidence should be carefully taken and judged according to the ordinary standards of proof". As I have stated, it would have been better in this case if precise charges had been formulated; but as the failure to formulate such charges has not prejudiced the pleader, I hold

(1) (1930) A. I. R. (P. C.) 144.

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that such failure to formulate charges is not fatal to these proceedings.

Before dealing with merits, it will be convenient at this stage to consider what standard of proof is required in cases of this kind. In the Madras case, to which I have already referred, Lord Thankerton at page 145 stated :—

"Before dealing with the charges it is right to state that, in their Lordships' opinion, charges of professional misconduct must be clearly proved and should not be inferred from mere ground for suspicion, however reasonable, or what may be mere error of judgment or indiscretion. An appropriate guide may be found in section 13, Legal Practitioners Act, no. XVIII of 1879, under which a pleader or mukhtar may be suspended or dismissed, who is guilty 'of fraudulent or grossly improper conduct in the discharge of his professional duty'."

The petitioner in this case has charged the pleader with fraudulent or grossly improper conduct in the discharge of his professional duty and in order to succeed he must clearly prove those charges. Proving facts and circumstances giving rise to grave suspicion is not sufficient to establish such a charge.

The petitioner's allegations were two-fold, namely, that the pleader had wilfully concealed from the petitioner the withdrawal of these various sums of money and had wrongfully and fraudulently retained the money in spite of repeated demands. According to the pleader, the petitioner well knew that these sums had been withdrawn and that he had been permitted to withhold Rs. 1,065-1-0 as a loan and to retain the balance, namely, Rs. 90-15-0 to meet current expenses. * * * *

[His Lordship then discussed the evidence, and examining the merits of the case proceeded as follows :]

In my judgment the petitioner has failed to prove that the pleader misappropriated this sum of

Rs. 1,065-1-0. In my view, the circumstances suggest that there was some arrangement between the parties whereby Mr. Patnaik was allowed to retain this sum by way of loan. In all probability what happened was that Mr. Patnaik was allowed to retain the sum as a temporary accommodation and having spent it, he was unable to repay the whole for a period of nearly three years. If the relationship of pleader and client was changed into one of debtor and creditor, then no question of misconduct can arise. Had there been no arrangement entitling the pleader to use the money, then this would be a clear case of temporary misappropriation. However, there was, in my view, some arrangement which entitled Mr. Patnaik to keep and use this money, and that being so, the relationship existing between the parties was changed to that of debtor and creditor. Failure by the debtor to pay the money on demand does not, in my view, amount to professional misconduct.

A letter dated the 17th of January, 1938, from Mr. Patnaik's clerk to Kashi Nath (Ex. Q) was put in evidence. In that letter reference is made to an auction sale and Kashi Nath is told to bring money for poundage and not to depend on the vakil to provide that sum. In my view, such a letter would never have been written if the vakil had been guilty of misappropriation. When that letter was written, it was known to both the parties that a large sum was still owing from Mr. Patnaik to Kashi Nath. Even so, the pleader's clerk wrote to Kashi Nath telling him to bring money and not to rely on the pleader. Such a letter might be written if the pleader was in the position of a debtor unable to pay his debts; but I cannot imagine the letter being written if the pleader was in the position of a person who had wrongly misappropriated monies.

As to the sum of Rs. 90-15-0 alleged to have been misappropriated, the defence was that the pleader was allowed to retain this sum to meet expenses. Mr. Patnaik withdrew a sum of Rs. 460-15-0 on the

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9th of October, 1935, and on the 4th of November, 1935, he paid Kashi Nath Rs. 400 out of this sum leaving a balance in his hands of Rs. 60-15-0. Kashi Nath signed a receipt for this sum in which he states that he is in need of money now and that he has taken a sum of Rs. 400. He says:

"Afterwards I shall take the balance and sign the chittah and auraja. This is with my consent."

It is clear that when Kashi Nath took Rs. 400 he knew that there was a balance due to him, but he was quite prepared to take that when an account had been settled. On the 14th of August, 1937, the pleader withdrew another Rs. 30 for Kashi Nath and, according to him, he also retained this money to meet expenses. The difference between Rs. 460-15-0 and Rs. 400 which was paid and this sum of Rs. 30 makes up the sum of Rs. 90-15-0 alleged to have been misappropriated. When the final settlement was made on the 1st of April, 1938, Kashi Nath acknowledged that a sum of Rs. 42 had been spent by the pleader on his behalf. Litigation was going on during this time in which Mr. Patnaik was acting for Mr. Kashi Nath and it may well be that the pleader was allowed to retain this small amount to meet current expenses.

If Kashi Nath was prepared to accommodate the pleader to the extent of Rs. 1,065-1-0, there is nothing strange in the fact that he permitted the pleader to retain a sum of Rs. 90-15-0 to meet current expenses.

Having given the matter the fullest consideration I can, I am not satisfied that the petitioner has proved that Mr. Patnaik has been guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, and I would, therefore, reject the reference and find U. C. Patnaik not guilty of the charges made against him.

Though I find Mr. Patnaik not guilty of these charges, it must not be thought that I approve of his conduct in this case. In my view lawyers should not, except in very special circumstances, accept loans

from their clients. Where a lawyer has withdrawn money for a client and has been permitted to retain it a document evidencing that transaction should in every case be drawn up. It is essential, in cases where the relationship of lawyer and client has been changed to one of debtor and creditor, that the clearest evidence of such a change should be obtainable. In the present case Mr. Patnaik should have drafted a document setting out in precise terms the transaction and, further, should have shown in his books that the sum of Rs. 1,065-1-0 was no longer money which he held on behalf of his client but was money which he had obtained from Kashi Nath as a loan. The sum always appeared in Mr. Patnaik's books as money due to Kashi Nath from Mr. Patnaik as his lawyer and Mr. Patnaik has no one but himself to thank for these proceedings. Where a lawyer conducts himself in the manner in which he (Mr. Patnaik) conducted himself in this case, suspicion is bound to arise, and a lawyer by so acting places himself entirely in the hands of an unscrupulous client. Further, Mr. Patnaik should not have accepted temporary accommodation from Kashi Nath when he must have realised that it would be extremely difficult for him to repay the money on demand. At this time Mr. Patnaik was in serious financial difficulties and he must have been aware that repayment of this money would be extremely difficult. In such circumstances, he should never have accepted a loan from a person who placed confidence in him. It is true that the failure of Mr. Patnaik to repay this money does not amount to professional misconduct, but borrowing money in such circumstances is, in my view, most reprehensible. No lawyer should ever borrow money from a client unless he is sure that he can repay it when the client demands repayment.

WORT, J.—I agree.

KHAJA MOHAMAD NOOR, J.—I agree.

Reference discharged.

S. A. K.

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February, 20, 21, 22, 23, 24.
March, 8, 9, 10, 13, 14, 15, 16, 17, 23.
May, 9.

APPELLATE CIVIL.

Before Wort and Agarwala, JJ.

KUMAR RAGHAVA SURENDRA SAHI

v.

BABUI LACHMI KUER.*

Hindu Law—Mitakshara—stridhan of a maiden—rule of succession—heirs entitled to succeed—step-mother, whether an heir—failure of father—father's remote agnates, whether preferred to less remote cognates.

The stridhan of a maiden, governed by the Mitakshara school of Hindu Law, devolves, in the absence of uterine brothers, on the mother, and after her death and in the absence of the father the property goes to the father's heirs in the order laid down in the Mitakshara for succession to a male dying without issue.

Therefore, after the mother, and in the absence of the father, the step-mother being the nearest heir of the father inherits the stridhan in the first instance, and after her a remote agnate of the father (great-great-great-grandson of the common ancestor) succeeds in preference to a less remote cognate (maternal great-grandson of the father's paternal grandfather).

The Mitakshara, while holding that the right to inherit does not spring from the right to offer oblations, does not exclude from consideration the test of propinquity or nearness of blood, but this test is applied only in competitions between persons of the same class.

Ram Chandra Martand Waiker v. *Vinayek Venkatesh Kothekar*(1), *Buddha Singh* v. *Lattu Singh*(2), *Dwarka Nath Roy* v. *Sarat Chandra Singh Roy*(3), *Janglubai* v. *Jetha Appaji Marwadi*(4), *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar*(5), *Kashee Mohun Roy* v. *Raj Gobind*

* Appeal from Original Decrees nos. 62, 63, 64, 69, 130 and 197 of 1935, from a decision of Maulavi Syed Mohammad Ibrahim, Subordinate Judge of Gaya, dated the 5th of June, 1934.

(1) (1914) I. L. R. 42 Cal. 384; L. R. 41 Ind. App. 290.
(2) (1915) L. R. 42 Ind. App. 208.
(3) (1911) I. L. R. 39 Cal. 819.
(4) (1908) I. L. R. 32 Bom. 409.
(5) (1870) 5 Beng. L. R. 15, F. B.

Chuckerbutty(1), *Digumber Roy Chowdhry* v. *Moti Lal Bundopadhya*(2), *Nanja Pillai* v. *Sivabagyathachi*(3), *Kanakammal* v. *Ananthamathi Ammal*(4), *Kamala Bai v. Bhagirathi Bai*(5), *Tukaram* v. *Narayan Ramchandra*(6), *Sundaram Pillai* v. *Ramasamia Pillai*(7), *Krishnai* v. *Sripati*(8), *Bai Kesserbai* v. *Hunsraj Morarji*(9), *Kamla Prasad* v. *Murli Manohar*(10), *Jullessur Kooer* v. *Uggar Roy*(11), *Tahaldai Kumri* v. *Gaya Pershad Sahu*(12) and *Ramanand* v. *Surgiani*(13), reviewed.

Appeals nos. 62, 63, 64 and 139 by the plaintiffs of Title Suits nos. 40, 39, 41 and 30, respectively; Appeal no. 69 by the defendants 1 and 2 of Title Suit no. 38 and Appeal no. 197 by the defendants 4 and 17 of Title Suit no. 38.

The facts of the case material to this report are set out in the judgments of Wort and Agarwala, JJ.

Dr. Dwarka Nath Mitter and *Harnarayan Prasad*, for the appellants in F. A. 62, 63, 64 and 69, and the respondents in F. A. 139 and 197.

P. R. Das (with him *Sir Manmatha Nath Mukherjee*, *L. K. Jha*, *S. N. Bose* and *J. N. Sahai*), for the appellants in F. A. 139 and 197, and the respondents in the remaining appeals.

Sir Sultan Ahmed (with him *S. M. Mullick*, *A. H. Fakhruddin*, *Syed Ali Khan*, *B. N. Rai*, *S. I. Hasan*, *K. Dayal*, *Gholam Mohamed*, *S. S. Rakshit*, *Ganesh Sharma*, *D. L. Nandkeolyar* and *A. S. Sinha*), for the respondents in all the appeals.

(1) (1875) 24 W. R. 229.
(2) (1883) I. L. R. 9 Cal. 563, F. B.
(3) (1911) I. L. R. 36 Mad. 116.
(4) (1912) I. L. R. 37 Mad. 293.
(5) (1912) I. L. R. 38 Mad. 45.
(6) (1911) I. L. R. 36 Bom. 339, F. B.
(7) (1919) I. L. R. 43 Mad. 32.
(8) (1905) I. L. R. 30 Bom. 333.
(9) (1906) I. L. R. 30 Bom., 431; L. R. 33 Ind. App. 176.
(10) (1934) I. L. R. 13 Pat. 550.
(11) (1882) I. L. R. 9 Cal. 725.
(12) (1909) I. L. R. 37 Cal. 214.
(13) (1891) I. L. R. 16 All. 221.

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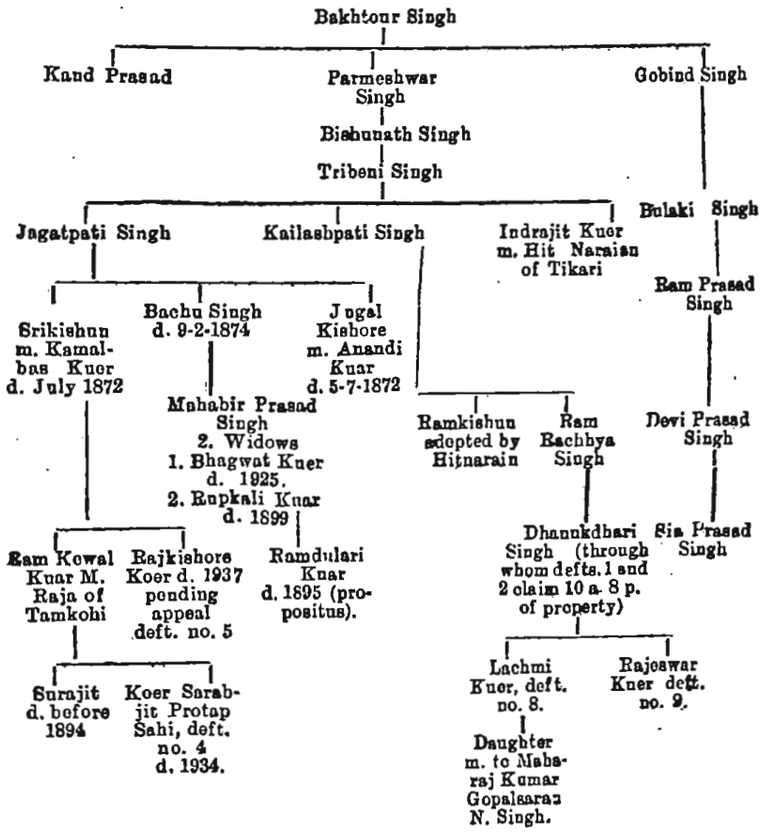
KUMAR RAGHAVA SURENDRA SAHI v. BABUI LACHMI KUER.

WORT, J.—These six appeals arise out of five suits which were brought claiming various interests in certain property, the last male holder of which was one Mahabir Prasad Singh. The genealogical table appended states the relationship between some of the parties to the suit as found by the learned Subordinate Judge. It appears that Mahabir was the son of one Bachu Singh. Mahabir died on the 21st of June, 1894, leaving him surviving two widows, namely, Bhagwat Kuer and Rupkali Kuer, and, what has been held by their Lordships of the Judicial Committee in *Bhagwat Koer* v. *Dhanukdhari Prashad Singh*(1), a vested remainder in favour of a posthumous daughter Ramdulari who died about six months after birth. Ramdulari Kuer the posthumous daughter died in 1894 and Rupkali died in 1899 and Bhagwat Kuer, a co-widow, survived till 1925. On the death of Rupkali, Bhagwat came into possession of the whole estate including the vested remainder of Ramdulari. On Bhagwat's death in 1925 the succession opened and disputes arose with regard to the properties. Of the suits brought Suit no. 38 of 1932, out of which Appeal no. 69 of 1935 arises, raised all the questions in dispute. But as an order was made on the 21st of January, 1927, attaching the properties in dispute and some of the parties succeeded in obtaining the registration of their names in the Land Registration Department as regards some of the other properties, the various claims were made and six suits in all were brought. In addition to the attachment to which I have referred, defendant no. 1 in the principal suit got his name recorded as mutawalli of some of the properties which had been dedicated to an idol by Bachu Singh the father of Mahabir Singh and also as regards properties dedicated for religious and charitable purposes by Bhagwat. Defendant no. 8, the daughter of Dhanukdhari Prasad Singh, one of the persons through whom the claim of defendant no. 1 of the principal action was made, got her

(1) (1919) L. R. 46 Ind. App. 259.

name recorded with regard to the properties situate in the Saran district. This was in 1926. The parties therefore deemed it necessary to start the various suits.



Some of the parties to these suits do not appear in the genealogical table. They come into the litigation by reason of assignments or other transactions to which reference is made hereafter.

Many questions have been decided during the course of this litigation, but after the decision of the Subordinate Judge in the Court below, whose decision

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on questions of fact is not disputed in this Court, the main question involved in these appeals is the right to succeed to the stridhan of Ramdulari Kuer. The other questions are, first, as to the validity of certain endowments by Bachu and his daughter-in-law Dulhin Bhagwat Kuer and, secondly, the right to the office of mutawalli in respect thereof.

The learned Judge has held that the three brothers Srikishun, Bachu and Jugalkishore were separate. He has held that the Lakhaipur Mukarrari estate was a grant to Bachu Singh alone and not to his brothers. He has held that the transactions carried out by the documents of the 8th, 9th and the 10th of January, 1921, by which Dulhin Bhagwat Kuer claimed to have obtained an absolute estate in the property were invalid. The suggestion that these transactions could not be attacked as being res judicata was not pressed in the Court below and was not urged in this Court. He has held that the kabala of 1907 in favour of Ambica Prasad, the deed of gift of the 2nd of July, 1907, and the sale deeds of the 10th of April, 1924, were invalid and not binding upon the heir of Ramdulari's estate. He has held that the properties nos. 1 to 8 of schedule 1—C to the principal suit were not accretions to the estate of Mahabir but were self-acquisitions of Dulhin Bhagwat Kuer and, therefore, formed a part of her stridhan. He has held that the deed of gift of the 8th of September, 1924, in favour of Raghava Surendra Sahi was invalid, and this is not now disputed. As regards the endowments, there was the endowment by Bachu Singh of six villages out of the Lakhaipur mukarrari to the deities in the temple at Ajodhya under the deed of the 2nd of September, 1873, which endowment was admitted by the parties to be valid. The endowments created by Dulhin Bhagwat Kuer was held to be invalid. He has found that none of the contesting parties to the mutawalliship of the properties endowed by Bachu had any rightful claim. The Judge having held that the endowments of

Bhagwat Kuer was invalid the question of mutawalliship did not arise.

The principal question of law is whether Sarabjit Protap Sahi who was a near cognate to Mahabir Prasad Singh, the last male holder, being the great grandson (through his mother who married the Raja of Tamkohi) of Mahabir Prasad Singh's paternal grand-father, or a distant agnate Sia Prasad Singh, the plaintiff no. 1 in the suit, being the great great great grandson of one Bakhtour Singh the common ancestor of Mahabir Prasad Singh and Sia Prasad Singh, is entitled to succeed to the properties in suit which by the terms of the will of Mahabir Prasad Singh were left to his two widows for life and under which the posthumous daughter Ramdulari Kuer had, on a true construction of the will, a vested remainder. The question shortly stated is, who is, in the events which have happened, entitled to succeed under the Mitakshara law to the stridhan property of Ramdulari Kuer after the decease of Rupkali, her mother, and Bhagwat Kuer, her step-mother.

The remaining question, so far as defendants nos. 1 and 2 are concerned, is whether Dhanukdhari Singh, who was the great grandson of Tribeni Singh who was the grandson of Bakhtour Singh, is entitled as heir of Mahabir Prasad Singh, depends entirely upon the question whether the co-wife of Mahabir was entitled to inherit after the death of his second wife under the Mitakshara School of Hindu law. The other question is as to the rights of these defendants who are plaintiffs in suits nos. 30 of 1930 and 41 of 1930 to be mutawallis of the endowments of Bachu and Bhagwat Kuer. This question, so far as it relates to the mutawalliship of Bhagwat's endowments depends upon the validity of these endowments.

The relationship disclosed in the genealogical table, I should have said, has been proved by the plaintiff in the Court below and, after contest with regard to the matter, has been accepted by the trial Judge and not disputed in this Court.

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The last male holder of the properties in suit, as I have already said, was Mahabir Prasad Singh. The properties in dispute consist in the first instance of mukarrari interests granted by the Maharani Indrajit Kuer of Tikari in the name of Bachu Singh in 1863. This property is known as Goshwara Mahal Lakhaipur, Lodipur and Saidpur to be described hereafter as the Lakhaipur mukarrari property. There are ancestral properties, also some self-acquired properties of both Mahabir and Bhagwat Kuer. It may be stated at once that the Judge in the Court below has held that the properties acquired by Bhagwat Kuer were not accretions to Mahabir's estate but were the stridhan properties of Bhagwat.

In the year 1864 separation took place between the branch of the family represented by the three sons of Jagatpati and the other branch represented by Ramrachhya. Srikishun, Bachu and Jugalkishore died within a short time of each other: Jugal on the 5th of July, 1872, Srikishun on the 18th of the same month and Bachu on the 26th of January, 1874.

Bachu Singh before his death established a temple at Ajodhya in the Fyzabad district and endowed it with six villages out of the Lakhaipur mukarrari. This was by a deed, dated the 2nd of September, 1873, by which he constituted a line of succession to the mutawalliship, making himself the first mutawalli and then his son Mahabir; the succession thereafter was to go to his descendants male and female.

In the year 1872, after the death of his two brothers Jugalkishore and Srikishun, Bachu filed an application for succession certificates to the estate of his brothers on the footing that they wree joint with him. Ram Kewal Kuer, the daughter of Srikishun, objected and filed a counter-application, and Anandi Kuer, Jugal Kishore's widow, also objected on the ground that the brothers were separate. Kamalbas Kuer, Srikishun's widow, made no objection. The objections were overruled and Bachu was granted succession certificates.

On the 9th of July, 1873, Bachu gave certain villages to Kamalbas Kuer by way of maintenance.

Anandi Kuer on the 17th of May, 1874, executed an ekrarnama by which she admitted the jointness of the three brothers. This was some four months after Bachu's death and Bachu's son Mahabir Prasad executed the ekrarnama with Anandi Kuer.

Ram Kewal Kuer, however, filed a suit in 1880 against Bachu's son Mahabir by which she claimed the Lakhaipur property as belonging to her father. But this suit was ultimately compromised, Sarabjit Protap Sahi, the grandson of Srikishun, joining in the compromise. By this compromise Ramkewal Kuer obtained three villages out of the Rusi ancestral estate.

Then on the 21st of March, 1884, Mahabir raised funds by sale of six of the villages endowed by his father to the Ajodhya temple: this was while Mahabir was the mutawalli of the endowment.

On the 21st of June, 1894, Mahabir died having left a will, dated the 26th of September, 1893. On the 5th of January, 1895, Bhagwat Kuer and her co-wife Rupkali Kuer obtained probate of the said will. On the 11th of October, 1894, Rupkali gave birth to a posthumous daughter Ramdulari Kuer who lived for a few months only dying on the 3rd of June, 1895. By the will estates for life were given by Mahabir Prasad to his widows and the will was construed ultimately by their Lordships of the Judicial Committee of the Privy Council as giving a vested remainder to the posthumous daughter Ramdulari Kuer.

Rupkali, the second wife of Mahabir, died on the 8th of January, 1899.

It is to be noted that Bhagwat Kuer, after the death of her husband, acted as the mutawalli of the temple founded by Mahabir's father Bachu. On the 7th of September, 1899, Kamalbas Kuer died and Anandi Kuer died on the 4th of August, 1904.

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Bhagwat Kuer was therefore in possession of the whole estate commencing in the year 1900. She made endowments six in number to a pathsala known as "Bhagwat Pathsala" at Ajodhya. These endowments date from the 7th of March, 1900, to the 14th of September, 1925. In the meantime Bhagwat purported to adopt Raghava Surendra Sahi, defendant no. 1 in the principal suit. This was on the 13th of February, 1906. The adoption was eventually held to be invalid by the Judicial Committee of the Privy Council.

In 1907 Dhanukdhari (father of defendants 8 and 9) claimed to be the nearest agnate of Mahabir and commenced a suit and in February of that year executed a sale of 10 annas 8 pies of the mukarrari property and 2 annas 8 pies of the Chapra property to one Ambica Singh, the father of Maharaj Kumar Gopal Saran Narain Singh of Tikari who was defendant no. 6 in the very suit. The Rusi and Maher properties were excluded. The shares of the properties which Dhanukdhari purported to sell by this deed were alleged to belong to Jugalkishore and Bachu, the contention being that the mukarrari properties belonged to the three brothers.

Three suits were commenced, namely, suits nos. 198, 199 and 200 of 1907. The first related to 5 annas 1 pie of Mahabir's property which he got from Bachu, the second related to 5 annas 4 pies which Mahabir got from Jugalkishore his uncle, and the object of the third suit was to set aside the adoption by Bhagwat of defendant no. 1.

Again in 1911 Sarabjit Protap Sahi, who was defendant no. 4 in the principal suit, brought a suit against Bhagwat Kuer claiming one-third share of Mahabir's property as the share of his maternal grand-father Srikishun who, he alleged, separated from his two brothers Bachu and Jugalkishore. The suit was dismissed eventually by the High Court in 1913 but pending the appeal to the Privy Council

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there was a compromise by which one-third share of the estate of Mahabir, being the share of Srikishun, was released. The suit was against Bhagwat Kuer and in 1921 as the result of the compromise Bhagwat and others entered into transactions which the Subordinate Judge in the Court below has held to be invalid, which decision, Dr. Dwarka Nath Mitter on behalf of defendants 1 and 2 contended, was wrong; but ultimately it was conceded that the transactions could not be supported. The question relating to them, therefore, does not enter into our consideration in this case. But the transactions were these.

Dulhin Bhagwat Kuer by an ekrarnama dated January, 1921, released one-third share of Mahabir's property as the share of Srikishun Singh. Rajkishore Kueri then executed by way of gift a deed dated the 9th of January, 1921, by which she gave to Sarabjit Protap Sahi (defendant no. 4) substantially the same property. Sarabjit in his turn made a gift to Bhagwat Kuer of the properties excluding thirteen villages which he retained and one which he gave to Rajkishore Kuer, the balance being given to Bhagwat Kuer as an absolute estate. Another deed was executed the same time undertaking to abide by the compromise even although the Privy Council did not approve of it. In 1917 Ambika Prasad had made a gift of what he had purchased from Dhanukdhari and two of the suits of 1907 were compromised between Dulhin Bhagwat Kuer on the one side and Maharaj Kumar Gopalsaran Narain Singh on the other side. Ultimately on the 10th of April, 1924, Ambica conveyed what he had got from Dhanukdhari on the 8th of February excepting nine villages to Dulhin Bhagwat Kuer for a consideration of Rs. 1,50,000. Dulhin Bhagwat Kuer in her turn executed a kabala in favour of the Maharajkumar (defendant no. 6) in respect of 10 annas 8 pies of the property which she obtained under the deed of the 10th of April, 1924, and 5 annas 4 pies of the nine villages, the subject-matter of the deed of the 8th of February, 1907, she making a gift

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of 10 annas 8 pies in fifty-two villages, which she got from Maharajkumar Gopalsaran Narain Singh and his father Ambika Prasad Singh, to defendant no. 2 Surendra Sahi. This was by a deed of the 1st of July, 1924. On the 19th of September, 1925, Dulhin Bhagwat Kuer died. The various transactions to which I referred in the earlier part of my judgment and various orders of the High Court and of the Land Registration Department led to the litigation out of which these appeals arise.

The principal plaintiff is Babu Sia Prasad Singh who, as I have said, claims to be the nearest agnate of Mahabir Prasad through whom succession to the stridhan property of Ramdulari Kuer is traced. The principal contesting defendants are defendants 1 and 2 and defendants nos. 4 and 17. In the result the main contest is between the plaintiff and defendants nos. 4 and 17 which depends entirely upon the question of Hindu Law as to who is entitled to succeed to the stridhan property of Ramdulari Kuer. As I have already indicated, defendants 1 and 2 also claim the property through various transactions entered into by Bhagwat Kuer to which I have referred, but it is unnecessary to trace the title of defendants 1 and 2 as they have abandoned any personal claim to the property excepting a 10 annas 8 pies interest, title to which they claim through Dhanukdhari by reason of the transaction referred to above, namely, the sale in February of 1907 to Ambica and the conveyance by Ambica Singh to Dulhin Bhagwat Kuer as also the gift by Dulhin Bhagwat Kuer to defendant no. 2 Surendra Sahi, and on the assumption that Bhagwat Kuer as co-wife was not entitled under the Hindu Law to inherit the stridhan of her step-daughter Ramdulari Kuer and the property of Rupkali through Mahabir. But it is to be noticed shortly that the other suit was the suit of 1930 brought by defendants 4 and 6 (4 and 17 of the leading suit) out of which appeal no. 139 of 1935 was preferred. The result of this appeal depends upon the main contest between

the plaintiff and defendants 1 and 2 in the principal suit. Then suits nos. 39, 40 and 41 were filed by defendants 1 and 2 of the leading suit out of which appeals 64, 63 and 62 of 1935 arise.

The claim in the principal suit, that is, in suit no. 38 of 1932, was allowed by the Subordinate Judge subject to the properties acquired by Bhagwat Kuer which had been held not to be accretions to Mahabir's estate: Sarabjit's suit (no. 30 of 1930) was dismissed, but in this appeal no claim has been made as regards the properties of Bhagwat Kuer which had been held to be self-acquisitions—item nos. 38 to 44 and 48 of Schedule C and the properties which were the subject-matter of Bachu's endowment. Suit no. 39 of 1932 by defendants 4 and 17, claiming 10 annas 8 pies of the property through Dhanukdhari was dismissed, and again suit no. 40 of 1932 claiming 5 annas 4 pies, being the claim through Srikishun, was dismissed. The same results would obtain in this appeal having regard to the acceptance by the parties of the decision of the learned Judge in the Court below on questions of fact, and the respective claims of the appellants to the estate, or portions of it, of Ramdulari would be decided against them. As has been seen, certain of the plaintiffs' claims in the suit depend upon the rights of the various parties to whom I shall refer as heirs to Ramdulari Kuer's estate. For the purposes of this appeal the claims of the latter only will be referred to and not of those claiming under them by reason of assignment or otherwise. Defendants 1 and 2 claim through Dhanukdhari Prasad now represented by Bhagwati Kuer his widow in the litigation. Dhanukdhari's claim depends upon whether Bhagwat Kuer, the first wife of Mahabir Prasad Singh, was entitled to the property after the death of Rupkali Kuer, the second wife of Mahabir Prasad Singh. The respective claims of Sia Prasad (Plaintiff no. 1) and Sarabjit Protap Sahi are claims to succeed as the nearest heir to the stridhan of Ramdulari—admittedly a succession

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which is traced through her father Mahabir Prasad Singh. The right of Bhagwat Kuer to take a woman's estate in Ramdulari's property after the death of Rupkali Kuer is admitted by defendant no. 4, Sarabjit Protap Sahi, and Sia Prasad and will be dealt with later, but will be disposed of incidentally in discussing the right to succeed as between Sia Prasad and Sarabjit. The learned Judge in the Court below has held that the right of succession to the vested remainder of Ramdulari Kuer's estate is to be traced first through her mother Rupkali Kuer, then Mahabir Prasad her father and then Bhagwat Kuer the heir of Mahabir. On the death of Bhagwat in 1925, Rupkali, Ramdulari's mother, and Mahabir, Bhagwat's husband, having predeceased her, the succession opened. That this is the position is admitted by the respondent to the principal suit as also by the appellants (defendants 4 and 17), but denied by the other appellants (defendants 1 and 2) who deny the right of Bhagwat as a co-widow of Mahabir to succeed.

The claim of defendants 1 and 2, which is now limited to 10 annas 8 pies of the property, depends, as I have already said, upon the right of Dhanukdhari to succeed after the death of Rupkali Kuer to the exclusion of Bhagwat Kuer. This claim in my judgment fails, based as it is on the exclusion of the co-widow Bhagwat as will hereafter be shown, and on that assumption the way is clear for the disposal of the respective claims based on the one hand upon the right of Sia Prasad a remoter agnatic relation of Mahabir and on the other hand on the right of Sarabjit Protap Sahi a nearer cognatic relation.

Mr. P. R. Das' argument on behalf of Sarabjit shortly stated is that the scheme of succession to the stridhan is different from that of succession to males, and that after tracing it through Mahabir (which is admitted on all hands) it goes to the nearest *sapinda*, *sapinda* a generic term being in this connection used in a special sense including agnates up to 7th degree

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and cognates up to 5th degree—*gotraja sapindas*, *somanodakas* and *bhinna-gotra sapindas* [*See* West and Buhler Hindu Law, Mitakshara, Verse 53, and *Ram Chandra Martand Waiker* v. *Vinayek Venkotesh Kothekar*(1)]. It is contended that the word '*sapinda*' has a special meaning and not adopted in the Mitakshara in the case of succession to males where the expression is *gotraja sapindas* and that the Judge in the Court below was in error in relying upon the text of Kamalakara for the solution of this problem, the relevant text regarding a woman's property being as follows: "Her kinsmen take it if she die without issue (Colebrooke: placitum cxliv-a)". "If a women died without issue, that is leaving no progeny, in other words, having no daughter nor daughter's daughter, etc., the women's property as above described shall be taken by her kinsmen (*sapindas*): namely her husband and the rest as will be (forthwith) explained" (Colebrooke Mitakshara. Chapter II, section XI, para. 9) and in paragraph 30 the statement of Baudhyayana given by Vigyaneshwara of the Mitakshara is as follows: "The wealth of a deceased damsel let the uterine brethren themselves take". On failure of them it shall belong to the mother: or if she be dead, to the father (Chapter II, section XI, verse 30, page 388 of Colebrooke's translation: 1870 Edition). The text remains silent as to succession after the father, but Veeramitrodaya, an authority in this School [*Gridhari Lall Roy* v. *The Bengal Government*(2) and *Ramchandra Martand Waiker* v. *Vinayek Venkotesh Kothekar*(1)] supplies the omission to some extent. It says: "On failure of the mother and the father it goes to the nearest relations" (Gopal Chandra Sarkar's translation, 241). It is clear that the succession to the stridhan of a maiden is the same as the succession to the stridhan of a woman

(1) (1914) I. L. R. 42 Cal. 384; L. R. 41 Ind. App. 290.

(2) (1868) 12 Moo. I. A. 448.

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married in an unapproved form with this difference that in the case of a maiden the uterine brothers come in. In the first place it was argued that the ordinary rule of the Mitakshara that agnatic relations succeed before cognatic does not obtain in the case of stridhan and the fallacy upon which the Judge in the Court below has decided the case is that after the succession is traced through the father Mahabir, it proceeds on the same lines as succession to males.

It was contended that Veeramitrodaya used the term " nearest relation ' advisedly, and that other and more technical terms such as ' *gotraja* ' were used in the case of succession to males (*see* Setlur's translation, 1911 Edition, Part VII, paragraph 1, at page 421): " On failure of brother's sons (the heirs are) the gentiles (*gotrajas*) who are to be taken to be other than the father " and that this being intentional it must be construed as meaning the nearest in relationship in the ordinary sense. That being so, Sarabjit being admittedly nearer (although cognate) than Sia Prasad (being a *samanodaka*) his claim must prevail. Further the nearness is not to be determined, as the Judge in the Court below has held, by the rules given in the Mitakshara with regard to succession to males as stated by Kamalakara, but by the test of religious efficacy, in other words, the capacity to offer oblations; again that sapindaship in this regard is the same as in the case of ceremonials. Further it is contended that the rule of religious efficacy is the ability to offer (in this case) oblations to the agnatic ancestor of Mahabir, and that as Sarabjit is the great grandson (through his mother) of Jagatpati Singh, an agnatic ancestor (grandfather of Mahabir), he could offer two undivided cakes to that ancestor, also undivided cakes to another common ancestor of them both, namely, Tribeni Singh, whereas Sia Prasad Singh can only offer divided cakes to an ancestor

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who was common to himself and Mahabir, being Bakhtour Singh, of whom Sia Prasad Singh is the great great great grandson, the rule being that to three ancestors undivided cakes may be offered and after that to three more remote ancestors divided cakes.

It has been decided in the Court below that the Mitakshara being one whole work cannot be taken to have applied different schemes of succession with regard to different subjects unless expressly so, and that therefore there being no enumeration of the heirs in default of the father, the rule as to males in the case of obstructed succession would apply which in this case is the same as succession to stridhan in default of enumerated heirs in the case of a woman married in one of the blamed or unapproved forms, this rule depending on the principle that a woman married in an unapproved form remains in the *gotra* of her father as in the case of a maiden.

In support of the argument that in using the term sapinda the rule that agnatic relations are to be preferred to cognatic is ignored, a solitary passage in the decision of the Calcutta High Court is relied upon. Mr. Justice Chitty, in dealing with a case in which the contesting parties claiming succession to the properties in suit were sisters of the propositus (father's daughters) and father's brother's sons, asked the question why agnates should be preferred to cognates in the case of succession to a maiden stridhan, and stated that there was no authority for that proposition. The judgments in that case both of Mr. Justice Chitty and Mr. Justice Chatterjea are in conformity with the view expressed by all the text-book writers of authority. But it is argued that although the decision in that case must be considered right, yet the reasoning was to a great extent obiter as the test which the appellants seek

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to apply in this case was adopted in that case and was sufficient to dispose of the matter. But it is to be remembered that the remark relied upon is limited to the facts of that case in which the rule of propinquity was applied, the successful parties (father's daughters) being in any event the nearest relation: I refer to *Dwarka Nath Roy* v. *Sarat Chandra Singh Roy*(1). Reliance was placed upon the decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Buddha Singh* v. *Laltu Singh*(2) for the proposition that the test of religious efficacy applies equally to the Benares as to the Dayabhanga Schools. Their Lordships observe: "It is well settled by decisions of this Board that under the Mitakshara the *sapinda* relationship arises 'between two people through their being connected by particles of one body', namely, that of a common ancestor, in other words, from community of blood in contradistinction to the Dayabhaga notion of 'community in the offering of religious oblations'". But, as it will be shown later on, the Mitakshara, whilst holding that the right to inherit does not spring from the right to offer oblations, does not exclude from consideration the test of propinquity or nearness of blood. But it is to be observed that their Lordships were applying the rule of religious efficacy to persons of the same class and towards the end of the judgment made this statement in referring to Mitra Misra, the author of Veeramitrodaya (Golap Chandra Sarkar's Translation, Page 91, Chapter II, Part I, section 23-A), an authoritative commentary on the Mitakshara which lays down in express terms the rule: "He says when there are many claimants to the heritage among gotrajas and the like, then the fact of conferring benefits on the proprietor of the

(1) (1911) I. L. R. 39 Cal. 319.

(2) (1915) L. R. 42 Ind. App. 208, 217.

wealth by means of offering oblations and the like excludes those that do not confer such benefits", and later: "In the case of *Bhyah Ram* v. *Bhyah Ugar*(1) the Board affirmed this rule in the following words: 'when a question of preference arises, as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty'". I think it is clear that the test of the right or capacity to offer religious oblations is a test of the Dayabhaga School whereas in the Benares School the test is propinquity. Only in competitions between persons of the same class is the matter determined on the footing of religious efficacy.

As I have said the Judge in the Court below has relied for decision of the question on Kamalakara as an authority in the Benares School. In Ghosh's Vivada Tandava of Kamalakara, page 1142, in dealing with succession to stridhan it is stated as follows: "In default of the husband, the estate is obtained by his near relation beginning with the lawfully married wife and daughter, etc., as prescribed in the text of Yagnavalkya in the rule about succession to sonless men. According to Vigyaneshwara it is taken by the husband's wife, her co-wife's daughter and the maiden daughter of the co-wife."

It is contended by Mr. P. R. Das that Kamalakara has not been correctly understood and that although it would appear that Yagnavalkya's text (which is a text dealing with succession to males) is relied upon it is for a limited purpose and is not adopted in the case of stridhan generally. We are invited to look at page 1145, of the same work where the final conclusion is arrived at by applying the test of religious efficacy. Again it is argued that if the

(1) (1870) 13 Moo. I. A. 373.

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rule, as stated in page 1142, is applied it is contrary to the Mitakshara and, that being so, the Mitakshara must prevail.

Again reverting to Veeramitrodaya it is contended that the rule of religious efficacy is the true test as will be seen by reference to section 14 where cognates are mentioned as heirs (G. Sarkar's Veeramitrodaya, page 243). But when there is a failure of the above mentioned heirs of a childless woman's property, Vrihaspati ordains "The mother's sister, maternal uncle's wife, the paternal uncle's wife, etc., are pronounced similar to mother: If they leave no issue of the body, nor son (of a rival wife) nor daughter's son, etc., the sister's son and the rest shall take the property". Here in the term *aurasa* or 'issue of the body' both sons and daughters are included; for they debar all (other heirs) and the order in which they debar others has previously been mentioned; and then explaining, what Manu declares, the meaning of the term son as not being in apposition with the term *aurasa*, proceeds: "Hence on the failure of heirs down to the daughter's son first the *aurasa* inherits, after him his sons and grandsons. For it is proper that succession should devolve on them, inasmuch as *they are competent to present pinda* and are liable to discharge debts, etc."

Apart from the argument on the text, it is contended that the rule of propinquity upon which the plaintiff relies is a rule applicable to the case of succession to males (and there is no reason to apply it to females) which is admittedly based on sapindaship. Mitakshara, Chapter II, sections III and IV, provides: "Propinquity is the great regulating principle in determining the order of succession among heirs". The rule is based on the following text of Manu: "To the nearest *sapinda* the inheritence belongs". In further development of this argument the contention is that the Mitakshara used

'*sapinda*' in one sense only. *Sapinda* relationship arises "between two people through being connected by particles of one body [*See Budha Singh* v. *Laltu Singh*(1)]. But when dealing with the males, the term '*gotraja*' is used. "The wife, daughter, both parents, brothers likewise their sons, *gotrajas* (gentiles), *bandhus* (cognates), a pupil and a fellow student" (Mitakshara, Chapter II, section I, verse 2, Mandlik's Translation of Institutes of Yagnavalkya, page 220).

The Hindu Jurists in their text books deal with this question, and in a manner contrary to the argument put forward by the appellant and the learned Advocate does no more than to argue that the veiws which are thus unanimously expressed are mistaken.

Mulla's Hindu Law, Eighth Edition, section 147, deals with the matter in these words: "If there be none of these, in other words, if the woman dies without leaving issue, her stridhan, if she was married in an approved form goes to her husband after him to the husband's heirs in order of succession to him. But if she was married in an unapproved form, it goes to her mother and then to her father and then to the father's heirs". If this statement of the law be correct, the matter is concluded against the appellant-defendants 4 and 17: it also defeats the case of the other appellants, defendants 1 and 2, who claim through Dhanukdhari, as it is clear that amongst the heirs of the father would be the co-widow under the text of Mitakshara, Chapter II, section XI, placita, 8, 9 and 11. "8. A woman's property has been thus described. The author next propounds the distribution of it.....9. If a woman die 'without issue' that is, leaving no progeny, in other words, having no daughter, nor daughter's daughter, nor

(1) (1915) L. R. 42 Ind. App. 208.

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daughter's son, nor son nor son's son, the woman's property, as above described, shall be taken by her kinsmen, namely, her husband and the rest, as will be (forthwith) explained. 11. Of a woman dying without issue as before stated, and who had become a wife by any of the four modes of marriage denominated Brahma, etc....., the property of a childless woman goes to her parents, that is, to her father and mother ". These passages are taken from Stokes' Hindu Law Books, pages 460, 461 and were adopted by their Lordships of the Judicial Committee of the Privy Council in *Bai Kesserbai* v. *Hansraj Morarji*(1). This case is a direct authority against appellants nos. 1 and 2, the decision in the case being that a co-widow is entitled to succeed to the stridhan of a widow dying without issue in preference to her husband's brother or brother's son. Their Lordships agreed with the learned editor of the Vyavastha Chandrika and Lord Davey at page 197 stated that " the words ' and the rest ' therefore must mean, or include, the other relations of the husband or father ". The case is also important for our purpose for their Lordships of the Judicial Committee of the Privy Council refer to Kamalakara. As is already pointed out, there is no dispute as to the nearest relation of the father being the same as the nearest relation of the husband. The author makes this observation at page 142 of his work: " when the marriage is in an unapproved form, the stridhan goes in default of issue not to the husband and his heirs but to the mother, father, and father's heirs—the successors after the father would be the deceased women's brother, brother's son, step-mother, sister, sister's son, grandmother, paternal uncle and her father's other *sapindas*, *samanodakas* and *bandhus* " This statement it is argued is incorrect as the Mitakshara uses the word ' *sapindas* ' only, and not ' heirs ' and Veeramitrodaya, as we have seen, the words ' nearest relations '.

(1) (1906) I. L. R. 30 Bom. 431; L. R. 33 Ind. App. 176.

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The Mitakshara in dealing with succession to males provides " The wife and the daughters also, both parents brothers likewise and their sons, gentiles, cognates, a pupil and a fellow student" (verse cxxxv). " On failure of the first among these, the next in order is indeed the heir of the estate of one, who departed for heaven leaving no male issue." This rule extends to all (persons and) classes (verse cxxxvi, Colebrook, Chapter II, section I).

Reliance was placed on Sarkar's Hindu Law, Seventh Edition, page 830, where in dealing with succession to stridhan this statement is made: " It should be noticed that the nearness or propinquity is the principle on which the order of succession is worked out in the Mitakshara. Hence the relations are to a woman's property in the same order in which they would become heirs to her husband or father or mother [*Janglubai* v. *Jetha*(1)]. Again Mulla, Eighth Edition, page 27, in this connection states: " Under the Mitakshara the right to inherit arises from propinquity that is proximity of relationship " and relies upon the authority of *Lullubhai* v. *Cassibai*(2). There being no difference in principle between marriage in an approved form or an unapproved form excepting that in the former succession is traced through the husband and in the latter through the father and therefore raises the same problem as I have just stated. The statement by the same author " that it descends in the same way as if it had belonged to the husband himself " is relied upon (*see* Sarkar's Hindu Law, 332).

Again Shyama Charan Sarkar on Vyavasta Chandrika, Volume II, page 839, dealing with succession to stridhan, states " So according to his own exposition in the case of the ' woman being married in the Brahma, Daivia, Asura, etc., form ',

(1) (1908) I. L. R. 32 Bom. 409.

(2) (1880) I. L. R. 5 Bom. 110.

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if there be no husband there then such of the above-mentioned heirs as are nearest to her in his family succeed in due order" and "in the case of her being married in the *asura*, etc. (unapproved form of marriage) if her father does not exist then such of the aforesaid heirs as are nearest to her in her father's family succeed in due order". Likewise Banerji in his Hindu Law of Marriage and Stridhana (Tagore Lectures, Fifth Edition, page 424) makes this statement: "In the absence of any provision in the Mitakshara for determining the order of proximity among the husband's (father in the present case) *sapindas*, we turn to the Veeramitrodaya, a work of high authority in the Benares School. But the work does not help much. The order of succession there is different from that in the Mitakshara as far as there are express provisions in both and where the express enumeration of heirs in the latter treatise stops, Veeramitrodaya does not carry it much further". Then dealing with succession as to enumerated heirs observes: "The order of succession is no doubt in accordance with the text of Brihaspati. And there is this additional argument in his favour that it is the same as given in the Vyabahara Mayukha (Chapter XIV, section X "30") and the Smriti Chandrika (Chapter IX, section 111 "36"). But being in conflict with that indicated by Vigyaneshwara it cannot be accepted as law in the Benares School which recognise the Veeramitrodaya only when it is not contradicted by the superior authority of the Mitakshara". Then, observing that it would be useless to refer to the Bengal authority for elucidation of the point, as the founder of the Bengal School controverts almost every doctrine of the Mitakshara on the subject, states that according to Kamalakara the "nearness" of *sapindas* in the above rule of Vigyaneshwara is to be determined by the rule given in the Mitakshara for the devolution of the property of a male owner dying without male issue.

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The same learned author relying upon West and Buhler, Volume I, at page 213, quotes this passage: "This opinion seems to be based on the consideration that as sapindas inherit only through the husband they virtually succeed to property coming from him and that consequently they must inherit in the order prescribed for the succession to a male's estate". The same learned author is of the opinion that Kamalakara being entitled to be followed as an author in the Benares School when it is not in conflict with that of any higher authority has its further recommendation being simple as it makes the order of succession to stridhan correspond after a certain point to that applicable to man's property and if that were not Vigyaneshwara's meaning, and if he had not referred to this known order of succession after the husband, he would in all probability have been explicit. The text of Kamalakara has already been referred to in Ghosh's Book, Volume II, page 1142: "In default of the husband the estate is obtained by his near relation—as prescribed in the text of Yagnavalkya in the rule about succession to sonless men." The argument that Yagnavalkya was used by Kamalakara merely for the purpose of bringing into the succession the wife and daughter is one which, in my judgment, is not justified and certainly is not supported by authority, although in support of this argument it is contended that Kamalakara does not incorporate the whole of Yagnavalkya but relies upon this for support on the particular point only and in that sense has not stated what he is supposed to have stated by certain learned authors including Banerji on Hindu Law of Marriage and Stridhana. Reliance was also placed upon Mayne's Hindu Law, Ninth Edition, at page 979, where the author, dealing with this subject, observed that in either case (a maiden and woman married in an unapproved form) in default of the specifically enumerated heirs, the estate goes to the *sapindas* of the parents or husband as the

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case may be. The term 'nearest relations of the parents' in this context means '*sapindas* of the father', and the author proceeds to state "So it was held that a sister (father's daughter) and a sister's son (father's daughter's son) were entitled to succeed ....." (*See* table at page 836-a.) It is argued by Sir Sultan Ahmed that if the meaning which is sought to be attached to the word '*sapindas*' by the appellants is adopted reference to the table at page 836-a of Mayne's work would be erroneous.

Again Macnaghten deals with the question in the following way at page 38 of his Hindu Law, Second Edition: "To such property left by an unmarried woman, the heirs are her brother, her father, and her mother successively: and failing those her paternal kinsmen in due order".

As regards the authorities Mr. Das argues in the first place in support of his contention that the point is to be tested by the capacity to offer funeral oblations and relies upon the case of *Guru Govind Shaha Mandal* v. *Anand Lal Ghose Mazumdar*(1) where the claim was by a father's brother's daughter's son, and the Full Bench of the Calcutta High Court, dealing with the point, made this observation at page 39 of the Report: "We wish to draw particular attention to it as an instance of the extreme solicitude evinced by the author of the Dayabhaga to provide for the spiritual welfare of a deceased proprietor. Again, when we come to look at the internal arrangement of each of these classes, so far as the details of such arrangement are actually given in the Dayabhaga, we find that the same principle is always kept in view. Thus among the *sapindas*, those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor are invariably preferred to those who are competent to offer such cakes to his maternal ancestors only; and the reason

(1) (1870) 5 Beng. L. R. 15, F. B.

assigned for the distinction is that the first kind of cakes are of superior religious efficacy in comparison to the second. Similarly those who offer larger number of cakes of a particular description are invariably preferred to those who offer a less number of cakes of the same description; and where the number of such cakes is equal, those that are offered to nearer ancestors are always preferred to those offered to more distant ones. The same remarks are equally applicable to the *sakulayas* and *Samanodakas* ". It is said that this is a true rule, but there was an attempted departure from the rule in the case of *Kashee Mohun Roy* v. *Raj Gobind Chuckerbutty*(1), but the matter, it is argued, was put right in the later Full Bench decision of the Calcutta High Court in *Digumber Roy Chowdhry* v. *Moti Lal Bundopadhya*(2) where it was held that the brother's daughter's son is a *sapinda*, and is, therefore, a preferable heir to the great-great-great grandfather's great-great-great grandson. But these cases were cases of Dayabhaga or the Bengal School of the Hindu Law in which admittedly the final test is capacity to offer funeral oblations. Defendants 4 and 17 gain no support from these cases. In the case of *Nanja Pillai* v. *Sivabagyathachi*(3) there was a contest between the daughter of a co-wife of a deceased woman married in one of the approved forms and the *sapindas* of her husband such as his father's brother's son. It was held, relying upon Kamalakara, that nearness was to be determined by the rule given in Mitakshara in regard to succession to the property of a male who died without descendants and consequently first the wife, i.e. the rival wife of the deceased succeeds, next the daughter, i.e. the deceased step-daughter and so

(1) (1875) 24 W. R. 229.

(2) (1883) I. L. R. 9 Cal. 563, F. B.

(3) (1911) I. L. R. 36 Mad. 116.

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on. In *Kanakammal* v. *Ananthamathi Ammal*(1) it was held that the brother's widow, although a *gotraja sapinda*, was not entitled to succeed as an heir under the Madras system of inheritance. In a later decision in the case of *Kamala Bai* v. *Bhagirathi Bai*(2) it was held that the rule that in the case of succession to stridhan property, a daughter inherits as *sapinda* where the succession is to be traced through the father or the husband, applies also to the case of a wife or widow. Mr. Justice Sundara Ayyar, delivering the judgment of the Court, stated: "We see no reason for not accepting the view of the Bombay High Court in *Tukaram* v. *Narayan Ramchandra*(3) that the *sapindas*, both of the father and mother, must be understood to mean the same persons as the mother becomes a member of the father's family on her marriage. In this view the defendant, as the wife of the deceased maiden's father, would be a nearer heir than the plaintiff (the maternal aunt of the deceased maiden). This is a direct authority against the argument of defendants 1 and 2 who depend, as I have already stated, on the exclusion of the co-widow Bhagwat Kuer for the purpose of establishing their title to the 10 annas 8 pies through the transactions of Dhanukdhari who claimed to be the next in succession to Ramdulari. It is also indirectly an authority against the other appellants represented by Mr. P. R. Das unless he could successfully contend that Kamalakara introduced the rule laid down by Yagnavalkya merely for the purpose of putting in wife and daughter. In *Sundaram Pillai* v. *Ramasamia Pillai*(4) the conflict was between the father's paternal uncle's son and

(1) (1912) I. L. R. 37 Mad. 293.

(2) (1912) I. L. R. 38 Mad. 45.

(3) (1911) I. L. R. 36 Bom. 339, F. B.

(4) (1919) I. L. R. 43 Mad. 32.

father's sister. The question discussed was who was the nearest relation? After referring to the text Mr. Justice Napier, in delivering the judgment of the Court, dealt with the argument that the decision in *Kamala Bai v. Bhagirathi Bai*(1) had followed the decision in *Tukaram* v. *Narayan Ramchandra*(2) and was wrong in doing so as the Bombay High Court had acted upon Veeramitrodaya—a work which is not followed in Madras, but pointed out in answer to this argument that the learned Judges of the Madras High Court, although not expressly following the language of Veeramitrodaya, which was definite on the subject, proceeded by way of analogy and arrived at the same result.

The argument on behalf of defendants nos. 4 and 17, as will be seen from the above considerations, has always been rejected. The authorities, so far as they dealt with the specific points, are entirely against the appellants. The argument is supported neither by authority nor by the authoritative authors of the text books, who are unanimous that sapindaship in the case such as we have before us and in the case of succession to males depends entirely upon the same rules. The argument, although attractive in some of its aspects, is one which cannot be accepted. In my judgment, therefore, the learned Subordinate Judge in the Court below was right in rejecting it, and the appeal, so far as these defendants are concerned, fails. That disposes of appeal no. 69 of 1935 in favour of the plaintiffs.

The next case is by the appellants who are defendants 1 and 2 in the action. They do not now press their claim which was given up at the end of the argument accepting the Subordinate Judge's conclusion that the decisions in the suits commencing in 1907 did not operate as res judicata, and that the principal

(1) (1912) I. L. R. 38 Mad. 45.
(2) (1911) I. L. R. 36 Bom. 339, F. B.

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property in dispute, the Lakhaipur mukarrari, was Bachu's separate property. The remaining claim is as to 10 annas 8 pies share which, as I have already pointed out, depends upon the right of Dhanukdhari to succeed as heir after Rupkali the junior wife of Mahabir Prasad Singh to the exclusion of Bhagwat Kuer the co-widow. One of the contentions is that Veeramitrodaya (Sarkar, at paragraph 15, page 244) deals with wife and daughter of the propositus and therefore the passage could not be of any assistance to those who contend that the co-wife is entitled. But it is to be observed that Ghosh, in his principles of Hindu Law, at page 1142, expressly mentions co-wife. It is further argued that the mention of 'parents' in the Mitakshara does not include step-mother. In *Kamala Bai* v. *Bhagirathi Bai*(1) a case to which I have already referred, this point was expressly decided against the contention now put forward; so also the case of *Krishnai* v. *Sripati*(2) is a direct authority on the point. Also by reason of the decision at which I have arrived as regards the respective claims of Sia Prasad and Kuer Sarabjit Protap Sahi, the right of Dhanukdhari Prasad to exclude Bhagwat Kuer, the co-wife, is necessarily decided against the contention. This appeal, therefore, so far as it relates to the claim of 10 annas 8 pies share of the property through Dhanukdhari, fails.

The next questions to be disposed of are the endowments of Bachu and Bhagwat Kuer. Bachu during his life-time in 1873 endowed a temple at Ajodhya in Faizabad with six villages and also with Rs. 40,000 in cash: this was on the 2nd of September of that year. Bachu constituted himself the mutawalli and provided for the devolution of the office after his death. Mahabir Prasad Singh held the office after the death of his father Bachu and on

(1) (1912) I. L. R. 38 Mad. 45.
(2) (1905) I. L. R. 30 Bom. 333.

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Mahabir's death Dulhin Bhagwat Kuer remained in office till her death. The plaintiff no. 1 in the principal suit claimed the office of mutawalli as the nearest of kin. There was a further transaction by Mahabir Prasad by which he sold six of the villages of the Lakhaipur mukarrari estate to the Thakurji on the 21st of March, 1884. Bhagwat Kuer, when in possession, purporting to act under the provision of the Will of her husband, dedicated by six deeds properties of which she was in possession through the wakf. These transactions were of the 7th of March, 1900, 19th of May, 1905, 10th of February, 1906, 3rd of November, 1913, and 29th of June, 1924. This last dedication was, as the Judge in the Court below has pointed out, merely a fictitious endowment for the purpose not of the wakf but of benefiting defendants 1 and 2. On the 2nd of July, 1924, Dulhin Bhagwat Kuer purported to change the order of succession to the office of mutawalli and provided that after her death the defendant no. 1 must be the mutawalli. The right of Bachu to endow the property is not disputed and the Judge has decided accordingly. As regards the mutawalliship, Mahabir, it has been pointed out, remained a mutawalli during his lifetime. As will be seen from the genealogical table, Mahabir was the last of the male line of Bachu. The deed of endowment, dated the 2nd of September, 1873, provided—

> "As long as I live the tauliat and management of the wakf properties shall remain vested in me personally and thereafter it shall be vested in my son Babu Mahabir Prasad Singh and after him it shall continue from generation to generation, to be vested in the eldest son found fit in the line of each of my children one after another, both in the male and female lines."

There was neither male nor female issue surviving and the line of succession laid down by Bachu came to an end. The right of management, therefore, reverted to the founder or to his heir. Mahabir Prasad made appropriate provisions by which the

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mutawalliship should go to his descendants, male and female and Ramdulari, therefore, on her birth was entitled to the office. It was the opinion of the Judge in the Court below that, that being so, the right again reverted to Bachu the founder or his heir, and both of them being dead it devolved upon Dhanukdhari Prasad Singh who, unaware of his right, failed to take action. On the findings at which I have arrived and in the events which have happened a right would devolve upon Sia Prasad Singh. But again this right was not exercised by him. No one being nominated nor coming within the line constituted by the founder, the parties in these proceedings can establish no right to the mutawalliship. The learned Judge relies upon the deed of gift by Kuar Sarabjit Protap Sahi to Dulhin Bhagwat Kuer admitting Dulhin Bhagwat Kuer's right as mutawalli of this endowment and making no claim to the office himself and also upon the fact that defendant no. 1 can only lay claim through Dhanukdhari. Dhanukdhari did not exercise his powers and again, as there was nothing to show that Bhagwat Kuer was nominated, she had no power to nominate defendant no. 1.

One of the points put forward by the appellant, however, is that rightly or wrongly Dulhin Bhagwat Kuer was in possession and therefore obtained a right to nominate by adverse possession. She, however, was in possession as executrix of the will of her husband and for a limited estate also. This question of adverse possession was not pleaded nor decided in the Court below, depending as it does on questions of fact such as the claim of the persons, to whom I have referred, either to nominate a line of holders of the office or to claim the mutawalliship themselves. cannot now be entertained. The learned Judge has In my judgment the contention of adverse possession disposed of the matter on the conclusion that none of the persons enumerated were entitled to hold the office

of mutawalli of the properties endowed by Bachu, and, as the claims made in the suits were not claims for appointment to the office by the Court, it was sufficient to hold that none of the claimants were entitled in those suits to succeed.

There remain two other questions to be determined; first, as to the validity of the endowments by Dulhin Bhagwat Kuer, and secondly, the claim by defendant no. 1 to the office of mutawalli. The Judge in the Court below has held that the endowments were beyond the power of Bhagwat Kuer. The question, therefore, as to the mutawalliship does not arise. It is obvious that if the Judge is right as regards the validity of the endowment, the second question does not arise. These endowments, as I have already said, are of the 7th of March, 1900, 19th of May, 1905, 10th of February, 1906, 3rd of November, 1913, and 29th of June, 1924. Reliance was in the first place placed upon the Will of Mahabir Prasad Singh which in paragraph 5, after referring to the dedication by Mahabir's father of considerable property to Sri Thakurji installed in the temple at Ajodhyaji, provides:

"5. My father has dedicated considerable property to six Thakurji installed at the Temple at Ajodhya for purposes of rag-bhog and charity and he also executed a wakfnama. It is my wish also to do one or two acts of dharam to perpetuate my name and fame, and this is known to my both wives. If I fail to fulfil my desire during my lifetime I authorise my wives who might survive to fulfil this desire of mine as set forth in paragraph 2, and the wakfnama, etc., which might be executed by them for this charitable act shall be operative and effectual to the same extent as the one which might have been executed by myself."

The translation before us omits the words 'one or two acts of dharam' which are taken from the translation by the Subordinate Judge which all parties admit as correct. Under that clause of the Will (which I have just read) and by reason of the general law it is contended that Bhagwat Kuer had

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power to make these endowments. The law on the subject is expressed by their Lordships of the Judicial Committee of the Privy Council in *Sardar Singh* v. *Kunj Behari Lal*(1) thus: "In their Lordships' opinion the Hindu law recognizes the validity of the dedication or alienation of a small fraction of the property by a Hindu female for the continuous benefit of the soul of the deceased owner". Against the argument in support of the validity of the endowment it is contended, first, that the provisions of the Will are too vague: *Ranchordas Vandrawandas* v. *Parvatibhai*(2). The first of the documents of the 7th of March, 1900, mentions no less than five acts of charity, and it is contended that if she had power to make the endowments of fractions of the property, she had exhausted that power completely by some of the purposes for which the endowment was made—admittedly about one-tenth of the whole property being the subject of these endowments. Again in the dedication of 1905 a statement is made

"by way of carrying out my husband's wish".

In this case the property endowed was of the value of Rs. 40,000 and it is contended that if this was the true purpose, the purpose had already been carried out by the earlier dedication of the 7th of March, 1900. Further in the document of February, 1906, Bhagwat Kuer purports to create more endowments on the ground that the properties already endowed were not sufficient to defray all the expenses of the temple and she denied that the two documents of March, 1900, and of May, 1905, were acts by which she carried out the object of perpetuating the memory of her husband. It would appear that the authority, if it was the authority of her husband upon which she was relying, had long since been exhausted, and it is impossible to contend that the lady was acting under

(1) (1922) I. L. R. 44 All. 503, 513; L. R. 49 Ind. App. 383, 394.
(2) (1899) L. R. 26 Ind. App. 71.

the general rule of the Hindu Law which would entitle her to dedicate a small fraction of the property of her husband for the benefit of his soul. It must be remembered her interest was limited, and no valid reason is put forward to support the transaction to which I have already referred, quite apart from the documents of 1913 and 1924. It is frankly conceded that the purpose of the 1913 endowment was for a Pathsala at Ajodhya which she herself had inaugurated. No mention is made of her husband and, therefore, it is impossible to say that she was continuing to carry out the authority of her husband under the Will. The other deed suffers from the same infirmity. Again in this transaction a property of the value of Rs. 40,000 was transferred. The Judge in the Court below has held that the authority in the Will was vague and void on account of uncertainty and that the endowments were not in accordance with the authority such as it was given under the Will. For that reason it was held that the endowments were inoperative against the plaintiff in the principal action. It is not an unreasonable view held by the Subordinate Judge that the purpose of these transactions was to benefit defendant no. 1 Raghava Surendra Sahi whom she adopted in 1906. In my judgment the learned Judge was correct in this view.

The decision on all these points being against the appellants the result is that all the appeals fail and must be dismissed with costs to the respondents being plaintiffs 1-a, 1-b, 2, 3 and 4 in the principal suit no. 38 of 1932. There will be two sets of hearing fee, one payable by the appellants in Appeals nos. 62, 63, 64 and 69 of 1935 and the other payable by appellants in Appeals nos. 139 and 197 of 1935.

AGARWALA, J.—These six appeals, which have been heard together, arise out of five suits which were tried together by the Subordinate Judge of Gaya,

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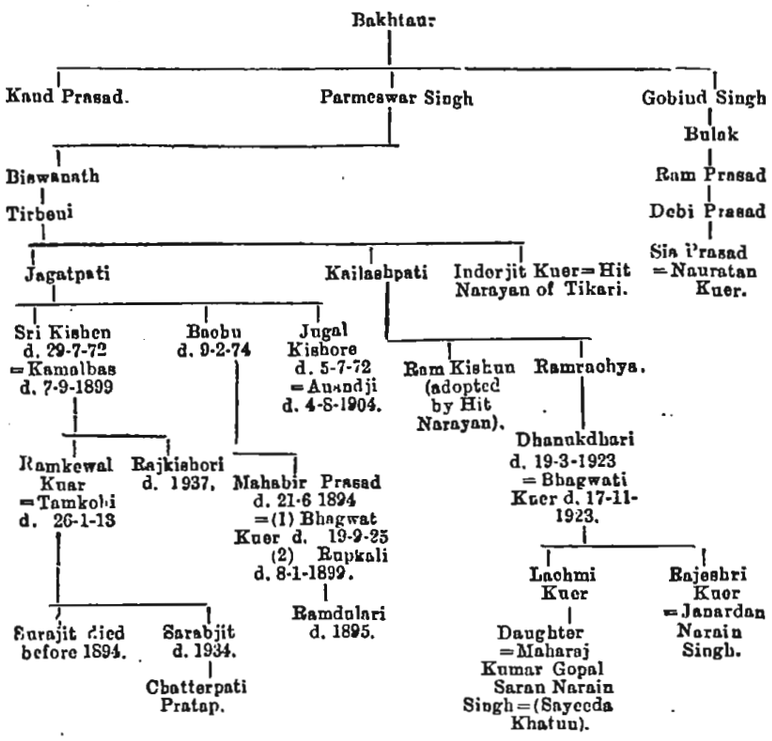
The following genealogical table will explain the relationship of the principal parties:



In 1863 Inderjit Kuer, daughter of Tirbeni Singh and wife of Maharaj Hit Narain of Tikari, made a grant known as the Lakhaipore mukarrari to Bachu Singh, one of the three sons of Jagatpati Singh, who was one of her two brothers. At the time the grantee was a member of an undivided Hindu family consisting of himself, his two brothers, Shrikishun and Jugal Kishore, and Ramrachya Singh, one of the sons of Kailaspati, brother of the grantee's father. In 1864 Ramrachya separated from Jagatpati's branch of the family taking with him a half share of the ancestral properties but no share in the

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mukarrari. Jugal Kishore died on the 5th of July, 1872, and Srikishun on the 29th of the same month. Bachu, the grantee of the mukarrari, died on the 8th of February, 1874, after obtaining succession certificates empowering him to collect the debts due to his brothers, Jugal Kishore and Srikishun, respectively. Kamalbas Kuer, widow of Srikishun, and Rajkishori Kuer, one of his daughters, had not opposed Bachu Singh's application for a succession certificate in respect of the debts of Srikishun and received from him, the widow a maintenance grant, and the daughter an absolute gift of certain properties. The application, however, so far as the debts of Srikishun were concerned, was opposed by his other daughter, Rani Ramkewal Kuer, and, so far as the debts due to Jugal Kishore's estate were concerned, by the latter's widow, Anandi Kuer. They denied that Srikishun and Jugal Kishore were joint with Bachu at the time of their deaths. The matter was decided in favour of Bachu Singh and after the latter's death his son, Mahabir Prasad, made a maintenance grant to Anandi Kuer by a deed, dated the 17th of May, 1874. Rani Ramkewal Kuer, however, challenged the decision by instituting Title Suit no. 163 of 1880 against Mahabir Prasad claiming her father's share in the ancestral properties. No claim was then advanced with regard to the mukarrari properties. The suit was compromised, Rani Ramkewal Kuer admitting Mahabir Prasad's title and receiving three villages from him. Rajkishori was impleaded in this suit. She and Sarabjit Pratap Sahi, son of Rani Ramkewal Kuer, who was then a minor, and his elder brother were parties to the compromise. In the result these disputes terminated in the widows of Srikishun and Jugal Kishore, and the descendants of the former, admitting that Srikishun and Jugal Kishore died in a state of jointness with Bachu and that the latter's son had succeeded to the joint family properties. But the Lakhaipore mukarrari was not the subject-matter of those disputes.

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Mahabir died on the 21st of June, 1894, leaving two widows, Bhagwat Kuer and Rupkali Kuer. On the 11th of October, 1894, the latter gave birth to a daughter, Ramdulari Kuer, who died on the 3rd of June, 1895. Rupkali died on the 8th of January, 1899. Kamalbas, widow of Srikishun, died on the 9th of September, 1899, Anandi Kuer, widow of Jugal Kishore, on the 4th of August, 1904 and Bhagwat Kuer on the 19th September, 1925. Under the Will of Mahabir Prasad his estate was given to his widows successively for life, and his daughter, Ramdulari, on her birth became entitled to the reversionary estate.

The various claimants to these properties are the parties to this litigation and the principal question on which they are at issue is as to who ultimately inherited the estate which Ramdulari obtained under the Will of her father, Mahabir. The parties are all agreed that the estate of Mahabir vested in Ramdulari on her birth and that on her death it passed to her mother, Rupkali Kuer. The contention of Raghava Surendra Sahi and his son Hari Surendra Sahi, who are plaintiffs in Title Suits nos. 40 and 41 of 1932 and defendants in Suits nos. 30 of 1930 and 38 of 1932, is that on the death of Rupkali Kuer the estate of her daughter Ramdulari passed to Dhanukdhari, who was at that time the nearest reversioner of Ramdularis's father, Mahabir, the latter's senior widow, Bhagwat Kuer, being excluded from inheriting the estate of her step-daughter. This contention was challenged by Sia Prasad who instituted Title Suit no. 38 of 1932 and by Sarabjit Pratap who was the plaintiff in Title Suit no. 30 of 1930. Both these persons have since died. Sia Prasad's widow, Nauratan Kuer, was substituted in his place and Sarabjit's son Chatterpati in his place. The contention of the plaintiff in Title Suit no. 30 of 1930 is that at the time of Bhagwat Kuer's death he was the

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nearest kinsman and heir of Mahabir although he was a cognate and not an agnatic relation. Sia Prasad's claim was based on the Mitakshara text that cognates do not succeed until other classes of heirs are exhausted.

As between the claim of Sia Prasad, who instituted Title Suit no. 38 of 1932, and the claim of Sarabjit Pratap, who instituted Title Suit no. 30 of 1930 (and whose representative is the appellant in First Appeals nos. 139 and 197 of 1935) the right to succeed to the stridhan property of Ramdulari on the death of her step-mother, Bhagwat Kuer, depends on the question whether the claim of a remote agnate is to be preferred to that of a less remote cognate. The parties are agreed, and it is clear, that in the case of a maiden the heirs to her stridhan are, first, her uterine brothers, secondly, her mother and, thirdly, her father. After this, it is contended by Sir Sultan Ahmed, in support of Sia Prasad's claim, that the heir to the deceased maiden's stridhan is the same as the heir to her father's property. In support of the claim of Sarabjit Pratap, however, Mr. Das contends that the next heir to the stridhan is not the father's heir but his nearest relation. Mr. Das founds his contention on the text of Manu, Ch. IX, verse 187: "The property of a near *sapinda* shall be that of a near *sapinda*", as explained by the Privy Council in *Ramchandra Martand Waikar* v. *Vinayek Venkatesh Kothekar*(1), and in the commentary of Viramitrodaya. The Mitakshara divides *sapindas*, or blood relations, into two classes, *gotraja sapindas* and *bhinna-gotra sapindas* or *bandhus*. The Privy Council pointed out that while the Mitakshara uses the word *sapinda* in its wider sense to include all blood relations (i.e. all persons having particles of the same body as the deceased) it lays down rules for the limitation of the *sapinda* relationship which confines it to blood relations within seven degrees on

(1) 1914 I. L. R. 42 Cal. 384; L. R. 41 Ind. App. 290.

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the male side and five degrees on the female side. In *Ramchandra Martand Waikar* v. *Vinayek Venkatesh Kothekar*(1) their Lordships of the Privy Council rejected the contention that the Mitakshara uses the word *sapinda* in its narrower sense only in relation to marriage, impurity and exequial rites and not in relation to inheritance. They approved of the observations of the Full Bench in *Umaid Bahadur* v. *Udoi Chand*(2) with reference to the meaning of *sapinda* in the Mitakshara: "Having taken great pains in accurately defining the word '*sapinda*' in the beginning of his work, and having once said in clear words in the passage in question that 'one ought to know that *wherever the word sapinda is used* there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent', it is hardly reasonable to suppose that the author used the word in another part of the work in a different sense. It is a well-understood rule of construction amongst the authors of the Institutes of Hindu Law, that the same word must be taken to have been used in one and the same sense throughout a work, unless the contrary is expressly indicated".

With regard to the succession to stridhan property the Mitakshara cites a text of Yagnavalkya that if it be the property of a woman married in one of the orthodox forms it will go to her daughters, and, in default of them, to her husband. In the case of a woman married in an unorthodox form her stridhan goes to her father and mother on failure of her own issue. It is common ground that the rules relating to the succession to stridhan are the same in the case of a maiden who has no brothers and a woman married in an unorthodox form and dying without issue.

A text of Baudhayana is cited in the Mitakshara as regulating succession to the stridhan of a maidan:

(1) (1914) I. L. R. 42 Cal. 384; L. R. 41 Ind. App. 290.
(2) (1880) I. L. R. 6 Cal. 119, 126, F. B.

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"The wealth of a deceased maiden let the uterine brothers themselves take; on failure of them it shall belong to the mother; or if she be dead to the father." Viramitrodaya, who was a commentator on the Mitakshara, after referring to this text, says, "On failure of the mother and father it goes to their nearest relations". The question on which the parties are at issue is whether "relations" (*sapinda*) is here used in the sense of *sapindas* generally or whether it is confined to the meaning defined in the Mitakshara. Mr. Das contrasts the word '*sapinda*' in the commentary of Viramitrodaya with reference to succession to stridhan with the term '*gotraja sapinda*' used in the text of Yagnavalkya cited in the Mitakshara in speaking of succession to the property of a male dying without issue. With regard to the latter Yaganavalkya's text is: "The wife and the daughters also, both parents, brothers likewise and their sons, gentiles (*gotrajas*), cognates (*bandhus*), a pupil and a fellow student. On failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven leaving no lineal male descendant (*putra*)". The Mitakshara, Chapter II, section 5, after referring to the order of succession among the *gotrajas* says: "If there be none such, the succession devolves on *samanodakas*, and they must be understood to reach the seven degrees beyond *sapindas*, or also as far as the limit of the knowledge and name extend. Accordingly Vrihat Manu says, 'The relation of the *sapinda* ceases with the seventh person, and that of *samanodakas* extends to the 14th degree, or, as some affirm, it reaches as far as the memory of birth and name extends'. This is signified by *gotra*".

Mr. Das contends that since the word *sapinda* in the Mitakshara is to be used in the same sense throughout and since, in describing the succession to stridhan, the word used is *sapinda*, and not *gotraja sapindas*

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as in the case of succession to the property of a male, the author of the Mitakshara must be taken to have intended to indicate that the two lines of succession were not the same, that is to say, whereas in the latter case *gotraja sapindas* and *samanodakas* have preference over *bhinna-gotra sapindas*, in the case of stridhan they have no such preference and the heir must be ascertained from among the *sapindas* generally by applying the test of religious efficacy. He referred to Viramitrodaya, Chapter V, Part II (Setlur), for the purpose of shewing that this writer also held that the lines of succession in the two cases are different. In section 9 the author explains that in the case of a woman married in an unorthodox form, in default of issue, her stridhan goes first to her mother and then to her father, although the text mentions only father. In section 14 the author says, "But when there is a failure of the above mentioned heirs to a childless woman's property, Brihaspati ordains—(here follows a list of persons pronounced to be similar to a mother, whom some writers call secondary mothers): if they (the secondary mothers) leave no issue of the body, nor son (of a rival wife) nor daughter's sons, nor their sons, the sister's son and the rest shall take their property." It is then explained that the term '*aurasa*' or 'issue of the body' includes both sons and daughters, and that 'their sons' relates to the term 'issue of the body' and 'son (of a rival wife)' and not to the term 'daughter's son' "*because the son of a daughter is not competent to offer oblations*". The author proceeds: "Hence on failure of heirs down to the daughter's son, first the '*aurasa*' inherits, after him his sons and grandsons. For it is proper that the succession should devolve on them, *inasmuch as they are competent to present the pinda*.....In their default, the son of a rival wife, his son and grandson (become heirs in their order) *by reason of their being, under the circumstances, the giver of the*

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pinda.....Hence on failure of these, the sister's son and the rest alone, in spite of the *sapindas*, such as the father-in-law are, by virtue of the text (of Brihaspati) which is not reconcilable in any other way, entitled to succeed, *according to their comparative propinquity*, to the property of their mothers, sister and the rest ". Here, contends Mr. Das, Viramitrodaya shews that the heir is to be found by applying the doctrine of religous efficacy to *sapindas* in general for among the" secondary sons " enumerated in the text of Brihaspati are persons who are cognates. It is to be remembered that, historically, until Yagnavalkya's text recognized the claims of cognates to succeed to the propery of a male, in default of agnates, cognates had no right of inheritance at all. Yagnavalkya having, in the case of the property of a male, postponed them to agnates, it is contended that Viramitrodaya, who was commenting on and explaining the text of Yagnavalkya, intended to place them on the same footing as agnates in relation to the property of a woman. In Chapter III, Part I, relating to the succession to the property of a separated male, Viramitrodaya states, in section 3, " But in fact when a person in whom rights vested dies, it is proper that the property should be inherited by his near relations.....when the owner of any property is dead, then if he leave no male issue, his property is inherited by his relations such as his wife, etc." There the author is clearly referring to the text of Yagnavalkya: " The wife, and the daughters also, both parents, brothers uterine, and their sons, gentiles (*gotrajas*), cognates (*bandhus*)....." in support of his proposition that " When a person in whom right vested dies, it is proper that the property should be inherited by his near relations ". In section 9 of Part II, Chapter I, relating to women's property the author explains, " It goes to the mother in the first instance, and after her to the father, according to the principle set forth while explaining

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the term 'parents' in the text (of Yagnavalkya), 'the wife and the daughters also, the parents, etc.', there being no other text against the application of that principle to the present case". Sir Sultan Ahmed contends that the citation of Yagnavalkya's text in this context indicates that what Viramitrodaya meant was that on failure of the mother, the father gets the property and, on failure of the father, it goes to the other persons mentioned in the text of Yagnavalkaya in the order there given.

Apparently the rival claims of a near *bandhu* and a more remote agnate to succeed to the stridhan of a maiden have never been directly in issue before, but the opposing views presented, respectively, by Mr. Das and Sir Sultan Ahmed in these appeals have been advanced in many reported cases and have been the subject of discussion by many text-book writers, and the view now supported by Mr. Das has not been accepted. The text of Brihaspati on which Mr. Das relies has been cited by commentators whose works are authorities in the Bombay, Madras, Mithila and Benares Schools, respectively, but no text-book writer has accepted it in the sense contended for by Mr. Das, and no Court has construed it in that sense: *see Bai Kesserbai* v. *Hunsraj Morarji*(1), *Nanja Pillai* v. *Sivabagyathachi*(2), *Kanakammal* v. *Ananthamathi Ammal*(3), *Kamala Bai v. Bhagirathi Bai*(4), *Sundaram Pillai* v. *Ramasamia Pillai*(5), *Kamala Prasad* v. *Murli Manohar*(6) and *Dwarka Nath Roy* v. *Sarat Chandra Singh Roy*(7). In all these cases the text of Yagnavalkya with regard to succession to the property of a male was applied to the stridhan property of a woman and no instance has been cited in

(1) (1906) I. L. R. 30 Bom. 431; L. R. 33 Ind. App. 176.
(2) (1911) I. L. R. 36 Mad. 116.
(3) (1912) I. L. R. 37 Mad. 293.
(4) (1912) I. L. R. 38 Mad. 45.
(5) (1919) I. L. R. 43 Mad. 32.
(6) (1934) I. L. R. 13 Pat. 550.
(7) (1911) I. L. R. 39 Cal. 319.

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which that text was not applied. In *Nanja Pillai* v. *Sivabagyathachi*(1), the text of the Mitakshara (Chapter II, section xi, pl. 11) that on the failure of the husband of a woman married in an orthodox form the property "goes to his nearest kinsmen (*sapindas*)" was under consideration. The then learned Chief Justice said, "The meaning of the above text is plain, it means that the stridhan property of a woman married according to an orthodox form who has left no issue will devolve on her husband, and on failure of the husband the property will go to his *sapindas* in the order laid down in the Mitakshara with reference to succession to the property of a male. That is to say, we have to ascertain the person who would succeed to the property as the nearest *sapinda* of the husband if the property belonged to him. *And that is the interpretation which has been placed upon the text whenever it has had to be considered.* This view was reiterated in *Kanakammal* v. *Ananthamathi Ammal*(2) where the learned Judges after citing the passage quoted above, went on to say, "No authority has been quoted for the suggestions of the learned Vakil for appellant that the term *sapinda* in Mitakshara, Chapter II, section 11, pl. 11, should be understood in a different sense to that in which it would be used in reference to inheritance from a male". Again Philips, J. in *Sundaram Pillai* v. *Ramasamia Pillai*(3) said, "I am unable to accept the contention based on the single sentence of the judgment in *Kamala* v. *Bhagirathi*(4) that the father's *sapindas* in a case when the property of a female is concerned are different to the *sapindas* in the case of a male's property. In the absence of any rule to the contrary the *sapindas* must always be the same".

The true construction of the text of Brihaspati was decided by the Privy Council in *Bai Kesserbai* v.

(1) (1911) I. L. R. 36 Mad. 116.
(2) (1912) I. L. R. 37 Mad. 293.
(3) (1919) I. L. R. 43 Mad. 32, 34.
(4) (1912) I. L. R. 38 Mad. 45.

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Hunsraj Morarji(1) in which it was held that the text is merely illustrative, enumerating some of the heirs entitled to succeed to the stridhan of a woman on failure of her husband, in the case of a woman married in an orthodox form, and of her father, in the case of a woman married in an unorthodox form, and that the order of succession is not indicated in that text. Mr. Das does not accept that decision as authority for the proposition that the proper order, in the case of succession to the stridhan property of a woman, is the same as in the case of the property of a male. He relies on the fact that the claim which the Privy Council upheld in that case was the claim of a co-widow and he contends that even on the view which he has presented the co-widow would exclude all other *sapindas* because she is the nearest *sapinda* of her deceased husband. He referred to section 15 of Part II of Chapter V of Viramitrodaya [Setlur] as authority supporting the co-widow's rights. In that section the author is commenting on Manu's text disinheriting women and mentions that the only exception is in favour of those women " whose right of succession has been expressly mentioned in texts such as ' The wife and the daughters, also, etc.' " Mr. Das admits that the author is actually applying the text of Yagnavalkya to stridhan, for he relies on section 15 to defeat the claim of Dhanukdhari to succeed in preference to Bhagwat Kuer, the step-mother of Ramdulari, but he contends that in paragraph 15 Viramitrodaya has not applied to stridhan the whole of Yagnavalkya's text relating to the property of a male but only a part of it, namely, " The wife and the daughters, also ". It is true that the text is being cited merely to illustrate the rule that only specially mentioned women have a right to inherit and, therefore, in section 15 the commentator cannot be held to have cited it for anything more than in support of the claims of certain women. In section 9, however, the same commentator cites the same text

(1) (1906) I. L. R. 30 Bom. 431; L. R. 33 Ind. App. 176.

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of Yagnavalkya in discussing succession to the property of a childless woman married in an unorthodox form. In such a case, according to the Mitakshara the property goes " to the father ". In section 9 Viramitrodaya explains that by " father " is here meant parents and goes on, " Amongst them also, it goes to the mother in the first instance, and after her to the father, according to the principle set forth above while explaining the term 'parents' in the text, ' the wife and the daughters also, the parents, etc.', there being no other text against the application of that principle for the present case." Mr. Das' comment on the fact that Yagnavalkya's text is quoted in this context is that it is an instance in which Viramitrodaya has cited in support of his own conclusions a text which is inapt for that purpose and, therefore, that it should not be read as incorporating into Viramitrodaya's discussion of the succession to a maiden's property, Yagnavalkya's rule regarding succession to the property of a male. That, however, is not the view taken by Kamalakara in his Vivada Tandava or by other commentators. Discussing succession to the stridhan of a woman married in an orthodox form Kamalakara says, " In default of husband the estate is obtained by his near relation beginning with ' the lawfully weeded wife and the daughter, etc.,' as prescribed by the text of Yagnavalkya in the rule about succession to a sonless man ". By this passage it has been generally understood that in Kamalakara's view the succession to stridhan, in default of husband in the case of a woman married in an orthodox form, and in default of father in other cases, was that the heirs of the husband or father succeeded in the order laid down in Yagnavalkya's text relating to succession to the property of a male. West and Buhler (4th Ed. p. 485) say, " This opinion (of Kamalakara) seems to be based on the consideration that, as the *sapindas* inherit only through the husband, they virtually succeed to property coming from him, and that consequently they must inherit in the order prescribed for the succession to a male's

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estate ". They then refer to the view now presented by Mr. Das and continue, " But, the identity of the wife with her husband being accepted as a leading principle of the Mitakshara, the rule seems on the whole most consonant with it, whereby precedence in heritable relation to him gives a like precedence and order of succession to his widow. Such appears to be the rule, too, which custom has preferred in this part of India ". *See* also Vyvastha Chandrika (Shyama Charan Sarkar, Vol. II, p. 539). Sir Gooroodass Banerjee in his Tagore Law Lectures on the Hindu Law of Marriage and Stridhan [9th Lecture, 4th Ed. pp. 383, 389] refers to the discussion of the subject by West and Buhler and says, " In this conflict of authority it is not easy to say which view is correct. But Kamalakara's opinion is entitled to be followed as authority in the Benares School when it is not in conflict with that of any higher authority; and in the present instance the rule based upon his opinion has the further recommendation of being simple, as it makes the order of succession to stridhan correspond, after a certain point, to that applicable to a man's property ". Another eminent Sindu Jurist, Golapchandra Sarkar Sastri [Hindu Law, 6th Ed. pp. 730, 731] after citing Viramitrodaya's comment on Baudhayana's text—"On the failure of the mother and the father, it goes to their nearest relations " says, " It seems that a maiden's status is similar to that of a woman married in a disapproved form of marriage, both being under the *patria potestas* of their father. The term ' their nearest relations ' must be the father's relations, in the first instance, inasmuch as they are also the mother's relations, so the term is not to be used distributively; and in default of such relations the relations of the mother alone become heirs.....It should be noticed that the nearness or propinquity is the principle on which the order of succession is worked out in the Mitakshara, hence the relations are to take a woman's property in the same order in

which they would become heirs to her husband or father or mother ".

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Mr. Das' comment on these writers is that they all misunderstood the text of Kamalakara because they made the mistake of directing their attention to one passage of his work and failed to notice what he said later on, and that to accept their view is to give *samanodakas* preference over *bandhus* which, he contends, is directly contrary to the Mitakshara rule that the heir to a maiden's stridhan is to be looked for among the *sapindas* in the sense in which that word is defined in the Mitakshara. His contention is that Kamalakara's final conclusion is that in default of husband or father the heir is to be found by applying the doctrine of religious efficacy to the *sapindas* generally without reference to the particular class of *sapindas* to which they may belong. It is a startling suggestion that so many eminent Sanskrit scholars and jurists should have missed what is so obvious to Mr. Das. In *Dwarka Nath Roy* v. *Sarat Chandra Singh Roy*(1) the question of succession to the stridhan of a woman married in an unorthodox form was considered and although the issue did not arise between a cognate and an agnate the texts relevant to the latter point was fully discussed by Chatterjea, J. who said, " So that, according to Kamalakara, the nearness of kinsmen in the rule laid down in the Mitakshara is to be determined according to the well known text of Yagnavalkya relating to the succession to a male owner dying without issue ". The decision in this case was followed in *Nanja Pillai* v. *Sivabagyathachi*(2) which has already been referred to. In this state of judicial dicta and the comments of learned Sanskrit scholars and jurists I have no hesitation in rejecting the contention of Mr. Das in support of the claim that Sarabjit is to be preferred as an heir to Mahabir in preference to Sia Prasad. Even if the texts and commentaries are

(1) (1911) I. L. R. 39 Cal. 819.
(2) (1911) I. L. R. 36 Mad. 116.

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capable of being construed in the sense for which he contends I should hesitate to adopt that construction for it would inevitably have the effect of upsetting titles long founded on the contrary view.

Certain other facts must now be stated in order to understand the claims of Raghava Surendra and his son, who are the appellants in the principal appeal (First Appeal no. 69 of 1935, arising out of Title Suit no. 38 of 1932). By an ekrarnama of the 12th February, 1906, Bhagwat Kuer proclaimed that she had adopted Raghava Surendra Sahi as son to her deceased husband. Thereupon, on the 8th of February, 1907, Dhanukdhari Singh, son of Ramrachya, executed a sale deed in favour of Ambica Prasad Singh of Tikari purporting to convey a two-thirds share of the Lakhaipore mukarrari and a 2 annas 8 pies share of certain of the ancestral properties. The sale deed recited that the Lakhaipore mukarrari had belonged jointly to Srikishun, Bachu and Jugal Kishore and that they had separated from each other; that on the death of the widows of Srikishun and Jugal Kishore the shares of the two latter had devolved on Dhanukdhari, who, on the death of Ramdulari, also inherited the estate left her by Mahabir Prasad, and that in order to raise money to finance litigation for the purpose of recovering the properties from Mahabir's widow, Bhagwat Kuer, who was in illegal possession of them, the vendor was obliged to sell the shares of Jugal Kishore and Bachu in the mukarrari, amounting to two-thirds, and the half share of Jugal Kishore in the other properties. The vendor and the vendee then instituted three suits. Title Suit no. 198 of 1907 was to recover the one-third share of Bachu which devolved on his son Mahabir; Title Suit no. 199 of 1907 was to recover the one-third share of Jugal Kishore, and Title Suit no. 200 of 1907 was to obtain a declaration that the adoption of Raghava Surendra Sahi was invalid. The last suit succeeded. The other two were finally dismissed by the Privy Council in 1919.

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In the meantime, Sarabjit Pratap, son of Rani Ramkewal Kuer, instituted Title Suit no. 153 of 1911 to recover the one-third share of his maternal grand-father Srikishun although he and his brother had signed the compromise entered into by his mother which admitted that Srikishun had died in a state of jointness with his brothers. While the suit was pending in appeal to the Privy Council the parties entered into what they called a family arrangement, for the purpose of settling their disputes. The arrangement is evidenced by three deeds. By the first, dated the 8th of January, 1921, Bhagwat Kuer purported to release the one-third share of Srikishun in favour of the latter's daughter Rajkishori. By the second deed, dated 9th of January, 1921, Rajkishori purported to surrender this one-third share to Sarabjit Pratap, son of her sister, Rani Ramkewal Kuer. By the third deed, dated 10th of January, 1921, Sarabjit Pratap purported to transfer to Bhagwat Kuer absolutely, by way of gift, most of the properties included in the one-third share. One of the properties, however, was given to Rajkishori and the remainder were retained by Sarabjit Pratap himself. Dhanukdhari died on the 19th of March, 1923, and his widow on the 12th of November, in the same year.

While an application by Bhagwat Kuer, for mesne profits, against the plaintiffs of Suit no. 199 of 1907 was pending, a compromise was arrived at on the 10th of February, 1924, between Bhagwat Kuer on one side and Ambica Prasad Singh and his son, Maharaj Kumar Gopal Saran Narain Singh to whom he had made a gift of the two-third share in the mukarrari properties purchased from Dhanukdhari on the 8th of February, 1907, on the other side. Ambica Prasad and his son executed a kebala in favour of Bhagwat Kuer by which they sold to her their rights in the two-third share, except nine villages, and Bhagwat Kuer executed a kebala in

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favour of the Maharaj Kumar in respect of the one-third share of the aforesaid nine villages and a deed of surrender in respect of the remaining two-thirds share. On the 2nd of July, 1924, Bhagwat Kuer made a gift of 52 villages out of the two-thirds share to Hari Surendra Sahi, son of Raghava Surendra Sahi. She died on the 19th September, 1925. Lachmi Kuer, a daughter of Dhanukdhari, was then recorded in Register D as proprietress in respect of some of the ancestral properties. As a result of disputes with respect to the Gaya properties all the latter were attached by the District Magistrate under section 146 of the Code of Criminal Procedure.

With regard to the two-thirds share which Dhanukdhari purported to sell in 1907 and which the vendee conveyed to Bhagwat Kuer, it is necessary for these appellants to establish that the estate of Ramdulari was inherited by Dhanukdhari and not by her step-mother Bhagwat Kuer. It is contended that a step-mother never, in any circumstances, inherits the stridhan property of her step-daughter. In support of this proposition reference was made to three cases none of which, however, is directly in point.

In *Jullessur Kooer* v. *Uggur Roy*(1) the rival claimants were the *gotraja sapindas* and the sister of the last male owner, respectively. The claim of the sister was rejected on the ground that she is not one of the heirs enumerated in the Mitakshara.

In *Tahaldai Kumri* v. *Gaya Pershad Sahu*(2) the rival claimants to the estates of two deceased brothers were their father's sister's sons and their step-mother, respectively. The latter's claim was disallowed.

(1) (1882) I. L. R. 9 Cal. 725.

(2) (1909) I. L. R. 37 Cal. 214.

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The third case is *Ramanand* v. *Surgiani*(1) in which it was held that a step-mother, not being one of the females expressly named in the Mitakshara and not being included under the term " mother " in Chapter II, section 3, cannot inherit from her deceased step-son.

The point which falls for decision in these appeals, namely, the right to inherit stridhan property, was considered in *Kamala Bai* v. *Bhagirathi Bai*(2) and decided in favour of the step-mother. There the contest was between the maternal aunt and the step-mother of a deceased maiden. The aunt's claim was disallowed. It is true that this case arose in the Madras Presidency but we have not been referred to any authority holding that in respect of stri dhan property the Hindu Law of Inheritance as administered in this Province differs from that of Madras. It was, however, contended that the Madras case did not refer to the text of Viramitrodaya relating to succession to the stridhan of an unmarried girl. It is argued that when the succession to stridhan has been traced as far as the father of a deceased maiden the property then passes to the heirs of the father as it were the property of a male. Accordingly, it is contended, it cannot be inherited by a female agnatic relation unless she be one of those expressly mentioned as heirs of a male, and a step-mother is not so mentioned. But in discussing sucession to stridhan, Viramitrodaya [Setlur, Chapter V, Part II, section 15] expressly introduces the text of Yagnavalkya—" The wife and the daughters also, both parents, brothers likewise, and their sons ..... "as an instance of certain women being specifically mentioned as heirs, and there seems to be no reason why this particular text should have been cited in that context if at least the relevant portions of it

(1) (1894) I. L. R. 16 All. 221.

(2) (1912) I. L. R. 38 Mad. 45.

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were not to apply to stridhan ; that is to say, if it were not cited as an instance of certain women being heirs to stridhan. Bhagwat Kuer was the wife of Mahabir, the father of Ramdulari, and hence is mentioned in Viramitrodaya as one of the heirs. The claim of Raghava Surendra Sahi and his son, so far as it is based on Dhanukdhari's right of inheritance, therefore, fails. This disposes of their claim to the two-third share which was the subject-matter of Dhanukdhari's sale to Ambica Prasad Singh, which was subsequently purchased from the latter's son by Bhagwat Kuer from whom the appellants claim.

With regard to the one-third share which belonged to Srikishun, these same claimants make an alternative case. They contend that in the litigation initiated by Dhanukdhari in 1907 which was determined in the Privy Council in 1919 it was decided that each of the three brothers, Srikishun, Bachu and Jugalkishore separated, and that each had a one-third share in the property; that Bhagwat Kuer put Srikishun's daughter Rajkishori in possession by the deed of release of the 8th January 1921; that Rajkishori surrendered it to Srikishun's grandson Sarabjit Pratap on the 9th January, 1921, and that the latter conveyed it absolutely to Bhagwat Kuer from whom the appellants obtained it by a deed of gift on the 10th January, 1921. It is argued that the decision of the litigation of 1907 operates as res judicata as to Srikishun's right to one-third of the mukarrari. The transactions of 1921 were relied upon as a family arrangement by which were settled the disputes between Bhagwat Kuer on the one hand and those interested in the estate of Srikishun on the other.

The Subordinate Judge overruled the plea of res judicata and held that the mukarrari grant was to Bachu alone, that there was no real dispute to be settled in 1921 and that if such a dispute existed the

settlement was not *bona fide* for the protection of the estate of which Bhagwat Kuer was in possession as a life tenant, but a device to convert her life interest in the one-third share into an absolute estate for the purpose of enabling her to convey it to Raghava Surendra Sahi. It was not contended that the Subordinate Judge's finding that the mukarrari was granted to Bachu alone is wrong in so far as it is based on the evidence in this case. The finding was at first challenged on the ground that the matter was concluded by the decision in the litigation of 1907 and a considerable amount of time was taken in discussing this question, both by the appellants and the respondents. In his reply, however, Dr. Dwarka Nath Mitter, the learned Advocate for the appellants in F. A. 69 of 1935, stated that he accepted the conclusion of the Subordinate Judge on the question of res judicata and also his finding that the transactions of 1921 did not amount to a family arrangement by way of settlement of a dispute.

The next question is as to the validity of endowments made by Bhagwat Kuer. They were all challenged both by Sia Prasad and Sarabjit Pratap and by Lachmi Kuer, a daughter of Dhanukdhari Prasad. Raghava Surendra claimed them to be valid. With regard to two deeds of endowment executed in 1905 and 1906, respectively, he sought for a declaration of their validity in Title Suit no. 41 of 1932.

In 1873 Bachu Singh conveyed six villages out of the Lakhaipore mukarrari to the deities installed by him in a temple at Ajodhya to whom he also assigned Rs. 40,000 owing to him by debtors. After his death this money was repaid by the debtors to Bachu Singh's son, Mahabir, who, however, instead of handing it to the shebait of the temple, conveyed another six of the mukarrari villages to the deities in lieu of it. The validity of these endowments is not in question.

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In 1900, after the death of Mahabir, his widow, Bhagwat Kuer, purporting to act under his Will, conveyed certain properties valued at Rs. 60,000 for the maintenance of a Sanskrit school at Ajodhya and a temple at Chapra. In 1905 she dedicated other properties valued at Rs. 40,000 to a temple which she herself founded at Ajodhya. Further properties valued at Rs. 32,000 were dedicated to this temple in 1906 and to the school in 1913. On 29th June, 1924, Bhagwat Kuer dedicated to the temple at Chapra her deceased husband's residential house at Chapra with the out-houses and land appurtenant to it valued at Rs. 40,000 as a residence for the mutwalli of the endowed properties. She herself was the mutwalli at the time. The deed stated that on her death Raghava Surendra, and after him Hari Surendra, would be the mutawalli.

The relevant portions of Mahabir's Will are as follows :—

"*1.* I have two wives. If by the grace of God one or both of them got issues, they shall, on my death, enter into possession and occupation of all my moveable and immoveable properties, ancestral as well as acquired, so that the name of my ancestors may be perpetuated and the expenses on charity and temple, etc., which have been met from the time of my ancestors down to the present time, as well as the expenses thereon to be provided for by me hereafter may continue to be defrayed exactly in the same manner as has (hitherto) been done, so that charitable acts may continue to be done in the family.

"*3.* If my children are minors at the time of my death, the senior wife and on her death the junior wife who are both very intelligent, possessed of administrative ability and pious, shall act as their guardian till they attain majority, and manage the estate, giving training to the boys, and carry out the orders of the hakims for the time being.

* * * * * *

"*5.* My father has dedicated considerable property to Sri Thakurji installed at the temple at Ajodhya for purposes of rag-bhog and charity and he has also executed a wakfnama. It is my wish also to do one or two acts of dharm to perpetuate my name and fame, and this is known to my wives. If I fail to fulfil my desire during my life time I authorise my wives who might survive to fulfil this desire

of mine as set forth in paragraph 2, and the wakfnama which might be executed by them for this charitable act shall be operative and effectual to the same extent as the one which might have been executed by myself....."

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The reference in paragraph 5 to "paragraph 2" is apparently a mistake. It seems that paragraph 1 was meant. The phrase "one or two acts of dharm" are taken from the translation of the Will by the learned Subordinate Judge which is admittedly accurate. In *Runchordas Vandrawandas* v. *Parvatibhai*(1) it was held that a bequest for dharm was too vague and uncertain to be given effect to. In *Vaidyanatha Ayyar* v. *Swaminatha Ayyar*(2), on the other hand, the charity to be benefited was a chattiram, a known and certain charity. It was contended in the present case that as the phrase "known to my wife" explains and amplifies the phrase "one or two acts of dharm" the acts of dharm are indicated with sufficient certainty to be enforced. The learned Subordinate Judge has found that there is no reliable evidence as to what, if any, were the acts of dharm which the testator had communicated to his wives and nothing has been said in these appeals which leads me to reject his conclusion on this point.

Apart from the Will, however, it is contended that Bhagwat Kuer had power under the Hindu law to dedicate a portion of her husband's estate to religious and charitable objects. That a widow has such a power is not contested but the widow's act must be reasonable, having regard to the value of the estate, and its object must be such as according to the notions prevalent in Hindu society conduce to the spiritual benefit of her husband [*See Lal Ram Singh* v. *Deputy Commissioner of Pratabgarh*(3)]. The

(1) (1899) L. R. 26 Ind. App. 71, 80.

(2) (1924) L. R. 51 Ind. App. 282.

(3) (1923) I. L. R. 45 All. 596, P. C.

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value of the dedicated properties according to the deeds is Rs. 1,72,000. In the course of the argument Dr. Mitter in supporting the dedications admitted that they amounted to a tenth of the estate. The object of the endowments has been found by the learned Subordinate Judge to be for the material benefit of Raghava Surendra and, if any spiritual benefit was in view, it was the spiritual benefit of Bhagwat Kuer herself. The circumstances of the case support the conclusion arrived at by the Subordinate Judge. She first attempted to adopt Raghava Surendra as the son of her deceased husband. When this failed she conveyed part of the estate to him and the balance, except the dedicated properties, to his son. She appointed him as mutawalli of all the dedicated properties and even put him in possession of the family residential house. None of the dedications was for the benefit of the deity installed by her husband's father at Ajodhya. In this respect the facts are similar to those in *Ram Kawal Singh* v. *Ram Kishore Das*(1) where a widow alienated a part of her deceased husband's estate for the maintenance of a deity which had not been installed by him and the dedication was found to be prima facie for the widow's own spiritual benefit and not that of her husband. Mr. Das, who challenged the dedications on behalf of Sarabjit Pratap, contended that under the Hindu Law a woman in possession of a life estate is entitled to dedicate part of the estate for the spiritual benefit of the last full owner only and, therefore, in the present case all alienations not for the spiritual benefit of Ram Dulari are void. He relied on an observation of their Lordships of the Privy Council in *Sardar Singh* v. *Kunj Behari Lal*(2)—". In their Lordships' opinion the Hindu Law recognises the validity of the dedication or alienation of a small portion of the property

(1) (1895) I. L. R. 22 Cal. 506.
(2) (1922) I. L. R. 44 All. 503; L. R. 49 Ind. App. 388.

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of a Hindu female for the continuous benefit of the deceased owner ". In that case the deceased owner was a male. It is not necessary to discuss this aspect of the matter, because in my view of the facts the alienations of Bhagwat Kuer were intended neither for the spiritual benefit of Ram Dulari Kuer nor Mahabir. For the same reason it is not necessary to discuss further the validity of the provisions of the Will under which Bhagwat Kuer purported to act although it was contended that Mahabir having bequeathed a vested zemindari to Ram Dulari the subsequent provisions empowering the widows to use a part of the estate for acts of dharm were void. In the result, therefore, the only dedications of Bhagwat Kuer which can be held to be valid are those of her own stridhan properties. Of these latter she appointed Raghava Surendra the mutawalli and her right to do so is not challenged. With regard, however, to the endowments made by Bachu Singh and the six villages transferred to the temple at Ajodhya by Mahabir, the right to the mutawalliship was claimed in the suits by Nauratan Kuer, widow of Sia Prasad, Sarabjit Pratap, Lachmi Kuer, daughter of Dhanukdhari and Raghava Surendra. The Subordinate Judge rejected the claims of all of them and only the last mentioned appeals. His claim is based on a deed of management of all the dedicated properties executed by Bhagwat Kuer in his favour on the 8th September, 1924, on the strength of which he succeeded in having himself recorded in Register D as mutawalli. In the deed of endowment executed by Bachu Singh in 1873 he appointed himself as the first mutawalli and his son, Mahabir, as his successor and confined the succession thereafter to the eldest and worthy son of his own descendants, male or female. The male line of Bachu Singh terminated with the death of Mahabir and the latter's only daughter, Ram Dulari, died when only a few months old. The line of succession laid down by the founder

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of the endowment having thus come to an end and the founder having died, the right of management reverted to the latter's heir, Mahabir. The latter, by his Will, provided that the mutawalliship should go to his descendant, male or female, and, therefore, it passed to Ram Dulari. On her death it again reverted to the founder's heir, who at that time was Dhanukdhari. Dhanukdhari never assumed the duties of the office or nominated a successor. On Dhanukdhari's death the founder's next heir was Sia Prasad, who also failed to nominate a successor. None of the claimants is a descendant of the founder or his son and none of them has been nominated by any heir of the founder. The same applies to Bhagwat Kuer. She was not the legally constituted mutawalli and had no power to nominate a successor. Her appointment of Raghava Surendra is, therefore, inoperative. It was contended that Bhagwat Kuer acquired a title to the office of mutawalli by adverse possession. The argument is that on the death of Ramdulari the mutawalliship devolved on Dhanukdhari but Bhagwat Kuer remained in possession for more than twelve years before appointing Raghava Surendra. No such case was made in the pleadings or at the trial. She took over the management of the dedicated properties as executrix of her husband's Will and there is no indication in the evidence that on the death of Ramdulari she asserted a title to the mutawalliship hostile to the legal claimant.

I agree that all the appeals be dismissed with costs as proposed.

Appeals dismissed.

S. A. K.

APPELLATE CIVIL.

Before Harries, C.J. and Manohar Lall, J.

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May, 2.

MAHARAJA PRATAP UDAI NATH SHAH DEO

v.

SUKHDEO PRASAD BHAGAT.*

Chota Nagpur Tenancy Act, 1908 (*Beng. Act VI of* 1908), *section* 215(*3*)—*orders made on applications for setting aside sale, whether appealable—practice—phrase "strike off", inappropriate use of—appellate Court, whether entitled to call for a private report from lower Court—procedure, whether irregular.*

The terms of section 215(*3*) of the Chota Nagpur Tenancy Act, 1908, make it clear that orders passed on applications to set aside sales are within the section and are, therefore, appealable.

Nilmani Nath Sahi Deo v. *Maharaja Sri Pratap Udai Nath Sahi Deo*(1), followed.

If an executing Court wants to dispose of an application finally, it should use clear and unambiguous language, such as "the application is dismissed". The phrase "strike off" which is really meaningless and is at any rate capable of a number of meanings, should not be used.

An appellate Court is not entitled to call for a private report from the lower Court for its information; it must decide an appeal upon the materials before it and if it cannot do so, it can only act in the manner provided by the Code of Civil Procedure, 1908.

Appeal by the decree-holder.

The appeal was in the first instance heard by Manohar Lall, J. who referred it to a Division Bench.

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*Appeal from Appellate Order no. 325 of 1938, from an order of T. Luby, Esq., Judicial Commissioner of Chota Nagpur, dated the 20th June, 1938, affirming an order of Maulavi A. Hussain, Rent Suit Deputy Collector, dated the 2nd February, 1938.

(1) (1918) 49 Ind. Cas. 389.

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

S. M. Mullick and *B. C. De*, for the appellant.

N. N. Sen, for the respondents.

HARRIES, C.J.—This is a miscellaneous second appeal from an order of the learned Judicial Commissioner of Chota Nagpur dismissing an appeal from an order of the Rent Suit Deputy Collector.

The facts of the case can be shortly stated as follows. The appellant obtained a decree for rent against a tenure-holder and in execution of that decree the property was sold and purchased by Gangadhar, respondent no. 3. The purchaser, however, did not have his name recorded in the landlord's sarishta. Further arrears of rent accumulated, and the plaintiff brought another suit against his original tenure-holder and obtained a decree. In execution of that decree he again put the property up for sale, and on the 16th of November, 1937, he purchased it himself. On the 18th of December, 1937, the respondent Gangadhar presented a petition praying that the sale should be set aside on the ground that he had purchased it at an earlier sale and that the property could not be resold. The learned Rent Suit Deputy Collector upon this petition passed the following order:

"Put up on 22nd December 1937, with execution record referred to".

The matter was adjourned and finally came for decision before the Rent Suit Deputy Collector on the 2nd of February, 1938, when he passed the following order:

"This holding has already been sold and the man to whom it has been sold is not a party in any of the proceedings taken since. Strike off."

It is to be observed that in the type-written paper-book before us the words "Strike off" have been incorrectly typed as "Struck off".

From this order the present appellant preferred an appeal to the court of the Judicial Commissioner who dismissed it. The judgment reads as follows:—

"Parties heard and record perused. On the facts as recounted in the Deputy Collector's report (and the accuracy of his report is not disputed) the landlord appellant has no case. At his instance the holding was sold at Court auction and purchased by the objector-respondent who got a sale certificate and delivery of possession. The holding cannot be sold again in execution of another decree against the original tenant (obtained) without making the auction-purchaser a party. I dismiss this appeal with costs and pleader's fee Rs. 10 to the contesting respondent."

In this judgment the learned Judicial Commissioner refers to some report made by the Deputy Collector. What this report was is not clear, and it would appear as if the Judicial Commissioner had called upon the Deputy Collector to make a report to supplement the orders appearing on the order-sheet. This seems to me to be a most unusual proceeding, and an appellate Court is not entitled to call for a private report from the lower Court for its information. An appellate Court must decide an appeal upon the materials before it and if it cannot do so, it can only act in the manner provided by the Code of Civil Procedure. I presume this report was shown to the parties; but if it was not, then the procedure was highly irregular.

My difficulty in this case is to know what precisely was the order of the Deputy Collector which was upheld on appeal by the learned Judicial Commissioner. It must be remembered that Gangadhar had presented a petition praying that the second sale should be set aside on the ground that he had purchased the property in the earlier sale and that it could not be resold. The learned Deputy Collector's order is "Strike off", but strike off what? Did he

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mean to strike off the petition to set aside the sale or the application for execution? I think it is clear that what he must have intended was to strike off the whole execution case.

It has been argued that he could not do that on the application to set aside the sale. He should have dealt with that application and either allowed it or dismissed it. Quite obviously the learned Deputy Collector was of opinion that the sale should be set aside; but, as I have stated, he merely passed an order striking off something.

I should like to make it clear that the phrase "strike off" is really meaningless and has led to endless litigation in these Courts. In other Courts it has been held time and again that the phrase "strike off" does not mean "dismissed" and in a decision of their Lordships of the Privy Council an order striking off was construed as an order staying execution rather than dismissing it. If an executing Court wants to dispose finally of an application, it should use clear and unambiguous language such as "the application is dismissed". "Striking off an application" is a phrase which is capable of a number of meanings. In the present case, however, it appears that the Deputy Collector desired to put an end to something, and it may be that that something was the whole execution case.

It is also tolerably clear from the judgment of the learned Judicial Commissioner that he regarded the order striking off as something passed in connection with a petition to set aside the sale. However, it is clear that if any meaning can be given to the phrase "strike off", it must mean that the execution application or the execution case in its entirety was dismissed. The Courts have not considered whether or not such an order could be made.

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In my judgment the order made by the learned Judicial Commissioner must be set aside and the case remanded to him to be heard and determined according to law.

Before ending this judgment, I must refer to a point raised by the learned Advocate for the respondents that no second appeal lay to this Court. It was contended that this was an order which was not appealable to the learned Judicial Commissioner and consequently that no appeal lay from that judgment to this Court. In my judgment this case falls within section 215(*3*) of the Chota Nagpur Tenancy Act, which provides that orders after decree and relating to the execution thereof with certain exceptions are appealable to the Court to which an appeal from the decree itself would lie. It has been strenuously argued that as the property here had been sold this is not a decree relating to execution, because the execution came to an end when the property was purchased by Gangadhar. Reliance has been placed on cases dealing with the construction given to a similar phrase in section 47 of the Code of Civil Procedure. In my view, however, the terms of section 215(*3*) of the Chota Nagpur Tenancy Act make it clear that orders passed on applications to set aside sales are within the section, because certain of those orders are by the terms of the section excluded from its ambit, for example orders passed under section 212(*2*) of the Act are not to be treated as orders relating to execution. A perusal of section 212(*2*) of the Act makes it clear that such an order is an order setting aside a sale. Had that order not been expressly excluded, it would have been within the ambit of the section. In my view the language of section 215(*3*) is wide enough to permit an appeal in this case.

In any event if the order is an order striking off the execution application, then clearly it is an order

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relating to execution and is, therefore, appealable under section 215(*3*) of the Chota Nagpur Tenancy Act.

For the reasons which I have given, I would allow this appeal, set aside the decree of the learned Judicial Commissioner and remand the case to him to be heard and determined according to law. In the circumstances of this case, I would make no order as to costs.

MANOHAR LALL, J.—I agree. In my opinion the language of section 215(*3*) of the Chota Nagpur Tenancy Act is wide enough to make an appeal competent in a case like the present. This was the view expressed by Mr. Justice Mullick in the case of *Nilmani Nath Sahi Deo* v. *Maharaja Sri Pratap Udai Nath Sahi Deo*(1) although his remarks are in the nature of obiter. For the reasons which have just been given by my Lord the Chief Justice, there cannot be any doubt that the legislature in enacting section 215 intended to depart from the interpretation put upon similar words in section 47 of the Code of Civil Procedure.

S. A. K.

Appeal allowed.
Case remanded.

APPELLATE CIVIL.

Before Harries, C.J. and Manohar Lall, J.

1939.

May, 2, 4, 9.

DEBI PRASAD AGARWALA

v.

HAJI SYED MEHDI HASAN.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule* I, *Articles* 97 *and* 116—*lessee taking possession under a registered*

*Appeal from Appellate Decree no. 333 of 1937, from a decision of Babu Sachindra Nath Ganguli, Subordinate Judge at Arrah, dated the 4th January, 1937, reversing a decision of Babu Shiva Nandan Prasad, Munsif at Sasaram, dated the 25th January, 1935.

(1) (1918) 49 Ind. Cas. 389.

lease—lessor's title found defective—dispossession of lessee—suit for damages and return of premium—limitation—proper article applicable—terminus a quo.

A suit for the refund of premium paid for a lease under a registered instrument, on the ground that the lessor had no title, is governed by Article 116, Limitation Act, 1908, even though the suit may apparently fall within Article 97 of the Act.

Tricomdas Cooverji Bhoja v. *Gopinath Jiu Thakur*(1), *Musammat Lakhpat Kuer* v. *Durga Prasad*(2), *Rajendra Narayan Singh Deo* v. *Lalmohan Tribeni*(3), *Nabin Chandra Ganguli* v. *Munshi Mandar*(4), *Multanmal Jayaram* v. *Budhumal Kevalchand*(5) *and Subbaroya Reddiar* v. *Rajagopala Reddiar*(6), followed.

As between parties to the transaction, a lease cannot be regarded as void ab initio when both the parties considered that the lessor had a good title to convey.

Under a registered permanent mukarrari lease the lessee *S* got possession of the leasehold property after payment of a certain premium to the lessor. Subsequently *D* brought a suit for specific performance of a prior contract for lease of the same property impleading both the lessor and the lessee in possession as parties to the suit. *D* alleged that after having executed the contract for lease in his favour, the lessor had no good title to convey to *S*. The suit was decreed and it was ordered that upon *D*'s depositing the balance of the consideration money which he had not paid to the lessor, a formal deed would be executed and registered in his favour and then possession would be delivered to him after ousting *S*. In pursuance of the decree *D* deposited the money and got delivery of possession on the 6th February, 1928. Thereupon *S* brought the present suit on the 3rd of July, 1933, claiming damages and return of the premium paid to the lessor:

(1) (1916) I. L. R. 44 Cal. 759, P. C.
(2) (1928) I. L. R. 8 Pat. 432.
(3) (1936) A. I. R. (Pat.) 462.
(4) (1927) I. L. R. 6 Pat. 606.
(5) (1920) I. L. R. 45 Bom. 955.
(6) (1914) I. L. R. 38 Mad. 887.

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Held, that the suit was governed by Article 116 of the Limitation Act, 1908, and that, as the cause of action arose on the date when the plaintiff was dispossessed, the suit was within time.

Subbaroya Reddiar v. *Rajagopala Reddiar*(1), followed.

Harnath Kuar v. *Indar Bahadur Singh*(2) and *Juscurn Boid* v. *Pirthichand Lal Choudhury*(3), relied on.

Appeal by the plaintiff.

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

S. M. Mullick and *D. N. Varma*, for the appellant.

M. Hasan Jan (with him *Syed Hasan* and *J. N. Sahai*), for the respondents.

MANOHAR LALL, J.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Shahabad, dated the 4th January, 1937, by which he has dismissed the claim against the respondent, defendant no. 1, in an action arising out of a transaction of a mokarrari lease by which the former sajjadanashin of Khankah Sassaram granted a permanent lease to the plaintiff of a portion of the wakf property and put him in possession but of which he was dispossessed on the 6th February, 1928, with the result that the plaintiff claimed damages and return of the nazarana under the following circumstances.

It appears that before the former sajjadanashin executed the mukarrari lease on the 8th September, 1925, in favour of the plaintiff reserving the rent of Rs. 6 per annum on taking a nazarana of Rs. 2,500, the then sajjadanashin had already entered into a

(1) (1914) I. L. R. 38 Mad. 887.

(2) (1922) L. R. 50 Ind. App. 69.

(3) (1918) I. L. R. 46 Cal. 670, P. C.

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contract for permanent lease of the same property in favour of one Lachmi Ram. After the plaintiff was put in possession in September, 1925, Lachmi Ram instituted a Title Suit in the Court of the Subordinate Judge of Arrah for enforcing specific performance of his earlier contract for lease in respect of the leasehold properties of which the plaintiff had been put in possession under the document of 1925. The plaintiff and the former sajjadanashin were both defendants in the action and they jointly resisted the claim of Lachmi Ram but the Court, by the judgment and decree, dated the 15th June, 1927, decreed the suit of Lachmi Ram. The appeal by the plaintiff before the District Judge of Arrah was unsuccessful, when he preferred a second appeal to the High Court. During the pendency of the appeal in the High Court Lachmi Ram took delivery of possession by executing his decree and thereby dispossessed the plaintiff on the 6th February, 1928. The High Court ultimately dismissed the appeal on the 4th July, 1930. Simultaneously with the deed of mukarrari of the 8th September, 1925, in favour of the plaintiff the former sajjadanashin had entered into an indemnity mortgage bond bearing date 18th September, 1925, to the effect that if any flaw or defect was found in the mukarrari properties and if the plaintiff was dispossessed he would be competent to recover the nazarana of Rs. 2,500 together with costs and damages which the plaintiff may have to pay and incur from the properties hypothecated by the bond which were the exclusive properties of that sajjadanashin. The former sajjadanashin was ousted from possession by the appointment of a receiver from the Khankah properties under the orders of the District Judge; that receiver is defendant no. 1 in the action. On the death of the sajjadanashin his legal heirs, namely, defendants 2 to 8 entered into possession of the properties left by the sajjadanashin as his personal

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properties including the properties entered in the schedule of the indemnity bond of 18th September, 1925. Accordingly the plaintiff instituted the present suit on the 3rd of July, 1933, for recovery of the sum of Rs. 3,999-7-0 out of Rs. 9,200 which is made up of the nazarana amount Rs. 2,500, Rs. 3,000-5-0 as the costs of defending the suit of Lachmi Ram, Rs. 851-5-0 as the costs realised by Lachmi Ram in execution of his decree and Rs. 2,848-6-0 as costs of repairs of the house (the property leased). Although the claim of the plaintiff came up to this figure of Rs. 9,200 including interest he, in the plaint, gave a remission of Rs. 5,200-9-0 out of the costs of repairing the house and costs of the suit of Lachmi Ram and interest and limited his claim to Rs. 3,999-7-0 as stated already, apparently to bring the suit within the pecuniary jurisdiction of the Munsif so that the appeal may lie to the District Judge and not to the High Court. The cause of action stated in paragraph 19 of the plaint is dated 6th February, 1928, when the plaintiff was dispossessed by Lachmi Ram and therefore "failure of consideration" of the mukarrari settlement occurred and also 4th July, 1930, the date of the judgment of the High Court. The plaintiff asked for a decree against the first defendant as the receiver but if the whole or any portion of his claim was not decreed against defendant no. 1 he prayed that the whole or the balance may be decreed against defendants 2 to 8 and that the mortgaged properties entered in the indemnity bond of the 18th September, 1925, may be directed to be sold in the manner provided by Order XXXIV of the Code of Civil Procedure. The only contesting party to the suit was defendant no. 1 who contended that the subject-matter of the lease was the personal property of the former sajjadanashin and that the suit has been unnecessarily brought and is not maintainable against the Khankah which was in the charge of the defendant no. 1 as a receiver. As an alternative it was prayed that the former sajjadanashin had no right

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under the Muhammadan law to execute any lease of a house for a period of more than one year without the sanction of the Kazi and therefore the lease was illegal, invalid and inoperative from the beginning. The payment of the nazarana by the plaintiff and the plaintiff's entering into possession of the lease-hold properties was also denied. The plea of limitation was also raised.

The learned Munsif held that the properties given in lease to the plaintiff belonged to the Khankah. that the amount of nazarana was actually paid and appropriated in the funds of the Khankah and therefore the Khankah was liable to refund the amount of Rs. 2,500 but was not liable for any loss or damages incurred by the plaintiff which were recoverable from the heirs of the former sajjadanashin to the extent of the personal assets left by him. He also held that the grant of the perpetual lease of the wakf property was absolutely void and there was a complete breach of trust committed by the then sajjadanashin. With regard to the question of limitation the learned Munsif held that the suit was within time as having been instituted within six years of the date of dispossession. In the result he decreed the suit for Rs. 2,500 with interest at 6 per cent. per annum from the date of the suit against defendant no. 1 and for the balance against defendants 2 to 8 against whom a preliminary decree in terms of Order XXXIV was passed with interest at the bond rate and costs. The defendants 2 to 8 did not challenge this decree but the defendant no. 1, the receiver of the Khankah, preferred an appeal before the learned District Judge which was disposed of by the learned Subordinate Judge on the 4th January, 1937. Before the learned Subordinate Judge the receiver gave up the contention that the property was not the property of the Khankah. The learned Judge was satisfied from the evidence in the case and, in agreement with the learned trial Court, held that the property leased out was a part of the Khankah Wakf Estate. The

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learned Subordinate Judge also agreed with the Munsif that the plaintiff had paid the sum of Rs. 2,500 as nazarana or the consideration of the lease in question to the former sajjadanashin who deposited the amount in the funds of the Khankah; the entries in the cash book of this Estate showed that the amount had been put in the coffers of the Khankah. The finding of the Munsif, that the grant to the plaintiff of a perpetual lease of the wakf property was ab initio void, was affirmed. The learned Subordinate Judge pointed out that the lessor, namely, the former sajjadanashin, as well as the plaintiff were fully aware of the infirmity of the title that was going to be conveyed under the lease of 1925, that there is not the least whisper in the document of lease showing that the permanent lease in question was going to be granted for any justifying necessity and that at the trial the plaintiff did not adduce any iota of legal proof in support of any necessity for the creation of the incumbrance in question.

Upon these findings the only question which remained was whether the claim could be decreed against the receiver and whether the suit was within time. The learned Subordinate Judge, having held that the transaction of the lease was void ab initio and that the plaintiff had full knowledge of the infirmity of his own title at the time he entered into this transaction and advanced the nazarana at his own risk, held that the receiver could not be saddled with the liability of refunding the nazarana as

> "there is no privity of contract between the then sajjadanashin and the present receiver of the wakf estate even though the estate was in possession of the plaintiff's money."

He, therefore, came to the conclusion that the defendant no. 1, the receiver, could not be held liable. Upon the question of limitation the learned Subordinate Judge came to the conclusion that the consideration of the lease having failed ab initio the cause of action for the recovery of the nazarana arose from the

date of the lease and, therefore, the plaintiff's suit having been instituted more than six years thereafter was barred by limitation. In the alternative he held that if the plaintiff's lease be assumed to be voidable only on the objection of a third party and possession was taken under it still, relying upon the decision of *Mussammat Lakhpat Kuar* v. *Durga Prasad*(1), the learned Judge held that limitation would run from the 15th June, 1927, when the claim of Lachmi Ram was established against the plaintiff and the former sajjadanashin, and, therefore, the suit of the plaintiff was still beyond six years of this date. The result was that the learned Subordinate Judge dismissed the suit as against the receiver but otherwise affirmed the decree in part against the defendants 2 to 8. He never considered the question whether a decree for the full amount should be given against defendants 2 to 8. Hence the appeal before us.

The findings of fact arrived at by the Courts below have not been challenged by the appellant and cannot be interfered with by us in second appeal. But Mr. Hasan Jan, appearing for the receiver, wanted to challenge the correctness of the finding that the nazarana amount, Rs. 2,500, was credited in the books of the Khankah and spent by it; but we are unable to accede to this argument. In order to come to a conclusion in favour of the respondent it would have been necessary to examine the accounts of the Khankah not only for that date but for the whole year if not for some other years also. Accordingly it is not open to any of the parties before us to challenge the findings of fact which have been concurrently arrived at by the Courts below.

The only question which presents difficulty is whether the suit of the plaintiff is within time. Mr. S. M. Mullick, appearing for the appellant, strongly contends that the suit is a suit for damages on account

(1) (1928) I. L. R. 8 Pat. 432.

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of the failure of the then sajjadanashin to preserve the plaintiff in quiet enjoyment of the lease-hold properties and, therefore, there was a breach of duty on behalf of the lessor as provided by section 108(*c*) of the Transfer of Property Act. He points out that the cause of action arose to him not when the lease was granted nor when the Court held in June, 1927, in the suit of Lachmi Ram that the lessor had no title to give to the plaintiff but when the High Court affirmed the decision on the 4th July, 1930, or in any case not earlier than the 6th February, 1928, when the plaintiff was dispossessed. He, therefore, contended that limitation started from any of these two dates with the result that the suit was within time being a suit for damages for breach of a contract in writing registered within the meaning of Article 116 of the Limitation Act. Mr. Hasan Jan, on the other hand, contended that the suit must be held to be a suit to which Article 97 of the Limitation Act applied and that the starting point of limitation was the date when the trial Court gave the decision that the plaintiff had no title to remain upon the land by his order, dated the 15th June, 1927. In other words, he contended that if it was a suit for damages the plaintiff was damnified by the decision on the 15th June, 1927, and therefore the suit was beyond six years; but so far as this suit was for the recovery of the nazarana amount the plaintiff must come within three years of the date of the lease, or of the date of the decision of the trial Court or of the date of dispossession and that the suit is beyond three years of any of these dates.

A large number of cases were cited before us; but it is unnecessary to discuss these cases because after the decision of their Lordships of the Judicial Committee in the case of *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*(1) it has been consistently held by this Court that a suit for damages, for return of the

(1) (1916) I. L. R. 44 Cal. 759, P. C.

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nazarana or for any consequent costs and damages must be governed by Article 116 even though a suit may apparently fall within Article 97 of the Limitation Act [*See Rajendra Narayan Singh Deo* v. *Lalmohan Tribeni*(1)]. In that case the plaintiff had obtained a lease of a certain piece of land under a registered document, as in the present case, after paying a certain premium to the lessor but afterwards it having been found that the lessor had no right to make such a grant the lease was held to be void ab initio and when the lessee asked for the return of the money paid to the lessor under section 65 of the Contract Act the suit for refund of the money was held to be governed not by Article 65 or Article 97 but by Article 116 of the Limitation Act. The learned Judges relied upon an earlier Division Bench decision of this Court (referred to later*). The same view was taken in *Mussammat Lakhpat Kuar* v. *Durga Prasad*(2). That suit was a suit for refund of the purchase money by a vendee paid under a registered document on the ground that the consideration for the sale had failed. It was held that the suit was governed by Article 116 and that the fact that the suit was in substance for a refund of the purchase money and not in the nature of damages, although that claim was made in the alternative, was immaterial. Mr. Justice Das made this observation at page 435 " But in the view which I take it is immaterial to consider whether the suit is a suit for refund of the purchase money or a suit for damages for breach of the covenant under section 55, clause (*2*), of the Transfer of Property Act ". He then drew attention to the case of *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*(3) referred to by me above and held that he regarded this decision of the Judicial Committee as establishing that where the suit is in substance a suit based on a registered document and

(1) (1936) A. I. R. (Pat.) 462.
* (1927) I. L. R. 6 Pat. 606.
(2) (1928) I. L. R. 8 Pat. 432.
(3) (1916) I. L. R. 44 Cal. 759, P. C.

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where such a suit could be regarded as a suit for compensation for breach of contract, Article 116 must apply although such a suit may fail under some other provision of the Indian Limitation Act. At page 435 the learned Judge also made this observation that the question whether the plaintiff had or had not knowledge of the infirmity of the title of their vendor is irrelevant.

The starting point of limitation was also considered in *Mussammat Lakhpat Kuar* v. *Durga Prasad*(1) and the learned Judge referred to two oft cited cases, *Subbaroya Reddiar* v. *Rajagopala Reddiar*(2) and *Multanmal Jayaram* v. *Budhumal Kevalchand*(3), where three classes of cases under which such questions are discussed were pointed out as being (*a*) where from the inception the vendor had no title to convey and the vendee has not been put in possession of the property; (*b*) where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale; and (*c*) where though the title is known to be imperfect the contract is in part carried out by giving possession of the properties. Here I wish to read from the judgment of Das, J., at page 438: "It was contended before us that the sale was not voidable but void ab initio since it has been found that Mussammat Lakhpat had no title whatever to convey. But this point was very completely dealt with in the judgment of the High Court, where it was pointed out that a transaction cannot be regarded as void ab initio where both the parties consider that the vendor has a good title to convey. This being so, as between the parties to this litigation it cannot be regarded that the sale was void ab initio and there is no doubt that possession was taken under the voidable sale". These

(1) (1928) I. L. R. 8 Pat. 432.
(2) (1914) I. L. R. 38 Mad. 887.
(3) (1920) I. L. R. 45 Bom. 955.

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remarks apply very closely to the facts of the present case. As between the sajjadanashin and the plaintiff the transaction cannot be regarded as void ab initio when both the parties considered that the lessor had a good title to convey and there is no doubt that possession was taken under the lease which could be avoided (after possession had been delivered) only on the objection of a third party. The quotation from remarks of the learned Judge of the Madras High Court is very apposite at this stage: "In the second class of cases the cause of action can arise only when it is found that there is no good title. The party is in possession and that is what at the outset under a contract of sale a purchaser is entitled to, and so long as his possession is not disturbed, he is not damnified".

In the case of *Nabin Chandra Ganguli* v. *Munshi Mandar*(1) the lessor having failed to put the lessee in possession of the properties demised, the suit by the lessee to recover the salami which he had paid for the lease was held to be governed by Article 116 of the Limitation Act provided the lease was in writing and registered.

In my opinion these three cases decided by Division Benches of this Court and founded upon the decision of the Privy Council in *Tricomdas Cooverji Bhoja* v. *Gopinath*(2) are sufficient to dispose of the contention of the respondent that the present suit so far as the amount of Rs. 2,500 is concerned is not a suit to recover damages but a suit to recover the actual amount of salami within the terms of section 65 of the Contract Act and, therefore, should be governed by Article 97 of the Limitation Act and not by Article 116.

The question which then remains to be determined is what is the starting point of limitation. In

(1) (1927) I. L. R. 6 Pat. 606.

(2) (1916) I. L. R. 44 Cal. 759, P. C.

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the case of *Harnath Kuar* v. *Indar Bahadur Singh*(1) the suit was instituted to recover the consideration paid under an agreement which was void ab initio, the agreement in question being the transfer of a right to expectancy. Their Lordships of the Judicial Committee, in dealing with the argument based on section 65 of the Contract Act, observed as follows:

"An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.

The agreement here was manifestly void from its inception, and it was void because its subject-matter was incapable of being bound in the manner stipulated.

Though this aspect of the case has not been satisfactorily presented or developed in the pleadings and the proceedings before the lower courts, their Lordships think there are materials on the record from which it may be fairly inferred in the peculiar circumstances of this case that there was a misapprehension as to the private rights of Indar Singh in the villages which he purported to sell by the instrument of January 2, 1880, and that the true nature of those rights was not discovered by the plaintiff or Rachpal Singh earlier than the time at which his demand for possession was resisted, and that was well within the period of limitation".

In the present case the plaintiff was actually placed in possession thereby leading to the inference that both the parties thought that they had a right to enter into this transaction of lease which was in law void ab initio. It may be remembered here that the defence of the receiver was that this property was not

(1) (1922) L. R. 50 Ind. App. 69.

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the property of the Khankah but was the personal property of the former sajjadanashin. The plaintiff also was apparently in doubt as to the true position because he took an indemnity bond from the sajjadanashin binding him and his personal properties in case he was disturbed in possession.

In the case of *Juscurn Boid* v. *Pirthichand Lal Choudhury*(1) their Lordships of the Judicial Committee again had to consider the question as to how the starting point of limitation should be decided in such cases. In that case the plaintiff instituted a suit against the zamindar to recover certain sums which he had to pay as purchaser of a patni taluk of a defaulting patnidar at a sale for arrears of rent under the Patni Regulation of 1819, the sale having been subsequently set aside in a suit by the darpatnidar to which the plaintiff was a party. The sale was set aside by the order of the District Judge dated the 24th August, 1905, which was affirmed by the High Court in appeal on the 3rd August, 1906. The plaintiff gave up possession on the 28th August following. The courts below treated the suit as governed by Article 97 of the Limitation Act as being a suit for money paid on an existing consideration which afterwards failed and held that it was barred by limitation as having been brought more than three years beyond the 24th August, 1905, being the date of the decree of the District Judge setting aside the sale when it was found that the consideration failed. It was decided by their Lordships that " whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal ". This incidentally would settle that the starting point of limitation would be the date

(1) (1918) I. L. R. 46 Cal. 670, P. C.

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of the decision of the learned Subordinate Judge dated the 15th June, 1927, if there was nothing else in the case. Their Lordships then made the following weighty observations: "To escape from this position and its consequence a new starting point was suggested in the course of the argument here: it was contended that the period of limitation began to run when possession was lost. There may be circumstances in which a failure to get or retain possession may justly be regarded as the time from which the limitation period should run, but that is not the case here. The quality of the possession acquired by the present purchaser excludes the idea that the starting point is to be sought in a disturbance of possession or in any event other than the challenge to the sale and the negation of the purchaser's title to the entirety of what he bought involved in the decree of the 24th August, 1905. If further support of this view be required, it may be found in the express provision of section 14 of the Regulation which directs that in the suit for reversal itself the purchaser is to be indemnified against all loss".

In my opinion in the circumstances of each case the Court is to decide whether the failure to give or retain possession may justly be regarded as the time from which limitation period should run. In the present case the lessee was in possession from the date of the lease. The decree of the Subordinate Judge of June, 1927, merely decided that upon Lachmi Ram's depositing the balance of the consideration money which he had not paid to the former sajjadanashin a formal deed of lease would be executed and registered by the former sajjadanashin and then possession would be delivered by ousting the present plaintiff. It may well have been that Lachmi Ram would have taken some considerable time to perform the obligations imposed upon him by the decree before he would be vested with a title and

before he would be entitled to oust the present plaintiff. The plaintiff can, therefore, have no cause of action for return of the money until he was actually ousted from possession by a formal delivery of possession or by an actual delivery of possession.

In my opinion the suit, whether it is regarded as a suit for return of the very amount paid as nazarana or as a suit for compensation, having been instituted within six years of the date when the plaintiff was dispossessed, therefore, is within time.

But it was argued by Mr. Hasan Jan appearing on behalf of the receiver that there is no privity of contract between the then sajjadanashin and the present receiver, defendant no. 1. This argument is of no substance. Upon the finding that the Khankah Estate was in possession in September, 1925, of the sum of Rs. 2,500 which the plaintiff had paid to the sajjadanashin the terms of section 65 of the Contract Act apply and the person in charge of the Khankah Estate is bound to refund the amount which has been in possession of the Khankah ever since 1925. The plaintiff has discharged the onus which lay upon him when he proved that a sum of Rs. 1,000 was entered in the cash book of the Khankah on the 20th August, 1925, and the balance of the sum Rs. 1,500 was credited on the 20th September, 1925, in its books. The question as to the subsequent application of the money or its misappropriation by the sajjadanashin is no concern of the plaintiff.

I would, therefore, allow the appeal of the plaintiff and restore the decision of the learned Munsif with costs throughout.

HARRIES, C. J.—I agree.

S.A.K. *Appeal allowed.*

APPELLATE CIVIL.

Before Fazl Ali and Manohar Lall, JJ.

1939.

March, 22, 24. *May*, 10.

KHIROD CHANDRA GHOSH

v.

PANCHU GOPAL SADHUKHAN.*

Execution—sale by executing Court of property outside its territorial jurisdiction, whether is a nullity—no objection to confirmation of sale—judgment-debtor, whether estopped from impugning the sale—Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 21—*estoppel, whether extends to another execution creditor purchasing the same property.*

A sale by an executing Court of a property which is outside its territorial jurisdiction is a nullity.

Prem Chand Dey v. *Mokhoda Debi*(1), *Haridas Basu* v. *National Insurance Company, Limited*(2), *Veerappa Chetty* v. *Ramasami Chetty*(3), *Begg Dunlop and Company* v. *Jagannath Marwari*(4), *Sheikh Abdul Hadi* v. *Musammat Kabultunnissa*(5) and *Bank of Bengal* v. *Sarat Ch. Mittra*(6), followed.

Though a judgment-debtor, who does not object to the confirmation of sale by a Court having no territorial jurisdiction to sell a property, may be estopped (by reason of the principles underlying section 21 of the Code of Civil Procedure, 1908) from raising the question that the sale was a nullity, such estoppel does not operate to prevent another execution creditor who purchases the same property in execution of his decree, from proving that as between himself and the previous purchaser his title ought to prevail.

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* Appeal from Appellate Decree no. 557 of 1938, from a decision of Rai Bahadur Shyam Narayan Singh, C.B.E., District Judge of the Santal Parganas, dated the 4th March, 1938, reversing a decision of Babu Rabindra Nath Banerji, Subordinate Judge at Deoghar, dated the 30th June, 1937.

(1) (1890) I. L. R. 17 Cal. 699, F. B.
(2) (1931) I. L. R. 59 Cal. 199.
(3) (1919) I. L. R. 43 Mad. 135.
(4) (1911) I. L. R. 39 Cal. 104.
(5) (1924) 6 Pat. L. T. 71.
(6) (1918) 4 Pat. L. J. 141.

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Vecrappa Chetty v. *Ramasami Chetty*(1), followed.

Raghubir Saran v. *Hori Lal*(2), *Ayisa Beevi Ammal* v. *Nagaratna Mudaliar*(3) and *K. C. Manavikraman* v. *N. C. Ananthanarayana Ayyan*(4), referred to.

Appeal by the defendant.

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

Shiva Narayan Bose, for the appellant.

S. M. Mullick and *N. N. Sen*, for the respondents.

FAZL ALI, J.—This is an appeal from an appellate decree passed by the District Judge of the Santal Parganas reversing the judgment and decree of the Subordinate Judge of Deoghar in a suit brought by the respondent no. 1 for a declaration of his title to a house in Deoghar which has been attached by the appellant in execution of his decree. The facts of the case are briefly as follows:—

Upendra Nath Dutt and Nirtyagopal Khan had obtained a decree against the pro forma defendants second party which they assigned to the respondent no. 1. The respondent no. 1 applied for the execution of this decree which being transferred to the Subordinate Judge at Alipur, three properties including the house in suit were advertised for sale in three lots. Thereupon the appellant who also had a decree against the pro forma defendants applied for rateable distribution and also objected to the jurisdiction of the Subordinate Judge at Alipur to sell the properties. At that time the appellant was interested only in one of the three properties, namely, Howrah Dragon Iron Works, and ultimately a compromise being arrived at between him and the respondent no. 1, his objection to the sale was dismissed and he got a sum of

(1) (1919) I. L. R. 43 Mad. 135.
(2) (1931) I. L. R. 53 All. 560.
(3) (1934) A. I. R. (Mad.) 573.
(4) (1924) A. I. R. (Mad.) 457.

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Rs. 445 out of the sale proceeds of the Howrah Dragon Iron Works in the Alipur Court. Some time later the appellant executed his decree against the defendants 2nd party at Deoghar and attached the two-fifths share in the disputed house which had in the meantime been purchased by the respondent no. 1 at a sale held at Alipur. The respondent no. 1 thereupon preferred a claim under Order XXI. rule 58, but his claim being summarily rejected he brought the present suit under Order XXI, rule 63, to obtain a declaration that by virtue of the sale held at Alipur he had obatined an absolute title to the disputed property and that as it no longer belonged to the defendants second party, it could not be attached in the execution of the decree against them. The appellant resisted the suit on several grounds, one of which was that the Alipur Court had no jurisdiction to sell the house in question. The trial Court upheld the objection and dismissed the suit and also held that the plaintiff was not the real purchaser of the decree obtained by Upendranath Dutt and Nirtyagopal Khan against the defendants second party but was merely a benamidar on behalf of the latter. On appeal, however, the learned District Judge of the Santal Parganas found, first, that the plaintiff was not a benamidar and, secondly, that the sale of the disputed house at Alipur was not *ab initio* void and inasmuch as the order of the Alipur Court as to its sale had not been questioned before a higher tribunal, the appellant was not competent to avoid it in a collateral proceeding. Thus, the learned District Judge reversed the decision of the learned Subordinate Judge and decreed the plaintiff's suit. The defendant no. 1 has now preferred this second apppeal.

It appears that the decree in execution of which the plaintiff purchased the property in dispute had been passed by the Subordinate Judge at Howrah and it was subsequently transferred for execution to Alipur on the application of the decree-holder. In the

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course of the execution the Subordinate Judge of Alipur sold three properties one of which was situated within his own jurisdiction and of the remaining two one was situated at Howrah and the other at Deoghar. So far as property at Howrah is concerned there was a compromise between the parties and the sale of that property is no longer in question. The dispute between the parties is now centred round the property at Deoghar and the question to be decided in this appeal is whether the appellant can impugn the sale of that property to the respondent no. 1. Section 38 of the Code of Civil Procedure provides that " a decree may be executed either by a Court which passed it, or by the Court to which it is sent for execution ". Section 39 provides that the Court which passed the decree may, on the application of the decree-holder, send it for execution to another Court, if the person against whom the decree is passed has no property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such Court, or if the decree directs the sale or delivery of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it. These two provisions have been construed in a large number of cases and it is now well settled that an executing Court cannot sell a property which is situated outside his jurisdiction: *see Prem Chand Dey* v. *Mokhoda Debi*(1), *Haridas Basu* v. *National Insurance Company, Limited*(2), *Veerappa Chetty* v. *Ramasami Chetty*(3), *Bega Dunlop and Company* v. *Jagannath Marwari*(4), *Sheikh Abdul Hadi* v. *Musammat Kobultunnissa*(5) and *Bank of Bengal* v. *Sarat Ch. Mittra*(6). In the last case, which is the

(1) (1890) I. L. R. 17 Cal. 699, F. B.
(2) (1931) I. L. R. 59 Cal. 199.
(3) (1919) I. L. R. 43 Mad. 135.
(4) (1911) I. L. R. 39 Cal. 104.
(5) (1924) 6 Pat. L. T. 71.
(6) (1918) 4 Pat. L. J. 141.

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leading case on the point so far as this Court is concerned, the legal position was explained by Atkinson, J. in these words :—

"Speaking generally, it is an accepted principle of international jurisprudence that the jurisdiction of a Court in enforcing execution of its decrees is restricted by its territorial limitations. That is to say, the jurisdiction of Courts is circumscribed by and co-extensive with its territorial limits. Thus a Court desiring to seize or attach the property of a judgment-debtor outside its jurisdiction, and where such property is in the hands of, or custody of another, also outside the jurisdiction, such property sought to be attached in aid of the executing Court can only be reached by a regular method of procedure which has been prescribed by the Rules of the Civil Procedure Code, and similar Codes which prevail in all countries, viz., the decree of the executing Court must be transferred to the local limits of the jurisdiction of the external Court within which the property sought to be attached is for the time being."

There can, therefore, be no doubt that the Court at Alipur had no jurisdiction to sell the disputed property.

The point, however, which is raised on behalf of the respondent no. 1 is that even though it be assumed that the Court at Alipur had no jurisdiction to sell the disputed property, yet inasmuch as the attachment, sale and confirmation of it were effected without objection by the judgment-debtor, not only he but also the appellant is now precluded from attacking the title acquired by the respondent no. 1 under the sale. Up to a point this argument is supported by several decisions which have laid down that if the judgment-debtor does not object to the jurisdiction of a Court to sell the property before the sale is confirmed, he

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cannot question the sale after it has been confirmed: *see Ayisa Beevi Ammal* v. *Nagaratna Mudaliar*(1) and *K. C. Manavikraman* v. *N. C. Ananthanarayana Ayyan*(2). In fact these cases merely extend the principle underlying section 21 of the Civil Procedure Code to execution proceedings. Section 21 provides that

"no objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice."

In some cases, however, it has been held that section 21 must be strictly construed and it would not be legitimate to extend the bar of that section beyond the limit expressly provided for it, namely, appellate or revisional stages of the original suit: [*see* for instance, *Raghubir Saran* v. *Hori Lal*(3)]. But the authority which has a direct bearing on this case is *Veerappa Chetty* v. *Ramasami Chetty*(4) in which it has been held that though a judgment-debtor, who does not object to a confirmation of sale by a Court having no territorial jurisdiction to sell a property, may be estopped from raising the question that the sale was a nullity, such estoppel does not operate to prevent an execution creditor from proceeding against the same judgment-debtor. With the view expressed in this case I fully agree. If a Court which has no jurisdiction to sell a property sells it, it is clear that the purchaser acquires no title to it. It may be that the judgment-debtor himself may have made it impossible for himself owing to his conduct to

(1) (1934) A. I. R. (Mad.) 573.

(2) (1924) A. I. R. (Mad.) 457.

(3) (1931) I. L. R. 53 All. 560.

(4) (1919) I. L. R. 43 Mad. 185.

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assert that such a person has no title to the property, but the fact remains that the property continues to be the property of the judgment-debtor and I do not see why another execution creditor who purchases it in execution of the decree should be debarred from proving that as between himself and the previous purchaser his title ought to prevail. In my opinion it was open to the appellant to show in the present suit that the sale held at Alipur was a nullity and that he was entitled to proceed against the disputed house in execution of his decree.

I would, therefore, allow this appeal, set aside the judgment and decree of the Court below and restore the decree of the trial Court. There will be no order as to costs so far as this Court and the lower appellate Court are concerned, but the appellant will be entitled to the costs awarded to him by the trial Court.

MANOHAR LALL, J.—I agree.

S.A.K. *Appeal allowed.*

FULL BENCH.

Before Fazl Ali, Agarwala and Varma, JJ.

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March, 21, 22. *May*, 11.

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 65 *and* 167—*mortgagee of a part of holding, rights of.*

* Appeal from Appellate Decree no. 967 of 1936, from a decision of Babu Manindra Nath Mitra, Subordinate Judge of Monghyr, dated the 13th of February, 1936, affirming a decision of Maulavi Muhammad Shamsuddin, Munsif of Monghyr, dated the 13th of May, 1935.

against purchaser in execution of rent decree—mortgage not annulled—purchaser, whether has priority over mortgagee—mutual rights of redemption, whether exist.

A purchaser (not being a landlord) of a holding in execution of a decree for rent has a charge for the amount of the decree for rent as against the holder of a mortgage of a part of the holding executed before the purchase, and is entitled to the same rights as the purchaser of a holding in execution of a decree passed on a prior mortgage.

A. B. Cheoditti v. *Quadress*(1), *Surat Lal Chowdhery* v. *Lala Murlidhar*(2), *S. M. Meherunnesa* v. *Sham Sundar Bhuiya*(3), *Bibi Taibatunnessa Chowdhurani* v. *Pravabati Dasi*(4) and *Gopi Nath Mahapatro* v. *Kashi Nath Beg*(5), followed.

Sukhi v. *Ghulam Safdar Khan*(6), applied.

Bidhumukhi Dasi v. *Bhaba Sundari Dasi*(7), *Sital Chandra Majhi* v. *Parbati Charan Chakrabarti*(8) and *Annada Prosad Chatterji* v. *Phanindra Bhusan Ghatak*(9), not followed.

Hargobind Das v. *Ramchandra Jha*(10), overruled.

Tariniprosad Roy v. *Narayan Kumari Debi*(11), *Badlu Pathak* v. *Sibram Singh*(12) and *Sourendra Mohan Singh* v. *Kunjbihari Lal Mander*(13), referred to.

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(1) (1916) 1 Pat. L. J. 161.
(2) (1918) 4 Pat. L. J. 362.
(3) (1902) 6 Cal. W. N. 834.
(4) (1909) 10 Cal. L. J. 640.
(5) (1909) 9 Cal. L. J. 234.
(6) (1921) L. R. 48 Ind. App. 465.
(7) (1920) 24 Cal. W. N. 961.
(8) (1921) 35 Cal. L. J. 1.
(9) (1936) A. I. R. (Cal.) 381.
(10) (1926) I. L. R. 6 Pat. 235.
(11) (1889) I. L. R. 17 Cal. 301.
(12) (1927) I. L. R. 7 Pat. 155.
(13) (1928) I. L. R. 8 Pat. 489.

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If a purchaser in execution of a rent decree fails to annul an incumbrance under section 167 of the Bihar Tenancy Act, 1885, the incumbrance will continue but he will not thereby lose his priority over the holder of the incumbrance.

Therefore, a mortgagee is entitled to redeem or otherwise exercise his right of redemption against a purchaser of the holding at a rent sale who has taken no steps to annul the mortgage under section 167. The latter too, being also a purchaser of the equity of redemption, is entitled to redeem the mortgage, if it has not been formally annulled.

Appeal by the defendant.

The appeal was in the first instance heard by Fazl Ali and Agarwala, JJ. who referred it to a Full Bench.

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

S. N. Bose and *G. P. Dass*, for the appellant.

Khurshaid Husnain (with him *Pitamber Missir* and *M. Rahman*), for the respondents.

FAZL ALI, J.—This case was originally heard by my brother Agarwala and myself and we referred it to a Full Bench by our order, dated the 5th May, 1938, which runs as follows:—

"This appeal raises a question of considerable importance about which the decisions of this Court are unfortunately, by no means, clear. We consider that it is desirable that the appeal should be heard by a larger Bench, and, therefore, direct that it be laid before the Chief Justice for orders under rule 2, Chapter V, of the Rules of the High Court.

The question which arises for decision is whether a purchaser (not being a landlord) of a holding in execution of a decree for rent, has a charge for the amount of the decree for rent as against the holder of a mortgage of the part of the holding executed before the purchase, or is entitled to the same rights as the purchaser of a holding in execution of a decree passed on a prior mortgage."

The question so formulated arose on the following facts. On the 16th September, 1929, the respondents nos. 5 and 6 executed a mortgage bond

in favour of respondents nos. 1 to 4 hypothecating several items of property including khata no. 325 which was part of a holding belonging to them. In 1929 the landlord of the village wherein the holding is situate brought a rent suit and in execution of the decree passed in his favour in that suit the holding was sold and purchased by the appellant on the 10th March, 1931. On the 5th December, 1933, the respondents nos. 1 to 4 brought the present suits to enforce their mortgage bond, inpleading therein no less than eleven persons including the appellant as defendants. The suit was contested only by the appellant who was defendant no. 11 and by the guardian ad litem of defendant no. 3, a minor son of one of the executants of the bond. The latter attacked the bond on the ground that it was without consideration and not supported by any legal necessity and the appellant took two additional pleas among others, namely, (*1*) that the incumbrance created by the mortgage had been annulled under section 167 of the Bengal Tenancy Act and (*2*) that the lands purchased by the appellant were not liable to be sold for the payment of the dues under the bond and that at any rate they could be sold only if the dues under the bond were not realised by the sale of the other mortgaged properties. The Munsif who tried the suit passed a mortgage decree against all the defendants including the appellant, holding, inter alia, that the mortgage bond was genuine and for consideration, that its execution was justified by legal necessity and that the proceeding under section 167 of the Bengal Tenancy Act was of no avail to the appellant as he applied under that section more than a year after having become aware of the plaintiffs' mortgage. The appellant then appealed to the District Judge, but as his appeal did not succeed he has preferred this second appeal.

The main ground which is put forward on behalf of the appellant in this Court is that he being

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the purchaser of the entire holding of the original mortgagors, has acquired with regard to khata no. 325 a title paramount to that of the plaintiffs and can use it as a shield in that suit. The question, as has been pointed out in the order of reference, is of some importance and requires careful consideration.

Section 65 of the Bengal Tenancy Act, which has been reproduced with a slight variation in the Bihar Tenancy Act of 1935, runs as follows:—

"Where a tenant is a permanent tenure-holder, a raiyat holding at fixed rates or an occupancy-raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon."

In view of this provision it was held by Mullick, J. in *A. B. Cheoditti* v. *Quadress*(1) that a purchaser at an auction sale in execution of a decree for rent or road-cess (which is included in the definition of 'rent') acquires a title paramount to that of a mortgagee of the same property even though the decree was obtained subsequently to the execution of the mortgage. The decision of Mullick, J. was upheld on appeal under the Letters Patent and was cited with approval in *Surat Lal Chowdhery* v. *Lala Murlidhar*(2) wherein it was held that a purchaser in execution of a rent decree is not liable to be ousted by a person who purchases the same property in execution of a mortgage decree even though the mortgage has not been annulled under section 167 of the Bengal Tenancy Act. The learned Judges who decided the last mentioned case observed in the course of their judgment that the purchaser under a mortgage decree might well be regarded as a second mortgagee. A similar view was expressed by the Calcutta High Court in *S. M. Meherunnesa* v. *Sham Sundar Bhuiya*(3). In that case one of the

(1) (1916) 1 Pat. L. J. 161.
(2) (1918) 4 Pat. L. J. 362.
(3) (1902) 6 Cal. W. N. 884.

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points urged before the High Court was that after the sale of a holding in execution of a rent decree, the rent charge must be taken to have been discharged, so that the plaintiff who was the mortgagee of the holding and whose encumbrance had not been annulled would be entitled to sell the property mortgaged free of that charge. The Judges who heard the case negatived this argument and remarked that the plaintiff may well be regarded in the circumstances as a second mortgagee, the prior charge being in the defendant. Similarly, in *Tariniprosad Roy* v. *Narayan Kumari Debi*(1) it was held that section 65 of the Bengal Tenancy Act creates a first charge upon the tenure for its rent and puts the landlord in the position of a first mortgagee so far as the rent is concerned; and in *Bibi Taibatannessa Chowdhurani* v. *Pravabati Dasi*(2) it was laid down that a purchaser at a sale in execution of the landlord's claim for rent acquires a title to the whole of the holding preferential to that which a mortgagee by his purchase in execution of his mortgage decree acquires in portions of the holding. The same principle was re-iterated in *Gopi Nath Mohapatro* v. *Kashi Nath Beg*(3).

These decisions which are all based on the language of section 65 of the Bengal Tenancy Act show that the title acquired by the purchaser of a holding at a rent sale, whether he be a landlord or a stranger, is to be regarded as paramount to that of the mortgagee of that holding, even though the decree is obtained subsequent to the execution of the mortgage. The view, however, which has been taken in some of the later decisions of the Calcutta High Court is quite different in spite of the fact that the earlier cases appear to have never been overruled. The view which has been taken in these later

(1) (1889) I. L. R. 17 Cal. 301.

(2) (1909) 10 Cal. L. J. 640.

(3) (1909) 9 Cal. L. J. 234.

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cases is that a purchaser at a rent sale whether he be a landlord or any one else, is bound to follow the provisions of section 167 and if the mortgage is not annulled on the expiry of one year from the date of the rent sale or from the date when the purchaser had notice of the encumbrance, the holding remains subject to the mortgage and the purchaser at a rent sale is not entitled to possession of the property unless he redeems the mortgage. Among the cases in which this view has been taken may be mentioned *Bidhumukhi Dasi* v. *Bhaba Sundari Dasi*(1), *Sital Chandra Majhi* v. *Parbati Charan Chakrabarti*(2) and *Annada Prosad Chatterji* v. *Phanindra Bhusan Ghatak*(3). The view expressed in these cases is justified by Mookerjee, J. in *Sital Chandra Majhi* v. *Parbati Charan Chakrabarti*(2) in these words: "In the first place, it was contended that the defendants were entitled to priority, as rent is a first charge on the tenure or holding under section 65 of the Bengal Tenancy Act. This argument, which may find apparent support from the decisions in *Gopinath* v. *Kashinath*(4) and *Taibatannessa* v. *Pravabati*(5), is based upon a misapprehension of the true effect of section 65, which only intends what is explicitly laid down in subsequent sections of the Act, that is, those in Chapter XIV, namely, that the charge should be enforced by the sale of the tenure or holding free of incumbrances, and if in any case the decree for rent either has not been or cannot be enforced by the sale of the tenure or holding, the charge created by section 65 cannot be enforced in any other way."

It may be noted here that the decisions quoted above do not draw any distinction between a transferable holding and a non-transferable one or

(1) (1920) 24 Cal. W. N. 961.
(2) (1921) 35 Cal. L. J. 1.
(3) (1936) A. I. R. (Cal.) 381.
(4) (1909) 9 Cal. L. J. 234.
(5) (1909) 10 Cal. L. J. 640.

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between a landlord purchaser and a purchaser who is not a landlord. It is clear that if the tenant of a holding, notwithstanding the fact that the holding is not transferable, mortgages it to a third person, the landlord of the holding is not bound to recognise the mortgage or admit the mortgagee to be his tenant even though the mortgagee may have obtained a decree on the basis of the mortgage. In such a case if the holding is sold in execution of a rent decree and the landlord himself purchases it, there is nothing to prevent him from ignoring the mortgage without formally annulling the encumbrance under section 167 of the Bengal Tenancy Act of 1885. This was very clearly pointed out by Dawson Miller, C. J. in *Badlu Pathak* v. *Sibram Singh*(1) in the following passage:—

"Can the mortgagee who has obtained a decree on his mortgage and purchased the property in execution claim possession from the landlord or the raiyat settled on the land by the landlord? Clearly not without the landlord's consent. He has no right to hold the land as a raiyat against the will of the landlord and his incumbrance although never formally annulled and although still subsisting for what it is worth, is a barren right against the landlord when he seeks to enforce it by taking possession of the property. It is therefore of no consequence that the landlord did not seek to annul the mortgage, for the mortgagee could not step into the shoes of the original tenants and acquire a raiyati interest against the landlord's will. To hold otherwise would be, in fact, to allow the tenant of a non-transferable holding to transfer in a roundabout way to a stranger without the landlord's consent, by executing a mortgage in favour of the stranger and allowing the holding to be sold in execution of a mortgage decree. Such a sale can give him no

(1) (1927) I. L. R. 7 Pat. 155.

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right against the landlord without the landlord's consent or entitle him to oust the landlord or the tenant claiming under him."

The same view was re-iterated by Sir Jwala Prasad in *Sourendra Mohan Singh* v. *Kunjbihari Lal Mander*(1).

These cases have so far as this Court is concerned settled the rights of a landlord purchaser, but the position is not so clear when the holding is purchased by a person who is not a landlord. As I have already stated, the view expressed in the earlier decisions of this Court was that such a purchaser may well be regarded as a first mortgagee, but a contrary view has been expressed in *Hargobind Das* v. *Ramchandra Jha*(2). In that case Adami, J. quoted with approval in his judgment the decision of the Calcutta High Court in *Bidhumukhi Dasi* v. *Bhaba Sundari Dasi*(3) and *Sital Chandra Majhi* v. *Parbati Charan Chakrabarti*(4) and held that a purchaser at a rent sale, who has not under section 167 of the Bengal Tenancy Act annulled a mortgage on the holding, is entitled to redeem the mortgage, but the mortgagee cannot redeem or otherwise exercise his right of redemption against the auction-purchaser. It is contended on behalf of the appellant that this decision should be ignored, first, because it runs counter to the earlier decisions of this Court which have not yet been overruled; secondly, because Macpherson, J., who heard the case with Adami, J., merely "agreed to the order proposed" which shows that he did not concur in all the reasons given by Adami, J. in support of his view; and, thirdly, because Adami, J. seems to have wrongly assumed that in

(1) (1928) I. L. R. 8 Pat. 439.
(2) (1926) I. L. R. 6 Pat. 235.
(3) (1920) 24 Cal. W. N. 961.
(4) (1921) 35 Cal. L. J. 1.

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Lala Murlidhar v. *Sarat Lal Chowdhery*(1), which was decided by Coutts and Ross, JJ., the purchaser of the holding was the landlord of the village though in fact he was a stranger. These facts no doubt detract to some extent from the authority of the decision in question, but as the view expressed in it has been shared also by some eminent Judges of the Calcutta High Court, it requires careful examination.

Section 65 is one of the sections in Chapter VIII of the Bengal Tenancy Act and section 167 occurs in Chapter XIV which is a different chapter. There is nothing in the Act to show that all the legal consequences which flow from the specific provision made in section 65 of Chapter VIII that rent is a first charge on the holding were exhaustively provided for in Chapter XIV or that the only right which the purchaser of the holding at a rent sale has with reference to the mortgagee of the holding is to annul the mortgage under section 167. If the latter view is correct, it will mean that the provision in section 65 that rent is a first charge on the holding is redundant, because, apart from this section and without any reference to it, section 167 gives the right of annulling incumbrances to a purchaser of a holding in execution of a rent decree. It may be that the charge created under section 65 was not intended to be enforced precisely in the same manner as the charge under section 100 of the Transfer of Property Act; but the fact remains that rent has been made a statutory charge on the holding and the charge is stated to be a first charge. The expression 'first charge' is not an uncommon expression and the least it can cannote in the present context is (*1*) that the rent can be realised by the sale of the holding itself and (*2*) that the claim for rent will have priority over other charges or incumbrances on the holding. It would thus be anomalous

(1) (1922) 3 Pat. L. T. 362.

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to hold that one who purchases a holding in execution of a rent decree occupies a position inferior to that of a mortgagee of a holding or a person who purchases it in execution of a mortgage decree. In my opinion, the view taken in the earlier decisions of this Court and the Calcutta High Court, namely, that the position of a purchaser in execution of a rent decree is similar to that of a purchaser in execution of decree based on a prior mortgage, is the better and more logical view. As in a rent suit the landlord is not obliged to implead the mortgagee of a holding as a defendant, if the holding is a non-transferable one, the latter should occupy the same position with reference to a purchaser in execution of a rent decree as a subsequent mortgagee occupies with reference to a purchaser in execution of a decree based on a prior mortgage to which he was not a party. It was held by the Judicial Committee of the Privy Council in *Sukhi* v. *Ghulam Safdar Khan*(1) that where the prior mortgagee having obtained a decree is sued by a puisne mortgagee whom he had not joined in the former suit, the former is entitled to use his prior mortgage as a shield, and to have the discharge of his decree made a condition to a sale decree in favour of a puisne mortgagee. I do not see why the same principle should not govern the relation between the purchaser of a holding in execution of a rent decree and its mortgagee. Thus if a purchaser in execution of a rent decree fails to annul an incumbrance under section 167, the incumbrance will continue but he will not thereby lose his priority over the holder of the incumbrance. This priority is acquired by him as a matter of law in consequence of the rent being a first charge on the holding and it should not be confused with the special privilege conferred on him by section 167. Therefore while agreeing with the first proposition laid down by Adami, J. in *Hargobind Das* v. *Ramchandra Jha*(2),

(1) (1921) L. R. 48 Ind. App. 465.
(2) (1926) I. L. R. 6 Pat. 235.

I respectfully dissent from his second proposition that the mortgagee of a holding cannot redeem or otherwise exercise his right of redemption against the auction-purchaser of the holding at a rent sale who has taken no steps to annul the mortgage under section 167 of the Bengal Tenancy Act. The first proposition laid down by Adami, J. was that a purchaser at a rent sale is entitled to redeem the mortgage if he has not annulled it under section 167 of the Bengal Tenancy Act. That this must be so is evident from the fact that the auction-purchaser is also a purchaser of the equity of redemption. In my opinion the question referred to the Full Bench should be answered in the affirmative.

Now so far as the present case is concerned the appellant (defendant no. 11) is not prepared to redeem the plaintiffs' mortgage but both the appellant and the plaintiffs are agreed that if a charge is declared in favour of the former, the proportionate sum chargeable on khata no. 325 will amount to Rs. 350 and in that event the khata no. 325 need be sold only if the mortgage dues are not satisfied by the sale of the other mortgaged properties and if khata no. 325 is sold the defendant no. 1 will be entitled to get Rs. 350 out of the sale proceeds. I would, therefore, partly allow this appeal and direct that a mortgage decree be passed in favour of the plaintiffs on the following terms:—

That if the mortgage dues are not paid within four months from the date of this judgment the mortgaged properties other than the land of khata no. 325 shall be sold in the first instance. If the decree is not satisfied by the sale of those properties, then only the land of khata no. 325 shall be sold, but out of the sale proceeds of this khata the plaintiffs shall pay to the defendant no. 11 a sum of Rs. 350. In case the plaintiffs themselves purchase khata no. 325 they will be entitled to retain possession thereof on payment of Rs. 350 to the appellant. If the decretal

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amount is not satisfied by the sale of the mortgaged properties including the land of khata no. 325 it will be open to the plaintiffs to take such proceedings as they are entitled to take under the law to realise the balance of the dues from the other properties, if any, belonging to defendants nos. 1 to 5. Each party will bear his own costs in this Court and in the Court below but the order of the first Court as to costs will stand.

AGARWALA, J.—I agree.

VARMA, J.—I agree.

Appeal allowed in part.

S. A. K.

REVISIONAL CIVIL.

Before Fazl Ali and Chatterji, JJ.

1939.

May, 9, 11.

RATANSHI HIRJI BHOJRAJ

v.

TRICUMJI JIWANDAS.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 60 *and Order XXI, rule* 53 (4)—*preliminary decree in a suit for dissolution of partnership and accounts, whether is attachable.*

A preliminary decree in a suit for dissolution of partnership and accounts is attachable under section 60 of the Code of Civil Procedure, 1908, and may be attached in the manner prescribed by Order XXI, rule 53 (4).

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* Civil Revision nos. 379, 467 and 468 of 1938, from an order of Babu Jugal Kishore Narayan, Subordinate Judge, Dhanbad, dated the 25th May, 1938.

Sailendra Krishna Choudhury v. *Harendra Kumar Roy*(1), dissented from.

F. P. Dhanaraju v. *Moti Lal Daga*(2), *Syud Tuffuzzool Hosein Khan* v. *Raghoonath Pershad*(3) and *Khettra Mohan Das* v. *Biswanath Bera*(4), distinguished.

Application in revision by the decree-holders.

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

R. S. Chatterji, for the petitioners.

Sir M. N. Mukherji and *N. N. Roy*, for the opposite party.

CHATTERJI, J.—These three applications are directed against an order by which three connected claim cases under Order XXI, rule 58, of the Code of Civil Procedure, arising out of execution case no. 12 of 1937 in the Court of the Subordinate Judge of Dhanbad were allowed. The decree under execution was obtained by the petitioners against the opposite party no. 1 (a firm named Tricamjee Jivandas) and another individual. The subject of the attachment which gave rise to the claims was a preliminary decree for dissolution of partnership and for accounts obtained by the opposite party no. 1 and three others, namely, opposite party nos. 2 to 4, against certain individuals. This preliminary decree provided, among other terms, that—

"After such accounting is completed a decree for the amount that may be found due for the plaintiffs' 1½ annas share in the profits of the partnership properties and business will be drawn up against defendants nos. 1 to 3 realisable from the assets of Goa Potha in their hands."

The decree further provided that the plaintiffs were to get full costs which were to be assessed after the accounting was over. In execution case no. 12 of 1937 in the Subordinate Judge's Court at Dhanbad

(1) (1936) 40 Cal. W. N. 1393.
(2) (1929) A. I. R. (Mad.) 641.
(3) (1871) 14 Moo. I. A. 40.
(4) (1924) A. I. R. (Cal.) 1047.

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when the petitioners attached the interest of the opposite party no. 1 in this preliminary decree, the opposite party nos. 2 to 4 who were the remaining decree-holders under that decree objected that the preliminary decree was not liable to attachment. This objection has been allowed.

The learned Subordinate Judges, relying upon the decisions in *Sailendra Krishna Choudhury* v. *Harendra Kumar Roy*(1) and *Dhanarju* v. *Moti Lal Daga*(2), has held that the preliminary decree in question is not a decree which is capable of being attached under the provisions of Order XXI, rule 53, of the Code of Civil Procedure. The question whether the decree is attachable or not must be determined with reference to the terms of section 60 of the Code of Civil Procedure. That section lays down that with the exception of certain classes of properties specified therein all other property over which the judgment-debtor has a disposing power is attachable. Order XXI, rule 53, merely prescribes the manner in which the attachment of decrees is to be effected. The real question, therefore, is whether the preliminary decree can be said to be property over which the judgment-debtor has a disposing power. It has not been suggested that it comes under any of the exceptions in section 60. It has, however, been contended by Sir M. N. Mukherji appearing for the opposite party that the right conferred by the preliminary decree is nothing more than a mere right to sue which under the provisions of section 6 of the Transfer of Property Act is not assignable. A decree conclusively determines the rights of a party with regard to all or any of the matters in controversy in the suit, and it may be preliminary or final, as the very definition of decree in section 2 of the Code of Civil Procedure shows. When a right to sue merges in a decree, it

(1) (1936) 40 Cal. W. N. 1393.

(2) (1929) A. I. R. (Mad.) 641.

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can no longer be said to be subject to the prohibition against alienation attaching to a mere right to sue. Indeed, a preliminary decree may not be capable of immediate execution but nevertheless it creates some rights which must be regarded as property, and there can be no doubt that such property is attachable under section 60 of the Code of Civil Procedure.

In *Sailendra Krishna Chaudhury* v. *Harendra Kumar Roy*(1) it was no doubt held that preliminary decree for accounts in a suit for dissolution of partnership and accounts is not attachable in execution of another decree. In that case which was heard ex parte no reference appears to have been made to the provision of section 60 or clause (*4*), Order XXI, rule 53, of the Code of Civil Procedure. Clause (*1*) of the last mentioned rule refers to a decree either for the payment of money or for sale in enforcement of a mortgage or charge. Clause (*4*) refers to decrees of all other kinds. So the preliminary decree in question which falls under clause (*4*) can be attached in the manner provided therein. With all respect to the learned Judges who decided the case of *Sailendra Krishna Choudhury* v. *Harendra Kumar Roy*(1), I am unable to concur in their view.

The case of *Dhanaraju* v. *Moti Lal Daga*(2) does not really support the view taken by the learned Subordinate Judge. There the question whether a preliminary decree for accounts in a suit for dissolution of partnership and accounts can be attached in execution of another decree did not really arise, and it appears that it was rather assumed that such a decree could be attached. The main controversy in that case was whether such preliminary decree could be regarded as a decree for the payment of money and whether the sale of such decree was valid in view of the privisions of rule 184 of the Civil Rules of Practice

(1) (1936) 40 Cal. W. N. 1393.

(2) (1929) A. I. R. (Mad.) 641.

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framed by the Madras High Court under the powers conferred by the Code of Civil Procedure.

Sir M. N. Mukherji has referred to *Syud Tuffuzzool Hossain Khan* v. *Raghoonath Pershad*(1). There with the consent of the parties, the accounts of a partnership Firm were referred under order of the Court to arbitrators, but before any award was made the rights and interests of one of the parties in the award were by order of the Court sold by auction in satisfaction of a decree against him made in another suit by a third party. It was held that the expectant claim under an inchoate award was not property within the meaning of section 205 of Act VIII of 1859, and was not saleable in execution of a decree. The very decision suggests that if the execution sale had taken place after the award the position would have been quite different. Their Lordships held that "a mere right of suit is not property." The reasons for that decision do not, to my mind, apply to a case like the present where there has been a decree of Court, though preliminary. Sir M. N. Mukherji has also referred to *Khettra Mohan Das* v. *Bishwanath Bera*(2). The question for decision in that case was whether the right to sue for accounts was assignable and it was held that it was not under section 6, clause (*e*), of the Transfer of Property Act. This decision is, therefore, of no assistance.

I should observe here that reference was made on both sides to Order XXI, rule 42, of the Code of Civil Procedure which runs thus:—

"Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money."

With reference to this rule the learned Judges in *Sailendra Krishna Choudhury* v. *Harendra Kumar Roy*(3) decided that the words "any other matter"

(1) (1871) 14 Moo. I. A. 40.
(2) (1924) A. I. R. (Cal.) 1047.
(3) (1936) 40 Cal. W. N. 1393.

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cannot include a preliminary decree directing the taking of accounts in a partnership suit. Their Lordships further observed " This rule deals expressly with the decrees for mesne profits and rents. In these cases the defendant can only be the judgment-debtor but the plaintiff can never be the judgment-debtor. No decree can possibly be passed in those cases, rendering the plaintiff liable to the defendant. That is the essential difference between those decrees and a decree in the partnership suit directing accounts to be taken as in the latter case the question as to who will be the judgment-debtor will depend on the result of the accounts ". The position thus indicated may, perhaps, be correct. But Order XXI, rule 42, is not relevant for our present purpose, because all that that rule provides is that there can be an attachment under a preliminary decree but it does not touch the question whether the preliminary decree itself is capable of attachment.

In my view the preliminary decree in question was attachable and the learned Subordinate Judge was wrong in allowing the claims.

It was further contended on behalf of the petitioners that the claimants had no locus standi to object to the attachment, the judgment-debtor himself having raised no such objection. In view of my decision on the other point it is not necessary to deal with this question.

In the result I would allow the applications and reject the claim petitions. The petitioners are entitled to costs of both Courts; hearing fee sixteen rupees in each case in the lower Court and one gold mohur in each case in this Court.

FAZL ALI, J.—I agree.

S. A. K. *Rule made absolute.*

REVISIONAL CIVIL.

Before Khaja Mohamad Noor and Chatterji, JJ.

1939.

May, 10.

SYED RAZAUR RAHMAN

v.

UDIT SINGH.*

Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938 (*Bihar Act IX of* 1938), *section* 15, *whether void—section, whether applies to proceedings for execution of decrees—Government of India Act*, 1935 (25 *and* 26 *Geo. V, Ch.* 42), *section* 107—*Bihar Tenancy Act*, 1885 (*Act VIII of* 1885), *section* 143—*order reducing amount of decree in execution, whether appealable—revisional powers, whether to be exercised when order is appealable—Code of Civil Procedure*, 1908 (*Act V of* 1908), *sections* 47 *and* 115.

The procedure and regulation of rent and revenue Courts being exclusively within the purview of the Provincial Legislature, it is open to that Legislature to amend section 143 of the Bihar Tenancy Act, 1885 (which, with certain reservations, makes the provisions of the Code of Civil Procedure applicable to rent suits) and provide a new procedure for the trial of rent suits.

Therefore, section 15 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938, which by implication authorizes the Court not to execute decrees for arrears of rent beyond a certain sum, is not repugnant to any existing law relating to the concurrent List so as to be void under section 107 of the Government of India Act, 1935.

Held, further, that section 15 of the Act applies to proceedings for the execution of decrees.

An order reducing the amount of decree in execution, under section 15 of the Act, comes within the purview of section 47 of the Code of Civil Procedure, 1908, and is therefore appealable.

* Civil Revision nos. 30, 52 and 59 of 1939, against the orders, respectively, of Babu Badri Narain Rai, Munsif, Second Court, Patna, dated the 7th December, 1938, Babu B. N. Roy, Munsif, Second Court, Patna, dated the 19th December, 1938, and Babu R. K. Sinha, Munsif, Second Court, Gaya, dated the 24th January, 1939.

It is the established practice of the High Court not to exercise its revisional powers in cases where a party entitled to appeal has not appealed.

Applications in revision on behalf of the decree-holders.

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

B. N. Mitter (with him *R. S. Sinha*, *A. H. Fakhruddin* and *Rajkishore Prasad*), for the petitioners.

Advocate-General (with him *Government Pleader G. N. Mukherji* and *Kanhayaji*), for the opposite party.

KHAJA MOHAMAD NOOR, J.—These three applications in revision arise out of proceedings for execution of rent decrees. They are against three different orders of three different Courts in three different cases between different parties. They have been heard together as the question involved in all of them is the same. In each of them the executing Court has reduced the amount of decree for the purpose of execution according to the directions given in section 15 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938 (Act IX of 1938). The decree-holders in each case have come up in revision.

The Provincial Legislature by amending the Bihar Tenancy Act and the Chota Nagpur Tenancy Act have made provisions for reduction of rents of raiyats. The raiyats under certain circumstances have been authorized to apply for reduction of rents and the officer deputed for the purpose is directed to reduce rent on certain basis. Act IX of 1938 provides, among others, that when rent has once been reduced under the provisions of section 112 or 112A of the Bihar Tenancy Act or under section 85 of the Chota Nagpur Tenancy Act the landlord will not be entitled to recover in any proceeding rent at a rate in excess of the rate which has been fixed after reduction under the provisions mentioned above. It goes

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further and provides that even if no application has been made for reduction of rent and that rent has not been reduced by Revenue Authorities, the landlord in any suit or proceeding will not be entitled to realise more rent than would have been fixed after reduction if the raiyat had applied under section 112A of the Bihar Tenancy Act and section 85 of the Chota Nagpur Tenancy Act. This, however, applies to arrears of rent due up to a certain year. Thus, on the one hand, they have provided machinery for reduction of rent on the application of the raiyat and, on the other, by Act IX of 1938 they have made it impossible for the landlord to realise for the previous years also rent at a higher rate than has been fixed after reduction or would have been fixed if the tenant had put in an application. In all these three cases the rent of the raiyat has been reduced and the learned munsif in each case has reduced the decree on the basis of the reduced rent. In other words, he has refused to execute the decrees for previous years for a sum in excess of the amount which was payable after the reduction of the rent.

In the first place, in my opinion, these applications are not maintainable. It is the settled practice of this Court that revisional powers are not exercised in those cases in which a party entitled to appeal has not appealed. In all these three cases the orders of the learned munsifs were appealable. They obviously came under section 47 of the Civil Procedure Code. Mr. B. N. Mitter, who appears for one of the petitioners, contended that the learned munsif amended the decree and that the order of amendment was not appealable. In whatever form the order of the munsif may be in fact the effect was that he refused to execute the decree for the sum which was mentioned in it and proceeded to execute it only after reducing it according to the direction given in section 15 of Act IX of 1938. It was really a question of execution, satisfaction and discharge of decree and, as I have said, obviously came under

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section 47 and an appeal lay to the District Judge. The petitioners not having appealed, cannot invoke the revisional powers of this Court.

I now come to the merits of the applications. Mr. Mitter argues (*1*) that section 15 had no application to execution proceedings, (*2*) that if it did apply, it was repugnant to section 38 of the Civil Procedure Code, an existing Indian Law, and to the extent of that repugnancy it was void under section 107 of the Government of India Act. Now, as to the first part of the argument, section 20 makes it perfectly clear that the directions given to Courts in section 15 apply to the proceeding for the execution of the decrees also. No doubt the word " decree " is not mentioned in the section, but the execution proceedings can refer to no other proceedings than proceedings for execution of a decree. Then the Civil Procedure Code by itself does not apply to suits for rent. It is section 143 of the Bihar Tenancy Act which, with certain reservations, makes the Civil Procedure Code applicable to rent suits and the procedure and regulation of rent Courts and revenue Courts are exclusively within the purview of the Provincial Legislatures. It was quite open to the Provincial Legislature to amend section 143 of the Bihar Tenancy Act and provide new procedure for the trial of rent suits. If by implication they authorised the Court not to execute decrees beyond a certain sum specified in section 15, they had full power to do so. In my opinion this provision is not repugnant to any existing law relating to the Concurrent List no. III of the seventh schedule of the Government of India Act.

For these reasons the petitions fail. I would reject them. There will be no order for costs.

CHATTERJI, J.—I agree.

S. A. K.

Rule discharged.

APPELLATE CRIMINAL.

Before Harries, C. J. and Meredith, J.

1939.

July, 24, 25.

SACHINDER RAI

v.

KING-EMPEROR.*

Trial by Jury—charges under sections 366, 366*A and* 376, *Penal Code,* 1860 (*Act XLV of* 1860)—*duty of Judge to warn the jury of the danger of convicting on the uncorroborated testimony of the girl—failure to give such warning, whether amounts to non-direction—statement by Judge that the general moral character of the girl was of no consequence, whether amounts to misdirection—Judge, how should direct the jury in cases dealing with sexual offences—charge to the jury must show how complicated law has been explained.*

It is extremely dangerous, and permissible only in exceptional cases, to convict a man of a sexual offence on the uncorroborated testimony of the complainant. The corroboration must be by independent evidence, and the rule must be properly emphasised in the charge to the jury. Failure to warn the jury of the danger of convicting the accused on the girl's evidence alone amounts to a non-direction which vitiates the conviction.

Emperor v. *Nur Ahmed*(1) and *Chamuddin Sardar* v. *Emperor*(2), followed.

In a trial for offences under sections 366, 366A and 376, Penal Code, 1860, a direction to the jury to the effect that the general moral character of the girl is of no consequence amounts to a misdirection.

Sahebali v. *Emperor*(3), followed.

It is the duty of the Judge to direct the jury that if they are not completely satisfied that it has been established that the girl is under eighteen, they are bound to acquit the accused upon a charge under section 366A of the Penal Code.

* Criminal Appeals nos. 102 and 106 of 1939, from a decision of A. N. Banarji, Esq., Assistant Sessions Judge of Shahabad, Arrah, dated the 17th April, 1939.

(1) (1934) A. I. R. (Cal.) 7.
(2) (1936) A. I. R. (Cal.) 18.
(3) (1933) A. I. R. (Cal.) 718.

Where the law is somewhat complicated and liable to be misunderstood by the jury, it is essential for the Judge to say exactly how he has explained it to the jury, so that the appellate Court may be in a position to judge whether he has done so correctly and fully.

Per Harries, C. J.—In cases dealing with sexual offences it is essential that the Judge should specially warn the jury of the danger of convicting upon the uncorroborated testimony of the woman concerned. It is true that there is no rule of law in India requiring corroboration; but experience has shown both in England and in India that it is extremely dangerous in this class of cases to act solely upon the woman's evidence. The rule is a rule of practice, but it has been followed for such a length of time that it has virtually become a rule of law.

After warning the jury of the danger of acting upon the uncorroborated testimony of the girl, the Judge should explain to the jury what amounts to corroboration. He should then point out to the jury what evidence can legally amount to corroboration and he should ask them to consider whether or not they accept such evidence. Finally, he should tell the jury that they should only convict if they are satisfied that the evidence tendered as corroboration is true and worthy of credence.

Criminal Appeal no. 102 on behalf of Sachinder and Hafiz Mian from jail.

Criminal Appeal no. 106 by Hafiz Mian only.

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

K. K. Banerji for the appellant in Criminal Appeal no. 106.

The Advocate-General, for the Crown.

MEREDITH, J.—These are two appeals from the judgment of the Assistant Sessions Judge of Shahabad, Mr. Ananta Nath Banarji. That of the appellant Hafiz Mian is a regular appeal; that of Sachinder Rai is a jail appeal. Both have been taken together for convenience.

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Both appellants have been convicted by a four to one majority verdict of the jury under sections 366 and 366-A of the Indian Penal Code, and accepting this verdict the learned Judge has sentenced each of them to undergo rigorous imprisonment for five years. The sentences are under section 366, no separate sentence being passed under section 366A. The appellants were on trial with two other accused, Salim Mian and Munshi Mian. Besides the charges mentioned, there was a charge of rape under section 376 of the Indian Penal Code against the appellants and one other man, and there was a charge under section 379 of the Indian Penal Code against the appellant Sachinder. These charges have ended in acquittal by a unanimous verdict of the jury.

Briefly, section 366 is the offence of kidnapping or abducting any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse. The definition of kidnapping is to be found in section 361 and it amounts to this: taking or enticing away any female under sixteen years of age. With the rest of the definition we are not concerned. Abduction is defined in section 362 as follows:—

> "whoever by force compels, or by any deceitful means induces any person to go from any place, is said to abduct that person."

As will appear presently, there is no question of kidnapping in this case as there is no evidence, and it is not contended, that the girl is under sixteen. The charge, therefore, rests on abduction: hence it is essential that either force or deceit shall be established as an ingredient of the offence. Section 366A is as follows:—

> "Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable, etc."

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This is a special section, and before a conviction under it can be sustained there must be strict proof that the girl in question is below the age of eighteen.

The facts of the case under appeal are as follows. The complainant in the case, Ekram Singh, (p.w. 1) with his wife Kishori (p.w. 4) lived with their uncle Sukhdeo Singh (p.w. 8) in quarter no. 6 of the Cement Department at Dalmianagar. On the 17th of December, 1938, Ekram Singh discovered in the evening that his wife was missing. He failed to find her that night and the following day, and on the evening of the 18th he went to Benares to his father-in-law's place to search for her. There also she was not found and the complainant returned to Dehri on the evening of the 19th. At 8 p.m. that day he lodged a *sanha* at the Dehri thana. This *sanha* is Exhibit 4 and is to the effect that on the afternoon of the 17th there was an altercation between the complainant and his wife and she being enraged fled from his house. Subsequently the complainant received certain information leading him to suspect that his wife might have been kept in the gola of one Ramzan Mian in Dehri and subsequently removed. He made some further inquiries and then at midday on the 20th December he lodged a formal information at the thana (F. I. R., Exhibit 2). In this first information it is stated that he had learnt from Mulukraj Sharma (p.w. 7) that a woman, who might be his wife, had been kept by Sachitanand (perhaps a mistake for Sachinder), Hafiz, Saleem, Alim and Munshi in the gola of Ramzan. He had learnt that these persons had kidnapped his wife from his quarter and after keeping her for some days in the gola had removed her to some place of which he had no trace. It should be mentioned that all the persons named were residing in the gola of Ramzan.

On this information the police arrested the appellant Hafiz and started an inquiry On certain information received a requisition was sent to the Sub-Inspector of Buxar who received it on the 25th

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of December. He sent a constable to the house of Sachinder's uncle in village Nuaon. From there they went to Buxar railway station where the girl was eventually found with Sachinder. Sachinder was then arrested and the girl was made over to her uncle Sukhdeo Singh (p.w. 8) and taken back to her husband's quarter. After completing investigation, charge-sheet was submitted against the appellants and two other accused as already mentioned. It may be noticed here that at various stages of the case the woman made wholly inconsistent statements. There were serious discrepancies in her story as to the circumstances in which she had left her husband's quarter. It may be also noticed, as already indicated, that her husband in the *sanha* had said that she had left of her own accord as the result of a quarrel, whereas his case in the first information was that she had been abducted from his quarter by the accused.

In Court the woman's case was that she had gone to the railway station to start for her parent's home in Benares. There she had been met by the accused who deceitfully decoyed her away, more or less forcibly detained her in the *gola*, and next morning she was forcibly ravished by the appellant Hafiz and two others. After that the appellant Sachinder compelled her to go to his uncle's place at Buxar and on the way he not only raped her in the railway waiting room but he also robbed her of her ornaments. Her story to the Sub-Inspector of Buxar, when first found, was entirely different. Then she said that she had not been raped or even molested by anyone. She was in love with the appellant Sachinder and had gone away with him of her own accord.

This first story of the girl was almost in complete accord with the defence of Sachinder—a defence which he put forward at once and stuck to right through up to the Court of Session. It is also his case, in his petition of appeal filed from jail. It is to the effect that he and Kishori Devi, the girl, had been known

to each other for some months and that the girl told him she had been badly treated at the quarters of her husband and been practically made to live the life of a prostitute. She requested him to take her away somewhere and she left the quarter and went with him of her own accord. He stated that the other three accused were in no way concerned in the affair.

As for the appellant Hafiz, his case was, and is. that he had nothing to do with the affair and had been falsely implicated by Mulukraj Sharma (p.w. 7) as he had declined to join in a labour strike.

In this appeal we are not, of course, directly concerned with questions of fact. The charge to the jury has, however, been strongly attacked both on the ground of non-direction and of misdirection. I consider that both these grounds have been established.

With regard to non-direction, the point made is that the jury were never warned about the danger of convicting in such cases as this upon the evidence of the woman alone. The charge does contain no warning of this sort. Two rulings have been cited in which it has been held that such a warning is absolutely necessary, and must be emphatic, and in its absence the conviction is vitiated. The first is *Emperor* v. *Nur Ahmed*(1). There it was laid down that it is extremely dangerous, and permissible only in exceptional cases, to convict a man of a sexual offence on the uncorroborated testimony of the complainant. The corroboration must be by independent evidence, that is to say, by some additional evidence coming from another person altogether, and the rule must be properly emphasised in the charge to the jury. In the other case, *Chamuddin Sardar* v. *Emperor*(2), the learned Judge went even further. He held that in a trial for an offence under section 366, Indian Penal Code, the Judge should point out to the jury

(1) (1934) A. I. R. (Cal.) 7.
(2) (1936) A. I. R. (Cal.) 18.

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that they are entitled, if they please, to convict the accused upon the uncorroborated testimony of the girl but that it is dangerous to do so in cases dealing with sexual offences, such as rape, abduction and similar cases, and that only in exceptional cases they should convict the accused upon the uncorroborated testimony of the girl. Failure to warn the jury of the danger of convicting the accused on the girl's evidence alone amounts to a non-direction, which vitiates the trial.

The present was a case where there was no real corroboration of the girl's statement. The only suggested corroboration is, first, a statement of p.w. 3 that he had noticed the appellant Hafiz with others seeing the girl off at the railway station. He was not able to explain how he was sure that the appellant had gone to the station for that purpose—worse still he had not made this statement at all before the police or in the lower Court. It was a statement which deserved no credence whatever. Even, however, could it have been accepted, it did not amount to corroboration, because it was equally consistent both with the version of the prosecution and with that of the defence.

The same remark applies to the only other suggested corroboration—a statement of p.w. 7 that he had seen the appellant Hafiz entering Ramzan's *gola*. Many other persons had been seen entering the *gola*, and some of them admittedly had gone there only to make inquiries about the presence of a strange woman. The statement, therefore, amounted to no corroboration whatever. In Sachinder's case there was really no corroboration at all.

Thus the case was certainly one where there was no real evidence except the girl's statement and the rulings cited were strictly applicable. But the learned Judge did not utter a single word of warning. I consider that his failure to do so was in itself sufficient to vitiate the conviction. In the present case a warning was all the more necessary in view of the hopelessly inconsistent statements made by the woman, and

the fact that she had shown herself to be an unscrupulous liar. Her story of rape was evidently disbelieved even by the jury themselves.

With regard to misdirection, attention has been drawn to a statement in the charge to the effect that about the girl being of loose morals, the Judge considered that he should tell them that as far as charges under section 366, 366A and 376 of the Indian Penal Code were concerned, her general moral character was of no consequence. In this connection a ruling has been cited, *Sahebali* v. *Emperor*(1), where it was laid down that it must be shown that the girl was leading a pure life at the time of the alleged kidnapping or abduction. It is not perhaps necessary to go quite so far as that, but at least the Judge should have told the jury that if the girl was immoral it made her story of abduction and deceit less probable and that of Sachinder that she had a love affair with him more probable. That was an aspect of the case which the jury should have carefully considered ; but it was never put to them at all. On the contrary, the Judge's unfortunate statement, if technically a correct statement of the law, was highly likely to mislead them.

The charge, therefore, was vitiated both on grounds of non-direction and of misdirection. The necessity cannot be too strongly emphasised for charging the jury in cases of this nature with extreme care, for experience has shown that juries in this country are most liable to misunderstand the law on the subject and to misapply it.

With regard to section 366A, there is yet another defect in the charge. Here, as I said in the beginning, the question of age is the crucial one and strict and exact evidence of age is essential. There was, however, no exact evidence of age. The parents were not examined. Two witnesses made vague statements

(1) (1933) A. I. R. (Cal.) 718.

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that she was aged fifteen or sixteen, and the doctor, who thought she was about sixteen, was also vague and admitted that it was only a matter of opinion, and that he could not say definitely that she was not over sixteen. The Judge should have strongly emphasised this feature of the case and clearly directed the jury that if they were not completely satisfied that it had been established that the girl was under eighteen they were bound to acquit upon that charge.

There is yet another aspect in which this charge is defective. I stated at the beginning that as there is no question of kidnapping, there being no evidence that the girl was under sixteen, the charge under section 366 depended entirely on the proof of force or deceit. There is nothing in the charge to show that the Judge ever explained this to the jury and asked them to consider carefully whether any deceit had really been shown to have been practised upon the girl. All that the charge contains on this subject is a general statement that the sections in question had been read over and explained to the jury. This will not do. Where, as in cases of this nature, the law is somewhat complicated and liable to be misunderstood by juries, it is essential for the Judge to say exactly how he has explained it to the jury, so that the appellate Court may be in a position to judge whether he has done so correctly and fully.

I consider the charge in this case so defective that a verdict based upon it, and only a majority verdict at that, could not safely be sustained.

Nor, having regard to all the circumstances of the case, do I consider it one where a retrial should be ordered.

I would allow the appeals, set aside the convictions and acquit both appellants.

HARRIES, C. J.—I agree. This case belongs to that class of cases commonly referred to as sexual cases. In such cases it is, in my view, essential that

the learned Judge should specially warn the jury of the danger of convicting upon the uncorroborated testimony of the woman concerned. It is true that there is no rule of law in this country requiring corroboration; but experience has shown both in England and in India that it is extremely dangerous in this class of cases to act solely upon the woman's evidence. The rule is a rule of practice, but it has been followed for such a length of time that it has virtually become a rule of law.

In the present case the learned Judge did not warn the jury of the danger of acting upon the uncorroborated testimony of the girl. As pointed out by my learned brother in his judgment, the girl's evidence was a mass of contradictions, and this was eminently a case in which the jury should have been warned most emphatically. In my view, in cases of this kind the learned Judge must point out in the clearest language that it is extremely dangerous to base a conviction upon the girl's evidence and he should stress the fact that before the jury can properly return a verdict of guilty they must be satisfied that the girl's evidence is corroborated by other independent testimony. Having given such a warning, the learned Judge should explain to the jury what amounts to corroboration. He should then point out to the jury what evidence can legally amount to corroboration and he should ask the jury to consider whether or not they accept such evidence. Finally, he should tell the jury that they should only convict if they are satisfied that the evidence tendered as corroboration is true and worthy of credence.

In the present case the learned Judge gave no warning of any kind and has not dealt at all with the question of corroboration. He never asked the jury to consider whether the pieces of evidence which might amount to corroboration could possibly be accepted. As pointed out by my learned brother, one piece of evidence suggested as corroboration of the girl's story

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against Hafiz could not possibly be accepted by any responsible jury. In my view, the charge in this case was deficient and the convictions based on it cannot possibly be sustained. I entirely agree that this is not a case in which a retrial should be ordered.

S. A. K. *Appellants acquitted.*

APPELLATE CIVIL.

Before Rowland and Chatterji, JJ.

1939.

July, 27, 28.

UMAR

v.

MAHABIR LAL SAHU.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXXII, rules 5 and 7—minor—reference to arbitration in contravention of rule 7—decree based on award, whether void or voidable—minor, whether can impeach the decree in execution proceeding—void and voidable decrees, difference between —minor effectively represented by a guardian—absence of formal appointment—effect—questions of effective representation and prejudice, whether can be investigated in execution proceeding.*

A decree based on an award made on a reference which is in contravention of Order XXXII, rule 7, Code of Civil Procedure, 1908, is not void but voidable at the instance of the minor, and, therefore cannot be impeached in an execution proceeding relating to that decree.

Kedar Nath Sahu v. *Basant Lal Sahu*(1), *Sadashivappa* v. *Sangappa*(2), *Nurul Anwar* v. *Sm. Golenoor Bibi*(3) and *Khiarajmal* v. *Daim*(4), distinguished.

* Appeal from Original Order no. 91 of 1939, from an order of Babu J. N. Das Gupta, Subordinate Judge of Muzaffarpur, dated the 27th March, 1939.

(1) (1939) I. L. R. 18 Pat. 271.

(2) (1931) A. I. R. (Bom.) 500.

(3) (1934) A. I. R. (Cal.) 845.

(4) (1904) I. L. R. 32 Cal. 296, P. C.

A decree is void when the Court which passed it had no jurisdiction, whether territorial or pecuniary or over the subject-matter or in respect of the judgment-debtor's person, to make it. Where, however, the Court has complete jurisdiction to hear a case but passes a decree in disregard of some provisions of law, the decree is voidable and binding until it is set aside in an appropriate proceeding.

Pande Satdeo Narain v. *Ramayan Tiwari*(1), *Girwar Narayan Mahton* v. *Kamla Prasad*(2) and *Jungli Lal* v. *Laddu Ram Marwari*(3), relied on.

Where a guardian for a minor defendant appears in the suit and effectively represents him, although no formal order of appointment is made, the decree cannot be said to be invalid against the minor unless prejudice is shown.

Walian v. *Banke Behari Pershad Singh*(4), relied on.

But the questions whether in a particular case a minor was effectively represented and whether he had suffered any prejudice cannot be investigated in an execution proceeding.

Appeal by the minor judgment-debtors.

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

B. C. De, for the appellants.

S. K. Mitra, for the respondents.

CHATTERJI, J.—This appeal which arises out of an execution proceeding is by Umar Mia and Bibi Asma two of the judgment-debtors who are minors. In the original suit which was for dissolution of partnership and accounts they were defendants 2 and 3 and in the plaint they were represented by their mother Musammat Sahebzadi who was herself a defendant as their guardian. It appears that Musammat Sahebzadi did not appear in the suit at all but at the very earliest stage the minors' step-brother

(1) (1923) I. L. R. 2 Pat. 335.
(2) (1932) I. L. R. 12 Pat. 117.
(3) (1919) 4 Pat. L. J. 240, F. B.
(4) (1903) I. L. R. 30 Cal. 1021, P. C.

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Muhammad Sadiq, who was also a defendant, appeared on his own behalf and also as guardian of the minors. However in the preliminary decree that was passed against them the minors were shown to be under the guardianship of their mother. In the course of subsequent proceedings in the suit there was an application by the parties concerned for reference to arbitration. In that application Muhammad Sadiq signed for himself and as guardian of the minors. He also made a separate application for permission to refer the matter to arbitration. Permission was accorded and the matter was referred to arbitration. In due course an award was submitted and on the basis of the award a final decree was passed against the minors and other defendants in the suit. Against that decree Muhammad Sadiq, for self and as guardian of the minors, presented an application for revision to the High Court with the result that their liability was reduced to some extent. Subsequently the decree-holder took out execution which was resisted by the minors on the ground that the final decree was not binding against them inasmuch as the reference to arbitration was invalid because their mother, who was their guardian did not join in the reference. This objection was overruled by the Subordinate Judge and he ordered the execution to proceed. Against this order the present appeal has been preferred by the minors.

The contention raised by Mr. De on behalf of the appellants is that under the provisions of Order XXXII, rules 5 and 7, of the Code of Civil Procedure the application for reference to arbitration could be made only by the guardian for the suit after obtaining the necessary leave of the Court and as Muhammad Sadiq, who made applications for the purpose, was not the guardian, there was no valid reference and, therefore, the award and the decree were wholly void. Order XXXII, rule 7, sub-rule 2, however, provides that any agreement or compromise entered into by the

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guardian without the leave of the Court shall be voidable against all parties other than a minor. Obviously this means that a decree based on such agreement or compromise is not void but only voidable at the instance of the minor. Mr. De relies on a decision of this Court in *Kedar Nath Sahu* v. *Basant Lal Sahu*(1), where their Lordships had to deal with a suit brought by a minor to set aside a decree based on an award which was made on a reference obtained by his guardian without the requisite sanction under Order XXXII, rule 7. It was held that in view of the provisions of Order XXXII, rule 7, which were applicable to the case the decree based on the award was not binding on the minor. Mr. De has referred to certain observations in the judgment of his Lordship the Chief Justice to the effect that the decree was invalid against the minor. Nowhere from that decision it appears that their Lordships decided, or were required to decide, whether the decree was void or only voidable at the instance of the minor. What their Lordships actually decided was that the express provisions of Order XXXII, rule 7, having been contravened, the decree was not binding on the minor. Indeed in the case of *Sadashivappa* v. *Sangappa*(2), which was referred to in that decision, their Lordships of the Bombay High Court observed that the award and decree based in terms of the award were void. But this observation cannot be taken to be an authority in view of the plain language of sub-rule 2 of Order XXXII, rule 7. In this Bombay case also their Lordships were dealing with a suit to set aside a decree. The position is quite different where objection to the validity of a decree passed in contravention of the provisions of Order XXXII, rule 7, is taken in the execution proceedings. It is a well settled principle of law that an executing Court cannot go behind the decree. No doubt if it appears that the Court had no jurisdiction

(1) (1939) I. L. R. 18 Pat. 271.

(2) (1931) A. I. R. (Bom.) 500.

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to pass the decree, the decree would be altogether void and in that case it would be open to the executing Court to disregard it and refuse to execute it. This was the view taken by a Full Bench of this Court in *Jungli Lal* v. *Laddu Ram Marwari*(1), where a decree passed against a dead man was held to be a nullity and therefore inexecutable against his legal representatives. Sir Dawson Miller, C. J. in that case very clearly pointed out the distinction between a void decree and a voidable decree. A void decree can be treated as non-existent and of no binding force or effect; a voidable decree is valid and binding until it is declared to be invalid by a competent tribunal. A decree is void when the Court which passed it had no jurisdiction, whether territorial or pecuniary or over the subject-matter or in respect of the judgment-debtor's person to make it. Where, however, the Court has complete jurisdiction to hear a case but passes a decree in disregard of some provisions of law, the decree is voidable and is binding until it is set aside in an appropriate proceeding. In this connection reference may be made to the decision of this Court in *Pande Satdeo Narain* v. *Ramayan Tewari*(2). Again in *Girwar Narayan Mahton* v. *Kamla Prasad*(3) it was clearly pointed out that there is a distinction between an inherent lack of jurisdiction in a Court and lack 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. It was further held in that case that where minors were properly represented in a suit but there was no formal order for the appointment of their guardian, it was a case of a mere irregularity which did not vitiate the decree. In the present case there

(1) (1919) 4 Pat. L. J. 240, F. B.
(2) (1923) I. L. R. 2 Pat. 335.
(3) (1932) I. L. R. 12 Pat. 117.

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is no justification for holding that the decree in question is a nullity. It is futile to suggest that the minors were not before the Court and therefore the Court had no jurisdiction over them; in fact they did appear in Court through a guardian who acted for them though there might be no formal order appointing him. The decision of the Privy Council in *Khiarajmal* v. *Daim*(1) relied on by Mr. De is distinguishable because in that case what was decided by their Lordships was that the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. There also the question was raised in a suit and not in an execution proceeding.

There is an equally effective answer to Mr. De's contention. We are not quite sure on the face of the records before us if any order was at all made by the Court appointing the mother as guardian for the suit. On the other hand we find that at the earliest stage before the time for filing written statement came Muhammad Sadiq appeared for self and as guardian of the minors and at subsequent stages also he appears to have acted as their guardian. The application for reference to arbitration was signed by him for self and as guardian of the minors and he also asked for leave of the Court as required by Order XXXII, rule 7, Civil Procedure Code, which was allowed. Though there might be no formal order of the Court appointing him as the guardian of the minors the question may arise whether they were effectively represented in the suit. It has been held by their Lordships of the Judicial Committee in *Walian* v. *Banke Behari Pershad Singh*(2) that where a guardian for a minor-defendant appeared in the suit and effectively represented him although no formal order of appointment was made the decree could not be said to be invalid against the minor unless prejudice was shown.

(1) (1904) I. L. R. 32 Cal. 296, P. C.
(2) (1903) I. L. R. 30 Cal. 1021, P. C.

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Whether in the present case the minors were effectively represented and whether they suffered any prejudice are questions which cannot be investigated in the execution proceeding.

For these reasons I must hold that the objection was rightly disallowed by the Subordinate Judge. I would, therefore, dismiss the appeal with costs.

ROWLAND, J.—I agree. All Mr. De's research and his interesting argument failed to produce before us any instance in which in a case of this nature the judgment-debtor against whom a decree had been passed had successfully objected to its execution on the ground of its being a nullity. The cases which he cited were cases in which the minors against whom a decree had been passed had brought suits and obtained declarations that the decree was not binding on them or had obtained a judgment and decree setting aside the decree. In one instance the minors had appealed from a preliminary decree and this decree was set aside on appeal. The mere fact that in *Sadashivappa* v. *Sangappa*(1) and *Nurul Anwar* v. *Sm. Golenoor Bibi*(2) the word 'void' appears among the observations of the learned Judges will not suffice to make them authority for what was not decided and was not necessary to be decided in those cases. The decisions in *Khiarajmal* v. *Daim*(3) and *Jungli Lall* v. *Laddu Ram Marwari*(4) were cases affecting the estate of a deceased party whose estate after his death was not represented. That is quite a different position from the one before us.

Appeal dismissed.

S. A. K.

(1) (1931) A. I. R. (Bom.) 500.
(2) (1934) A. I. R. (Cal.) 845.
(3) (1904) I. L. R. 32 Cal. 296, P. C.
(4) (1919) 4 Pat. L. J. 240, F. B.

Note to the Binder.—*Substitute* the new pages *for* the old ones of Volume XVIII.

LETTERS PATENT.

Before Harries, C. J. and Fazl Ali, J.

1939.

August, 4.

RAMJAN ALI

v.

KHAWJA MEER AHMED SETHI.*

Limitation Act, 1908 (*Act IX of* 1908), *section* 19—*"signed", meaning and significance of—name of debtor appearing in acknowledgment of liability—name introduced under authority of debtor—acknowledgment, effect of.*

Where upon a document, which purports to be an acknowledgment of liability, appears the name of the debtor, and this name is introduced under his authority with a view to authenticate the document, such a document is a valid acknowledgment of his liability within the meaning of section 19 of the Limitation Act, 1908. It is not necessary that the name should be written by the debtor himself. It is sufficient if it is written by a person with authority to write his name.

Mathura Das v. *Babu Lal*(1), followed.

Section 19, Limitation Act, 1908, does not draw a distinction between a person who is literate and one who is not literate. In either case an acknowledgment signed by an agent with his authority would be enough.

The section also does not say as to what should be the form of the signature. If the name of the debtor is introduced into the document of acknowledgment in such a way as to show that the acknowledgment was intended to be his own, such a name, whether written or printed, would constitute his signature within the meaning of the expression as used in section 19.

Appeal by the defendant no. 1.

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

K. K. Banarji, for the appellant.

Gholam Muhammad, for the respondent.

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* Letters Patent Appeal no. 4 of 1939, from a decision of Mr. Justice Manohar Lall, dated the 6th December, 1938.

(1) (1878) I. L. R. 1 All. 683.

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RAMJAN ALI v. KHAWJA MEER AHMED SETHI.

FAZL ALI, J.—This is an appeal under the Letters Patent from a decision of Manohar Lall, J. in a second appeal affirming the decision of the Courts below in a suit based on a bond executed by defendant no. 1 in favour of defendant no. 2 on the 19th June, 1931. The bond having been duly assigned by the defendant no. 2 in favour of the plaintiff, the latter brought this suit on the 31st of October, 1935, to recover the sum due under it.

The only question which arises in this second appeal is whether two letters, Exhibits 1 and 1(*a*), dated the 23rd of September, 1933, and 28th of January, 1934, respectively, constitute a valid acknowledgment of the liability of the defendant no. 1 so as to extend the period of limitation for the suit which would otherwise have been barred. Admittedly these letters were written not by defendant no. 1 but by one Rahmat Ali; but both the trial Court and the lower appellate Court found that Rahmat Ali wrote these letters at the instance of and on the instructions given by defendant no. 1, and defendant no. 1 had these letters duly posted to the address of the defendant no. 2. Both the Courts held upon these facts that these letters constituted a valid acknowledgment of liability so as to bring the case under section 19 of the Limitation Act, and this view has been upheld by the learned Judge of this Court on second appeal.

The learned Advocate for the appellant contends that these letters do not constitute a valid acknowledgment, first, because they were not signed by the defendant no. 1 himself although there is evidence to prove that he could make his own signature; and, secondly, because Rahmat Ali was not duly authorized to acknowledge the debt due under the bond. It is true that the letters have not been signed by the defendant no. 1; but the question as to what constitutes a signature under section 19 of the Limitation

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FAZL ALI, J.

Act has been considered in a series of cases by the Indian High Courts, and there is a consensus of opinion that if upon a document which purports to be an acknowledgment of liability there appears the name of the debtor, and this name is introduced under his authority with a view to authenticate the document, such a document would be a valid acknowledgment of his liability. This view is very lucidly set out in the judgment delivered by the learned Chief Justice of the Allahabad High Court in *Mathura Das* v. *Babu Lal*(1), and it has been reiterated in a number of subsequent decisions. The learned Chief Justice in the case referred to above observed as follows:—

"The Act does not require that the signature should be at the foot or in any particular part of the document, and in our judgment, whenever the maker of an instrument or his agent acting with authority introduces the name of the maker with a view to authenticate the instrument as the instrument of the maker, such an introduction of the name is a sufficient signature".

Thus it is not necessary that the name should be written by the debtor himself. It is sufficient if it is written by a person acting with authority to write his name and to acknowledge the debt in question. *Explanation II* to section 19 of the Limitation Act clearly states that for the purposes of the section "signed" means signed either personally or by an agent duly authorized in this behalf. It is contended that defendant no. 1 being literate could have signed the letters himself; but the section, as it stands, does not draw any distinction between a person who is literate and one who is not literate. In either case an acknowledgment signed by an agent with his authority would be enough. The section also does not say as to what should be the form of the signature, and it is now well settled that if the name of the

(1) (1878) I. L. R. 1 All. 688.

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debtor is introduced into the document of acknowledgment in such a way as to show that the acknowledgment was intended to be his own, such a name, whether written or printed, would constitute his signature within the meaning of the expression as used in section 19 of the Limitation Act. This view is also in consonance with the view taken in a number of English decisions. The effect of these decisions is stated thus in Addison on Contracts, 11th Edition, page 41 :—

"If the party has recognized and adopted his printed name or signature—for instance, by sanctioning or permitting the distribution of printed handbills, or printed particulars of sale, in which his name appears—there has been a signature by an agent duly authorised, upon the principle that the subsequent sanction or adoption of the printed name or signature is equivalent to an antecedent authority to the printer to print it".

The second objection which has been put forward on behalf of the appellant is equally untenable. As I have already stated, it has been found by the Courts below that the letter was written by Rahmat Ali at the instance of defendant no. 1 and upon his instructions. It has also been found that it was defendant no. 1 who caused the letter to be posted to the address of defendant no. 2. These circumstances clearly indicate that Rahmat Ali had been duly authorized to make the acknowledgments in question.

In my opinion, the view taken by Manohar Lall, J. is perfectly correct, and I would, therefore, dismiss this appeal with costs.

HARRIES, C.J.—I agree.

K. D.

Appeal dismissed.

APPELLATE CIVIL.

Before Rowland and Chatterji, JJ.

1939.

August, 4.

LALITA PRASAD CHAUDHURY

v.

SYED MUHAMMAD MANSOOR.*

Security Bond—hypothecation of properties for satisfaction of decree—bond in the name of the Judge—execution—decree-holder seeking to sell hypothecated properties without assignment and attachment—legality—Code of Civil Procedure, 1908 *(Act V of* 1908*), Order XX, rule* 11*—instalment decree passed under rule* 11*(1)—Court, power of, to amend the decree under rule* 11*(2).*

Where the decree in a money suit provided for instalments, and thereafter the Court amended the decree with the consent of both parties, making it an instalment decree coupled with a hypothecation of properties, and the security bond was expressed in favour of the Judge, and the decree-holder without taking assignment of it and without taking out attachment proceeded to sell the hypothecated properties in execution:

Held, (*i*) that rule 11(*2*) of Order XX, Code of Civil Procedure, 1908, is wide enough in its terms to apply to the fixing of instalments and the taking of security after the passing of any decree for the payment of money whether the form of the original decree was for instalments or for a lump sum, and, therefore, that the Court had jurisdiction, under rule 11(*2*), to pass a further and different kind of decree coupled with a hypothecation of property;

(*ii*) that the decree-holder could proceed to sell the hypothecated properties without attachment since they were the subject-matter of a security bond executed by the judgment-debtor for the satisfaction of the decree in the suit;

(*iii*) that the Judge was not a juridical person and the decree-holder could enforce the bond without assignment.

Tata Iron and Steel Company, Limited v. *Charles Joseph Smith*(1), followed

*Appeal from Original Order no. 172 of 1938, from an order of Babu Gobind Sharan, Subordinate Judge of Motihari, dated the 16th May, 1938.

(1) (1929) I. L. R. 8 Pat. 801.

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LALITA PRASAD CHAUDHURY v. SYED MUHAMMAD MANSOOR.

Appeal by the judgment-debtor.

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

Mahabir Prasad and *A. K. Mitter*, for the appellant.

Syed Ali Khan, for the respondent.

ROWLAND, J.—This miscellaneous appeal by the judgment-debtor arises out of his objections under section 47 of the Civil Procedure Code against execution of a decree, the Subordinate Judge having decided all the objections against him. The points raised before the Subordinate Judge were numerous, but in appeal only the following are taken. It is said that the properties which the decree-holder sought to put to sale could not be put up for sale without first being attached. The answer to this was that the properties were the subject-matter of a security bond executed by the judgment-debtor hypothecating these very properties for the satisfaction of the instalment decree in the suit. In such a case there is good authority in this Court in *Tata Iron and Steel Company, Limited* v. *Charles Joseph Smith*(1) that the decree-holder may proceed to sell all the hypothecated properties without taking out attachment of them.

The appellant then objects to the validity of the security bond. First, it is said that the money suit had been decreed on 21st December, 1932, the decree providing for instalments. Thereafter on the 13th January, 1933, both parties by a joint petition moved the Court for amending the decree by making it a decree for instalments coupled with a hypothecation of properties for due payment. The amount and dates of instalments as fixed on 20th December were not altered. So Mr. Mahabir Prasad contends that the new contract which led to the security bond was

(1) (1929) I. L. R. 8 Pat. 801.

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KOWLAND, J.

a contract without consideration and as an agreement was unenforceable. The answer to this seems to be that we are in the domain of decree and not of contract. This was an objection before the executing Court which ordinarily is precluded from going behind the decree. It may also perhaps be said that the consideration of the agreement as a whole was the existence of a debt. In any case there does not seem to be substance in the contention that the security bond was bad as being founded on an agreement without consideration.

Then it is said that the amended decree drawn up in pursuance of the order of 14th January, 1933, was made without jurisdiction and that absence of jurisdiction will entitle the executing Court to go behind the decree. The argument is that once the Court had passed an instalment decree under Order XX, rule 11(1), of the Code of Civil Procedure, it was functus officio and no jurisdiction remained to pass a further and different kind of instalment decree coupled with a hypothecation of property. The answer to this seems to be that rule 11(*2*) is wide enough in its terms to apply to the fixing of instalments and the taking of security after the passing of any decree for the payment of money whether the form of the original decree was for instalments or for a lump sum, provided that the new direction is made by consent of both parties. According to the words of the rule it should be on the application of the judgment-debtor and with the consent of the decree-holder. Undoubtedly the consent of both parties was present to the passing of the order of 14th January, 1933. The alleged defect of jurisdiction, therefore, fails.

Then it is said that the bond by which the properties were hypothecated is expressed to be in favour of the Subordinate Judge of Motihari and the contention is that it cannot be enforced by the decree-holder unless he first obtains an order of the Court assigning

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ROWLAND, J.

it to him and permitting him to enforce it. The argument is sought to be supported by the analogy of section 35 of the Guardians and Wards Act which deals with the assignment by the District Judge of a security bond executed in his favour by a guardian to a person whom the District Judge authorises to sue on the bond. The procedure regarding security bond under the Guardians and Wards Act is, however, a special procedure governed by a special statute and its analogy is no guide for us in proceedings under the Code of Civil Procedure. As regards the effect of expressing a security bond in the name of the presiding officer of the Court, this matter is dealt with in the case above cited of *Tata Iron and Steel Company, Limited* v. *Charles Joseph Smith*(1) where it is pointed out that the Subordinate Judge is not a juridical person. In that case the bond had been expressed in favour of the Subordinate Judge; but the latter had purported to assign the bond in favour of the decree-holder. It was held that what purported to be an assignment was of no effect at all, but nevertheless that the decree-holder could enforce the bond as the bond created an unquestioned liability which must be enforced in the only method available.

The result is that all the objections taken on behalf of the judgment-debtor fail and I would dismiss the appeal with costs.

I hardly think it necessary to enter into a further point taken in reply by Mr. Syed Ali Khan that the objections are barred by the principle of constructive res judicata.

CHATTERJI, J.—I agree.

K. D.

Appeal dismissed.

(1) (1929) I. L. R. 8 Pat. 801.

APPELLATE CIVIL.

Before Harries, C.J. and Manohar Lall, J.

1939,
May, 5, 9, 10.
August, 7.

RANI HARSAMUKHI DASI

v.

AGADHU MOHAPATRA. *

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order I, rule* 8, *and Order XXII, rule* 4—*abatement of appeal—some of the respondents permitted to represent the others in appeal —death of one or more of the respondents so representing—legal representatives not brought on record—appeal, whether abates—Court, duty of, in such cases.*

The provisions of Order XXII of the Code of Civil Procedure, 1908, which relate to the death of a plaintiff or defendant cannot be applied to a case instituted or defended by a few persons on behalf of numerous persons under Order I, rule 8, of the Code.

Where, therefore, there are numerous respondents some of whom have been allowed, under Order I, rule 8, of the Code, to represent the others, the appeal does not abate if any one of the persons appointed to represent the others dies and the legal representatives of the deceased are not brought on the record within time.

In such cases a duty is cast upon the Court to decide whether the respondents should be allowed to be represented by the surviving persons, or the original number should be maintained by adding some more respondents.

Jagdam Ram v. *Asarfi Ram*(1) and *Venkatakrishna Reddi* v. *Srinivasachariar*(2), followed.

Musammat Afzalunnisa v. *Fayazuddin*(3), dissented from.

Wali Muhammad v. *Barkhurdar*(4), distinguished.

Udmi v. *Hira*(5), referred to.

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*Appeal from Original Decree no. 2 of 1936 (Cuttack), from a decision of Babu Chintamoni Acharjya, Rent Suit Deputy Collector of Puri, dated the 11th October, 1933.

(1) (1936) 17 Pat. L. T. 926.
(2) (1930) I. L. R. 54 Mad. 527.
(3) (1931) I. L. R. 13 Lah. 195.
(4) (1924) I. L. R. 5 Lah. 429.
(5) (1920) I. L. R. 1 Lah. 582.

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Appeal by the plaintiff.

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

S. M. Mullick and *Nitai Chandra Ghose*, for the appellant.

G. P. Das and *P. Misra*, for the respondent.

MANOHAR LALL, J.—This is an appeal by the plaintiff against the decision of the learned Rent Suit Deputy Collector of Puri, dated the 11th October, 1933, by which the suit of the plaintiff was dismissed. That suit was instituted for recovery of arrears of rent and cess for the second kist of 1336 and both kists of 1337 and First Kist of 1338 in respect of the Tanki Bahel tenure of the defendants in tauzi no. 268 lying in certain villages—the tenure has a large area of about 3,170 acres.

The principal question for decision in the present appeal is whether the claim of the plaintiff so far as road cess is concerned can be maintained and also whether the defendants can be allowed to claim a set off for the amount of road cess which they say they have paid erroneously for about 10 years prior to the institution of this suit. A preliminary point as to the maintainability of the appeal was also raised on behalf of the respondents which will be considered in its proper place later on.

The facts necessary for determination of the controversy in the appeal may now be shortly stated. The plaintiff instituted the suit, referred to above, against a very large number of tenure-holders, the number being about 2,000. The arrears of rent and cess claimed for the period in suit were stated to be recoverable jointly and severally from the defendants. On the 8th of August, 1932, six of the defendants, namely, defendants 4, 7, 19, 48, 164 and 302, appeared and filed a written statement. In paragraph 10 of the written statement they stated that as

they are the kartas and mamlatkars amongst all the defendants they have filed the written statement on behalf of all the defendants. In other words they attempted to defend the suit not only on their behalf but as representing the other defendants also. The Court did not allow the written statement to be treated as a representative written statement with the result that the written statement remained as a written statement filed on behalf of these six defendants only, the other defendants remaining unrepresented and the case proceeded *ex parte* against them.

The plaintiff claimed rent at Rs. 1,994-9-10 per annum and road cess at the rate of Rs. 479-14-4, being the rate of cess for the tenure included in the annual valuation of 1902, for the period 1337 to the first kist of 1338; but for the second kist of 1338 the plaintiff claimed cess at the rate of Rs. 876-1-6 on the basis of a revaluation in the current year. The defendants resisted the claim of the plaintiff so far as the road cess for the period ending the first kist of 1338 is concerned on the ground that there was a revaluation in the year 1917 but in that year the tenures in suit escaped assessment and, therefore, the plaintiff was debarred from suing for cess for these years at the old valuation of 1902 which was superseded by the valuation of 1917. The plaintiff replied that it was true that there was a revaluation in 1917, but as there was no revaluation of the tenures in suit in 1917 the valuation of 1902, which was not interfered with, must be held to be payable by the defendants for these tenures.

The learned Rent Suit Deputy Collector overruled this contention. He held that there was a revaluation in 1917, the new roll of the estate of that year was duly published but when no revaluation could be found of the tenure in question in the revaluation roll of 1917 the result was that there was an escapement of revaluation and the tenure was not liable to pay any road cess at all.

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Mr. S. M. Mullick appearing on behalf of the plaintiff contested this proposition and asserted that by virtue of the provisions of sections 6, 12, 36, 38 and 40 of the Cess Act of 1880 it must be held that the plaintiff is entitled to recover road cess for the first period at the old rate fixed in 1902. In my opinion this argument is fallacious. The moment it is admitted that there was a revaluation in 1917 the rights and liabilities of the parties will be determined by the valuation for the tenures which may be found in the revised roll of the estate. That roll has to be (and in the present case it was) published as provided by section 35 of the Cess Act and this provision applies both to the original valuation or of any revaluation which may be made of a tenure under Chapter II, Part II, of the Act. Indeed section 37 provides for a remedy where any estate or tenure has been omitted from revaluation or assessment or which was not in existence when such revaluation or assessment was made. In the present case the procedure provided by section 37 has not been admittedly followed for some reason with the result that from the year 1917 the tenures have escaped assessment. I, therefore, conclude that for the first period in suit no cess is payable either at the old rate or at any rate at all. For the period which concerns the second kist of 1338 Fasli when another revaluation was again effected upon the tenures in suit the claim for cess is valid and has not been resisted. The result is that I agree with the learned Rent Suit Deputy Collector who held that the claim of the plaintiff so far as it is based upon the rate of cess fixed by the annual valuation of 1902 for the period ending first kist of 1338 Fasli must be disallowed.

The appellant argues in the next place that the learned Rent Suit Deputy Collector was in error in allowing a set-off for a sum of Rs. 4,628-12-2 which was paid on behalf of all the defendants for the period 1917 to 1928 as evidenced by Exhibit A series.

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The claim put forward by the defendants is for an ascertained amount and, therefore, comes within the provisions of Order VIII, rule 6, of the Code of Civil Procedure being a claim for legal set-off for an ascertained sum. The respondent argues that although there cannot be a set-off in law, his clients are entitled to claim an equitable set-off. I do not agree with this contention. This is not a case of any equitable set-off but a case of legal set-off. If the argument of the respondent was correct there would be no need to resort to the provisions of a legal set-off in any case and the requirements of the Code could be always nullified. No court-fee has been paid on behalf of the defendants for the amount which is sought to be claimed to be set-off. The question is whether the claim should be allowed.

In the written statement, as I have already stated, which was on behalf of six defendants only, their request to defend the suit on behalf of all the defendants was negatived. The claim of set-off is stated in paragraphs 7 and 8 of the written statement and may be summarised as a claim for recovery of the amount which the defendants paid by way of road cess at the rate of Rs. 479-14-4 per annum illegally from the year 1917 to 1928. The date of knowledge of the allegation that payments were made erroneously was attributed to some of these defendants only whose names are not disclosed in the written statement or in the evidence. The written statement merely states:

> "Some of these defendants brought these matters to the knowledge of the plaintiff herself at Calcutta."

On a reading of the whole written statement I do not find any assertion as to the date when some or all of the defendants came to know of the illegal payment or payment under a mistake by the defendants of the road cess, which I have held was not due. The evidence on behalf of the defendants is equally vague and consists of two witnesses only.

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The first witness is a tahsildar who said that he collected the tanki rent of the Brahmins of one of the villages in the tenure. He says that Rs. 479-14-4 was realised as cess annually and that no cess was assessed on these lands in the previous revaluation (meaning the revaluation of 1917). He says:

"We came to know of this at the present assessment of revaluation from the revaluation amlas."

The date of this information again is not disclosed. But we were informed at the Bar that exhibit E, an application for information, dated the 24th March, 1931, may be taken to be the date when the information was obtained by the defendants. Only one defendant, Anant Mohapatra, examined himself. He is witness no. 2 for the defendant. He is aged 36 and says that Rs. 479-14-4 was being paid by them (meaning the defendants) as the amount was assessed as road cess in the Provincial Settlement. He says:

"There was no revaluation of road cess after this so far as our village was concerned. Without knowing that it was not assessed we went on paying the amount."

The share of rent of this defendant is only Rs. 8 per year and he says that he cannot state the rent payable by other contesting defendants. In the face of the evidence referred to just now, which is the only evidence upon the record, I am unable to hold that this Court is in a position to determine accurately the date or dates when the defendants came to know that the payments made by them were made under a mistake. But there is a further difficulty. The six defendants have been unable to show that they have paid any specific sums to the plaintiff on account of road cess. The evidence, as I have stated, is extremely vague. In these circumstances I am of opinion that the claim for set-off ought to have been disallowed. The defendants had a remedy open to them to institute a suit for recovery of the sums which they say they had paid under a mistake of law or fact by asserting and

proving the date of the cause of action in a properly constituted suit. The plaintiff would then be able to defend his position by adducing proper evidence to rebut the allegations of the defendants. The Civil Procedure Code allows the defendants to seek the same relief by way of defence but by proceeding in the manner indicated therein for the making of a legal set-off. The claim is required to be treated as a counter claim or as a plaint and a proper court-fee is to be paid thereon. For these reasons the claim for set-off is disallowed and the decree of the learned Rent Suit Deputy Collector should be varied accordingly.

The following amounts should be excluded from the claim of the plaintiff: Rs. 959-12-8 or any other sum being the claim for cess for the second kist of 1336, for both the kists of 1337, and for the first kist of 1338. The plaintiff's claim will also be reduced by a sum of Rs. 901 paid to her on the 23rd September, 1931, as well as the sum of Rs. 101-14-8 paid on the 11th February, 1933. The claim for interest will be reduced proportionately. The amount ultimately found due to the plaintiff will be worked out by the office showing how much is due from the defendants on the lines indicated.

The learned Rent Suit Deputy Collector also reduced the claim of the plaintiff by a sum of Rs. 1,071-9-0 as being the amount realised by the plaintiff in execution of a decree in certain rent suits against the defendants. This sum the learned Rent Suit Deputy Collector has allowed as a set-off against the claim for cess in the present case. For reasons similar to those given above, as this sum relates to part of the cess paid for the period before 1927, the claim for set-off is disallowed.

It now remains to deal with the preliminary objection that the appeal is no longer maintainable in the following circumstances. The present appeal was filed on the 10th of January, 1934. On the 6th

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December, 1934, there was an order by the Registrar that the application of the appellants who wanted that the numerous respondents should be represented in a representative capacity through some of the respondents only under Order I, rule 8, of the Code of Civil Procedure, should be put up on a future date. On the 26th July, 1935, notice was issued on this application under Order I, rule 8. On the 13th February, 1936, order no. 8 passed by a Division Bench consisting of Mr. Justice Noor and Mr. Justice Rowland dealt with the application under Order I, rule 8, at length. It is pointed out in that order that the plaintiff-appellant seeks permission under Order I, rule 8, to proceed only against those six defendants who had appeared and defended the suit in the trial court, that the notice of this application was given by public advertisement and in response to it some of the respondents appeared, filed vakalatnama and were heard. The order which the Bench passed was that the appellant will be permitted to proceed against the 15 respondents, namely, respondents 4, 7, 19, 48, 164, 302, 644, 723, 736, 744, 990, 1010, 1263, 1332 and 1492, as representatives of the entire body of respondents. The Bench also directed that the notice of this appeal will be served upon those respondents only and that the notice will also be published in the 12 villages where the tenures in suit are situated and in the newspapers, named in the order, which are published in Orissa. It was also directed that the notice which was to be published in the villages will be hung up on some conspicuous part of it followed by beat of drum or by such other method as the Rent Deputy Collector of Puri may decide. It was after these preliminaries, carefully enumerated, had been observed that the appeal was admitted on the 16th April, 1936. It is now argued on behalf of the respondents that two of these 15 respondents who were permitted to be proceeded against as the representatives of the entire body of the respondents are

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dead and that as no substitution has been made in their place the appeal has become incompetent.

A large number of cases were referred to at the Bar in support of the contention of the respondents but in my view the matter so far as this point is concerned has been accurately decided by Khaja Mohamad Noor, J. in the judgment which is reported in *Jagdam Ram* v. *Asarfi Ram*(1) where he points out that in these cases the appeal cannot be held to have abated, the reason for the rule being that " the provisions of Order XXII, which relate to the death of plaintiff or defendant cannot be applied to a case instituted or defended by a few persons on behalf of numerous persons not on record under Order I, rule 8 ".

In the present case, as already pointed out, 15 respondents were given permission by this Court to defend the entire appeal on behalf of all the respondents and the only thing which this Court should consider is whether, when two of these respondents have died, the Court should allow the remaining persons to conduct the case or whether more persons should be added as respondents for this purpose. In the present case I do not see that by the mere death of two out of 15 respondents the defence of this appeal cannot be or is not being properly conducted. Mr. G. P. Das, appearing on behalf of the respondents, has placed before us everything which could be urged on behalf of all the respondents and there is no trace of any collusion between the thirteen respondents who are now represented before us and the appellant. Accordingly it will be ordered that this Court permits the remaining thirteen respondents to conduct the appeal on behalf of all the respondents. In this view of the matter it is unnecessary to consider as to what would be the situation if one or more of the persons who were represented through the 15 respondents or

(1) (1936) 17 Pat. L. T. 926.

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through the 13 respondents as they now stand had died and no substitution made in his or their places.

It is desirable to refer to the three cases decided by the Lahore High Court upon which reliance was placed strongly by the learned Advocate for the respondents. In the case reported in *Udmi* v. *Hira*(1) the facts were that some of the plaintiff-respondents who had died were not among the six plaintiffs who had instituted the suit in accordance with the order of the Court under Order I, rule 8, of the Code of Civil Procedure, but among the persons on behalf of whom the six plaintiffs had sued. It was held that as they were not parties to the suit and were needlessly made respondents in the appeal, the failure to bring their legal representatives on the record would not result in an abatement of the appeal. As I have stated above this question does not arise for consideration in the present case.

Four years later a similar question arose in *Wali Muhammad* v. *Barkhurdar*(2). In that case the plaintiffs had sued 43 persons for a declaration to the effect that they were not entitled to have any share in certain lands and that the plaintiffs were the exclusive owners thereof. The suit was dismissed by the trial court and the plaintiffs filed an appeal before the High Court. The appellants had made an application under Order I, rule 8, of the Code of Civil Procedure, to the effect that four of the respondents should be permitted to defend the appeal on behalf of the others and this application had been accepted. When the appeal was called on for hearing it was found that some of the respondents who were allowed to be represented had died and no application had been made for bringing their legal representatives on the record. It was also found that one of the four respondents who were allowed to represent all the respondents had died

(1) (1920) I. L. R. 1 Lah. 582.
(2) (1924) I. L. R. 5 Lah. 429.

but in his case an application had been made within time to bring his legal representatives on the record. A preliminary objection was taken by the respondents that the appeal had abated and the learned Judges held that the defendants-respondents who had died were not only parties to the suit in the Court of the first instance but were also made parties to the appeal, and, relying upon an unreported case of the same Court, held that when certain respondents who have died were parties to the suit and to the appeal the order passed under Order I, rule 8, of the Code of Civil Procedure, will not relieve the appellants from the necessity of impleading all those persons who were parties in the Court below and had obtained a decree in their favour and the representatives of any of those persons who had died during the pendency of the appeal. The circumstances in the present appeal are entirely different from what was decided by the case just referred to.

The next case referred to was *Musammat Afzal-un-nisa* v. *Fayaz-uddin*(1). In that case it was held that " where there are numerous respondents, some of whom have been allowed, under Order I, rule 8, of the Code of Civil Procedure, to represent the others, the appeal does not abate, if one of the persons, who are represented by the others, dies and the legal representatives of the deceased are not brought on the record within time; but the appeal will abate if any one of the persons appointed to represent the others dies and his legal representatives are not so impleaded ". So far as the first point decided by this case is concerned I have stated above that the question does not arise in the present case. But I respectfully differ from the conclusion arrived at in this case so far as the point which arises in the present appeal before us is concerned. I have already pointed out that I do not see how an appeal can be said to have abated if one of the persons

(1) (1931) I. L. R. 13 Lah. 195.

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appointed to represent the others dies and his legal representatives are not impleaded. The other persons were ordered to be represented by a certain number and if there is a diminution in that number by reason of death or any other cause the only effect is that a duty is cast upon the Court to decide whether the respondents should be allowed to be represented by the surviving persons who were allowed to represent the entire body of respondents as pointed out by my brother Khaja Mohamad Noor in the case of *Jagdam Ram* v. *Asarfi Ram*(1). It may again be respectfully pointed out that the learned Judges of the Division Bench in *Afzal-un-nisa* v. *Fayaz-uddin*(2) did not follow the constitutional practice of referring the question to a Full Bench if they were disposed to take a different view from what was expressly decided by another Division Bench [*see* the observations of their Lordships of the Judicial Committee in *Bindeshwari Prasad Singh* v. *Maharaja Kesho Prasad Singh*(3)]. In *Venkatakrishna Reddi* v. *Srinivasachariar*(4), a similar question arose for decision and Ramesam, J. gave the opinion that where sanction is given by the Court to a certain number of persons *eo nomine* to prosecute or defend a suit and one of them dies, the proper procedure is for the remaining persons to apply to the Court for directions; and it is for the Court to decide whether it will permit the remaining persons to whom the original sanction was given to continue to prosecute or defend the suit, or whether it will insist upon the original number being maintained by adding some of the respondents.

For the reasons given above I agree that the correct view is laid down by my brother Khaja Mohamad Noor in *Jagdam Ram* v. *Asarfi Ram*(1) where he approves of the correctness of the decision

(1) (1936) 17 Pat. L. T. 926.
(2) (1931) I. L. R. 13 Lah. 195.
(3) (1926) I. L. R. 5 Pat. 634; L. R. 53 Ind. App. 164.
(4) (1930) I. L. R. 54 Mad. 527.

in the Madras case just referred to. The appeal, in view of our order above, remains competent and has not abated.

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The result is that the appeal is allowed. There will be a decree in favour of the plaintiff for the amount which the office will determine in the light of the directions given above; but in the circumstances of this case I will direct that each party will bear his own costs throughout.

HARRIES, C. J.—I agree.

Appeal allowed.

S.A.K.

LETTERS PATENT.

Before Harries, C.J. and Fazl Ali, J.

1939.

July, 31. August, 1, 8.

PATNA CITY MUNICIPALITY

v.

DWARKA PRASAD SINHA.*

Bihar and Orissa Municipal Act, 1922 (*B. & O. Act VII of* 1922), *sections* 58, 62 *and* 172—*municipality, whether has an unrestricted power to sell or lease roadway—sections* 62 *and* 172(*f*), *scope of—owner of land abutting on a roadway, whether entitled to access at all points on his boundary.*

The owner of land abutting on a roadway is entitled to access to that roadway at all points along the whole length of his boundary.

The power to sell, lease, exchange, or otherwise dispose of any land, given to the Commissioners by section 62 of the Bihar and Orissa Municipal Act, 1922, is not confined to land which has been acquired by the municipality under that section but extends to land which is vested in the municipality by reason of section 58 of the Act.

The word "land" in section 62 includes a road.

*Letters Patent Appeal no. 9 of 1938, from a decision of Mr. Justice Dhavle, dated the 5th of May, 1938.

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But section 62 does not give an unrestricted power to the municipality; it does not give it a right to lease a road or any part of it if such road is still required for the purposes of the Act, that is, as a public road.

Clause (*f*) of section 172 of the Act must be read with the preceding clauses and, therefore, the power of sale or of leasing given in that clause must be confined to cases coming within the general scope of the section.

Appeal by defendant no. 2 under clause 10 of the Letters Patent.

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

Sir Sultan Ahmed (with him *Rai Gurusaran Prasad*, *Syed Ali Khan*, *Rai Parasnath* and *Girijanandan Prasad*), for the appellant.

P. R. Das (with him *B. P. Sinha* and *D. L. Nandkeolyar*), for the respondents.

HARRIES, C. J.—This is a Letters Patent appeal from a judgment of Dhavle, J. in second appeal reversing a decree of the lower appellate Court and restoring the decree of the learned Munsif which was in favour of the plaintiffs.

The plaintiffs were the owners of a property abutting on the Convent Road, Patna City. Between the metalled portion of the roadway and the plaintiffs' boundary was a strip of land upon which a kachcha drain was at one time situate. Between that drain and the plaintiffs' boundary wall was a narrow strip of land which has given rise to the dispute in the present case. The Patna City Municipality, which was defendant no. 2, executed a lease in favour of defendant no. 1 for a period of five years with a certain option to renew. Upon this strip of land defendant no. 1 has erected a petrol pump and the other constructions complained of, and the suit was brought by the plaintiffs for their removal.

The plaintiffs at first alleged that they were the owners of the narrow strip of land between the

kachcha drain and their boundary wall, but eventually they gave up that claim. They, however, alleged that the Patna City Municipality had no right to lease the land in question to defendant no. 1 and that the latter had no right whatsoever to erect the structures complained of and thus obstruct the plaintiffs' access to the roadway.

The main defence relied upon was that the Patna City Municipality had a right by statute to lease or otherwise dispose of this land and that the plaintiffs had no right to object to what had been done in pursuance of the lease granted to defendant no. 1.

The learned Munsif held that the Municipality had no right, in the circumstances of this case, to deal with this land to the detriment of the plaintiffs and accordingly ordered demolition of the offending structures. The learned District Judge came to a contrary finding and dismissed the claim. In second appeal Dhavle, J. held that the Municipality could not give the defendant no. 1 a right to erect these structures and accordingly he reversed the decision of the lower appellate Court and restored the decision of the Munsif.

On behalf of the Patna City Municipality Sir Sultan Ahmed has argued that this strip of land could be leased by the Municipality and that defendant no. 1 could erect the structures now complained of. In this Court an attempt was made to show that this strip of land was something apart from Convent Road; but it is to be observed that throughout the proceedings in the lower Courts it had always been conceded that this disputed strip of land formed part of the roadway and was the property of the municipality by reason of the fact that the road vested in them.

Section 58 of the Bihar and Orissa Municipal Act, 1922, provides for the vesting of certain property in the municipal commissioners. Sub-clause (*a*)

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provides that inter alia all roads within the municipality, including the soil, the pavements, stones and other materials thereof, and all drains, bridges, trees, erections, materials, implements and other things provided for such roads are to vest in the municipality. The word "road" is defined in section 3(*24*) of the Act and the definition is in these terms :—

"'road' means any road, bridge, footway, lane, square, court, alley or passage which the public, or any portion of the public, has a right to pass along, and includes, on both sides, the drains or gutters and the land up to the defined boundary of any abutting property, notwithstanding the projection over such land of any platform, verandah or other superstructure."

It was the case of the municipality that Convent Road was vested in the commissioners, and such has never been disputed by the plaintiffs. By reason of the definition to which I have just referred, the Convent Road includes on both sides of it the drains or gutters and the land up to the defined boundary of the abutting property. Some attempt was made in this Court to show that the kachcha drain lying between the metalled portion of the road and the plaintiffs' boundary was the defined boundary of the abutting property. In other words, Sir Sultan Ahmed has suggested that the strip of land lying between the drain and the plaintiffs' property is the property abutting on the road and the side of the drain is the boundary of the road. This point was made for the first time in this Letters Patent appeal and has never been taken in the Courts below. Throughout the proceedings it seems to have been conceded by all parties that the defined boundary of this road on the side of the plaintiffs' property was the boundary wall of the plaintiffs' compound. In face of the fact that it has always been the municipality's case that this strip formed part of the road, they cannot now be heard to say that the strip is vested in them as property other than part of the road. In my view there can be no doubt that the plaintiffs' compound wall is one of the defined boundaries of the

Convent Road, and, therefore, all land up to that boundary will form part of the road.

Sir Sultan Ahmed has further argued that even if this strip of land be regarded as part of the road, nevertheless the municipality had a perfect right to lease it to defendant no. 1. He contends that the municipality has power to sell or lease any public road or part thereof, and he relies upon sections 62 and 172(*f*) of the Bihar and Orissa Municipal Act, 1922. It will be convenient to deal first with the argument based on section 62 of the Act.

Section 62 provides that the Commissioners at a meeting may purchase or take on lease any land for the purposes of this Act, and may sell, lease, exchange or otherwise dispose of any land not required for such purposes or which has been acquired by them for the purpose of being leased. According to the appellants, this gives the municipality an unrestricted right to sell, lease or exchange or otherwise dispose of any road. On behalf of the respondents it has been argued that section 62 has no reference whatsoever to roads, and it only gives the municipality powers to sell land which does not include roads. There is no exhaustive definition of "land" in the Act, and the phrase

"may sell, lease, exchange or otherwise dispose of any land"

seems to be wide enough to cover "road"; but even if it be held that the word "land" does include a road, yet the municipality has not an unrestricted right to sell such road. At its very highest, the power given to the municipality by section 62 is to sell, lease, exchange or otherwise dispose of any land not required for any of the purposes of the Act. If such land is still required for any of the purposes of the Act, then it cannot be disposed of under the powers given by section 62.

In the present case the municipality made no effort to show that this strip of land was no longer

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required for any of the purposes of the Municipal Act, and indeed it would be very difficult for the municipality to establish such a case. The streets in Patna City are notoriously narrow, and it would be practically impossible to satisfy any independent body that any strip forming part of such roads, no matter how narrow, was not urgently required for the use of the public. It was never the case of the municipality that this strip was not required as a road or for other purposes of the Act. The municipality's contention has always been that they have a right to lease or sell the public road or any portion of it and that there is no real restriction to that right.

The contention that the municipality has an unrestricted right to sell a roadway or any portion thereof is a startling one, and in my view is contrary to the plain terms of section 62. That section only gives them a right to sell or lease land if such land is no longer required for the purposes of the Act. Where a road is still required as a road, the municipality have no right to sell it under the powers given by section 62.

The commissioners are given certain powers by section 178 to close a road temporarily for certain purposes. It is expressly provided that if the commissioners so close any road, they shall be bound to provide reasonable means of access for persons occupying holdings adjacent to such road. If the municipality had an unrestricted right to sell or lease roads, it seems somewhat strange that they have only a power to close roads temporarily, and such they can only do if they provide owners of adjacent property with means of access. It would appear that if the municipality do not possess an unrestricted right to close a road, then they cannot possess an unrestricted right to sell or lease a road which might result in its being closed permanently. Placing the most favourable construction to the municipality upon section 62, it cannot give them a right to lease a road or any part

of it if such road is still required for the purposes of the Act, that is, as a public road. The municipality have not established or even tried to establish that this strip is no longer required for the purposes of the Act, and accordingly they had no power to sell it under section 62.

The respondents have suggested that an extremely narrow construction must be placed upon section 62 of the Act. That section gives the commissioners a right to purchase or lease land for the purposes of the Act, and it then goes on to give them a right to sell, lease, exchange or otherwise dispose of any land not required for such purposes. It was argued that the power of sale, lease or exchange is confined to land which has been acquired by the municipality under this section and does not extend to land which is vested in the municipality by reason of section 58 of the Act. In short, it was argued that the power to sell or lease was the power to sell or lease lands which had been purchased for a specific purpose and which were no longer required for such purpose. This, in my view, is too narrow a construction, because the section in terms says that the commissioners may sell, lease or exchange any land subject always that such is not required for the purposes of the Act. In my view the section does empower the commissioners to dispose of land whether acquired by them or whether such has become vested in them by reason of section 58; but such construction does not assist the municipality for the reason which I have already stated that it has not been established that this particular strip was not required for the purposes of the Act. For these reasons I am satisfied that section 62 of the Act did not give the municipality a right to execute the lease in favour of defendant no. 1.

Sir Sultan Ahmed for the appellant relied also upon section 172(*f*), and he argued that this clause (*f*) gave the municipality an unfettered right to dispose of any roadway whether such was required or not for the purposes of the Act.

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Section 172(*f*) is in these terms :—

"The Commissioners may—

(*f*) subject to the provisions of any rule prescribing the conditions on which property vested in the Commissioners may be transferred, lease, sell or otherwise dispose of any property acquired by the Commissioners under clause (*e*) or any buildings erected thereon or any land used by the Commissioners for a public road, and in doing so impose any condition as to the removal of any building existing thereon, as to the description of any new building to be erected thereon, as to the period within which such new building shall be completed, and as to any other matter that they deem fit."

It is said that this clause in terms gives the commissioners a right to sell any land used as a public road subject to the provisions of any rule prescribing the conditions on which property vested in the commissioners may be transferred. It is said that no such rules have been drafted.

If this clause was intended to give the commissioners an unrestricted right to sell any road or portion of the road, it appears to me extremely strange that it should have been placed in the section in which it is found. The previous clauses refer to road improvements and improvements to property abutting on the highway. In short, clauses (*a*) to (*e*) are clauses relating to schemes of town development and improvement. That being so, it would be natural to find that the last clause (*f*) had also some reference to road improvement and development. The marginal note to this clause is :

"Power to construct, improve and provide sites on public roads";

and if this note formed part of the section, it would conclude the matter against the municipality. It has, however, been held that a marginal note does not form part of the section, and accordingly it cannot be looked at for the purposes of construing this particular section. It is, however, permissible to examine the other clauses and to consider whether clause (*f*) is to be divorced from its context or must be read with the other clauses. In my judgment,

clause (*f*) of section 172 of the Act must be read with the preceding clauses and in fact in the opening portion of clause (*f*) there is a reference to land which has been acquired under clause (*e*). The commissioners are given power to transfer, lease or sell or otherwise dispose of any property acquired under clause (*e*) and any buildings erected thereon, that is, property which the commissioners have acquired as being necessary for the purposes of any scheme or work undertaken or projected in exercise of the powers conferred by the preceding clauses. Immediately following this power of sale is the power to sell any land used by the commissioners for a public road; and this, it is said on behalf of the municipality, gives the latter an unrestricted right to sell any road or part of it.

The phrase:

"any land used by the commissioners for a public road"

is not a happy one if it was intended to mean any public roadway. A public road is used by the public and not by the commissioners other than as members of the public. In this clause the land contemplated is land used by the commissioners for a public road. It is difficult to say with any certainty what this provision means; but I am satisfied that it does not empower the commissioners to sell any public road. It may mean that the commissioners have power to sell any land which they have acquired under clause (*e*) and which they have used as a roadway for the purposes of a road development scheme. Again it may possibly mean some road or part of a road which has ceased to be a road or part of a road by reason of any road development scheme. In my view it is not necessary to decide precisely what these words mean; and it is sufficient for this case to hold that the words cannot mean that the commissioners may sell any roadway which is being used by the public as a public highway or thoroughfare.

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If this clause gives the commissioners an unrestricted right to sell a road, then it is in conflict with section 62, if "land" in this latter section includes a roadway. As I have stated, section 62 only empowers the municipality to sell land if it is no longer required for the purposes of the Act; whereas it is said that section 172(*f*) gives them the power to sell a road without any restriction whatsoever.

Section 185(*b*) of the Act empowers the commissioners to make by-laws consistent with the Act to prevent, prohibit or regulate the use or occupation of any or all public roads or places by any person for the sale of articles or for the exercise of any calling or for setting up any booth or stall, and to provide for the levy of fees for such use or occupation. Under this section the municipality have framed certain by-laws which were published under Government notification no. 2374-L.S.-G., dated the 27th February, 1932. These by-laws provide:—

"1. No person shall be permitted to use or occupy any part of any public road or place for the sale of articles or the exercise of any calling or the setting up of any booth or stall unless he has previously obtained from the Municipal Commissioners a licence in form A appended to these by-laws:

Provided that no licence shall be granted for the erection of a permanent booth or stall.

2. Such licence may be granted for such specified period, not exceeding one year, as may be determined by the Municipal Commissioners, and all such licences shall expire not later than the last day of the year within which they were granted."

These by-laws made under section 185 restrict the rights of the municipality to grant licences. In no case can they grant a licence for the erection of any permanent booth or stall, and the maximum period for which they can grant a licence for a temporary booth or stall is one year. In the present case the municipality have granted a lease for five years with powers to renew which gives the lessee a right to erect permanent structures for the sale of petrol. It is clear that a licence for five years could not be

given, and I cannot understand how something far more substantial, namely, a lease can be validly granted. Section 185 and the by-laws made thereunder show clearly that the municipality have not an unrestricted right to deal with roadways. If they cannot grant a licence to a person to occupy a piece of road for more than a year, then surely they cannot sell a piece of road or lease it for a period of years to enable the lessee to erect buildings necessary for the sale of articles. It seems to me that section 185 of the Act clearly shows that the power of sale or of leasing given in section 172(*f*) must be confined to cases which come within the general scope of that latter section.

Section 172(*c*) empowers the commissioners to turn, divert, discontinue or close any public road vested in them. The words are very wide, and, according to Sir Sultan Ahmed, empower the commissioners to close any public road if they so think fit. I have already pointed out that the power of the commissioners to close roads even temporarily is strictly limited (*see* section 178), and, therefore, clause (*c*) of section 172 must be read in its context. In short, it must be held that the power given to the commissioners to turn, divert, discontinue or close any public road is a power to do so when they are carrying out any road development or road improvement scheme. If the wide words in clause (*c*) must be given that limited construction, it appears to me that the words in sub-section (*f*) must also be given a similarly restricted meaning.

In my judgment, the municipality had no power under the Municipal Act to lease this land, and accordingly defendant no. 1 had no right whatsoever to make the structures complained of.

The owner of land abutting on a roadway is entitled to access to that roadway at all points on his boundary. It was suggested that the plaintiff-respondents had no real complaint in this case because

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they had or could have access to their property. In my view it matters not whether access can be given to them, because these buildings seriously infringe one of their most valuable rights, namely, a right of access to the highway along the whole length of their boundary. In my view these constructions are a serious infringement of the plaintiffs' rights, and that being so, the latter was entitled to insist on their removal.

For the reasons which I have given, I am satisfied that Dhavle, J. was right in holding that the municipality had exceeded their rights in leasing the property to defendant no. 1 and that the lease gave the latter no right to erect these structures to the prejudice of the plaintiffs. That being so, I would dismiss this appeal with costs.

FAZL ALI, J.—I agree.

Appeal dismissed.

S. A. K.

APPELLATE CIVIL.

Before Rowland and Chatterji, JJ.

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August 7, 8.

RAMA PRASAD

v.

MAHARAJA BAHADUR RAM RAN VIJAY PRASAD SINGH.*

Bihar Tenancy Act, 1885 (Act VIII of 1885), section 60, scope and applicability of—arrears of rent—proprietor's right to such arrears devolving on his heir—elder son registered under Bengal Land Registration Act, 1876 (Beng. Act VII of 1876)—suit for rent by elder son—tenant's plea that rent was due to younger son also, whether tenable.

* Appeal from Appellate Decree no. 32 of 1937, from a decision of Babu Nilkanta Bagchi, Subordinate Judge of Arrah, dated the 24th September, 1936, reversing a decision of Babu Jugal Kishore Prasad, Munsif of Buxar, dated the 7th August, 1935.

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The registered proprietor of an estate is not barred from obtaining a full decree for the rents due to the estate to the extent of the interest for which he is recorded notwithstanding that he may in reality have title to a smaller interest or even to no interest at all.

Shyama Charan Bhattacharjee v. *Mustafizar Rahman*(1), followed.

Nagendra Nath Basu v. *Satadalbasini Basu*(2) and *Rai Brindaban Prasad* v. *Rai Banku Bihari Mitra*(3), distinguished.

Section 60, Bihar Tenancy Act, 1885, is intended to apply to cases where rent has accrued due to the proprietor of an estate and is still unpaid. The fact that something happens to the proprietor will not affect the character of the rent or the nature of this liability, nor will rent cease to be rent due to the proprietor.

Srish Chunder Bose v. *Nachim Kazi*(4), referred to.

K was the proprietor of an impartible estate in which the defendants held an occupancy holding. On *K*'s death the estate devolved on his elder son *R*. The name of *R* was registered as sixteen annas proprietor under the Bengal Land Registration Act, 1876. *R* instituted a suit for arrears of rent for four years. The rent for the first three years had accrued due in the life-time of *K*. The defence was that *R* and *B*, the younger son, both were entitled to the rent of the first three years, and the suit for the whole rent by *R* alone was not maintainable.

Held, that the defence was barred under section 60 of the Bihar Tenancy Act, 1885.

Musammat Nand Kuer v. *Jodhan Mahton*(5), followed.

Rani Jagadamba Kumari v. *Wazir Narain Singh*(6) and *Aparna Debi* v. *Sree Sree Shiba Prasad Singh*(7), distinguished.

Appeal by the defendants.

(1) (1917) 41 Ind. Cas. 769.
(2) (1899) I. L. R. 26 Cal. 536.
(3) (1934) I. L. R. 14 Pat. 352.
(4) (1900) I. L. R. 27 Cal. 827, F. B.
(5) (1921) 6 Pat. L. J. 658.
(6) (1922) I. L. R. 2 Pat. 319; L. R. 50 Ind. App. 1.
(7) (1924) I. L. R. 3 Pat. 367.

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

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

WORT, J.—I propose to refer this matter to a Division Bench as a large number of cases of similar kind are before the Court at the present moment. The suit was for rent for the years 1338 to 1341 by the proprietor of an impartible estate. The late proprietor died in the year 1340. It is, therefore, contended by the defendants that, as the rent accrued due did not by accretion become part of the estate, the present registered proprietor is not entitled to recover. *Rani Jagadamba Kumari* v. *Wazir Narain Singh*(1) and *Aparna Debi* v. *Sree Sree Shiba Prasad Singh*(2) are clear authorities for the proposition that the rent which accrued due to the late proprietor is not recoverable by the present proprietor as such but by the legal representatives or, as in this case, by the whole of the joint family. Section 60 of the Bihar Tenancy Act is pleaded by the plaintiff. The question is—what is the meaning of the expression "where rent is due to the proprietor"? It is contended by Mr. Sinha on behalf of the plaintiff-respondent that it is merely descriptive and that it means "where rent is due to the proprietor, manager or mortgagee of an estate" in contradistinction to rent being due to any other class of persons, and that for the reason that the section proceeds to make provision for the recovery of the rent by the registered proprietor. I must say there is a lot to be said for that argument; but there is also something to be said for the other argument that where rent has not been due to the proprietor suing, section 60 of the Bihar Tenancy Act does not apply and the cases to which I have already referred are relied upon.

As I have already said, this matter will be referred to a Division Bench for decision.

On this reference.

D. N. Varma, for the appellants.

Sushil Madhab Mullick and *B. P. Sinha*, for the respondent.

ROWLAND, J.—This appeal, which at first came before a single Judge of this Court and was referred by him to a Division Bench, arises out of a suit for the rent of the years 1338, 1339, 1340 and twelve annas kist of 1341. The plaintiff is the proprietor of the Dumraon estate and the defendants are tenants

(1) (1922) I. L. R. 2 Pat. 319; L. R. 50 Ind. App. 1.
(2) (1924) I. L. R. 3 Pat. 367.

having an occupancy holding directly under the estate without the intervention of any intermediate tenure. The proprietor, at the time when the rents of the first three years in suit accrued due, was Maharaja Bahadur Kesho Prasad Singh, who died in September, 1933, and the estate, which is an impartible Raj, devolved on his elder son, the present plaintiff-respondent. There was also a younger son, Kumar Biswanath Prasad Singh, who did not succeed to the estate, but became, along with his elder brother, the heir to the personally acquired properties of the late Maharaja. The contention of the defendants was that rents due to the estate were such personal properties, and on the death of the Maharaja the persons entitled to those rents are the two brothers and not the elder brother only. Therefore, it is said, the elder brother alone cannot sustain this suit for the sixteen annas rents. The younger brother has not been impleaded, nor has he intervened. The Munsif gave effect to the contention of the defendants and gave the plaintiff a decree for the rent of twelve annas kist of 1341 only; but on appeal the Subordinate Judge has decreed the entire suit, taking the view that section 60 of the Bengal Tenancy Act precluded the defendants from resisting the suit of the plaintiff who is registered as sixteen annas proprietor by the plea that the rent is due to any third person.

The position taken up by the Subordinate Judge is supported by a very long series of authorities of which at this stage I may refer to *Musammat Nand Kuer* v. *Jodhan Mahton*(1) as the leading case of this Court. In this case it was held that the person registered as proprietor under the Bengal Land Registration Act, 1876, is entitled to recover rent from the tenants without any further proof of his title to it, and the tenants are not entitled to plead that the registered proprietor is not in fact the

(1) (1921) 6 Pat. L. J. 658.

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proprietor and that the rent is due to a third person. The contention of the defendants was based on *Rani Jagadamba Kumari* v. *Wazir Narain Singh*(1) and *Aparna Devi* v. *Sree Sree Shiba Prashad Singh*(2). In the former of these cases which was decided by their Lordships of the Privy Council, the dispute was between a widow, who was the personal heir of the late holder of an impartible estate, and a somewhat distant agnate who succeeded to the estate itself by primogeniture, and the decision was that certain moveable and other properties which had been self-acquired by the late Raja were to be regarded as not incorporated in the estate, and therefore, should pass to his widow and not to the new holder of the estate. In the Patna decision a Bench of this Court applied the principle to rents which had accrued due during the life-time of the last holder of an estate, and it was held that the person entitled to moneys due on account of rent of this kind was the widow, that is to say, the personal heir and not the agnate on whom the estate devolved. In neither of those cases was there any question of section 60 of the Bengal Tenancy Act. The latter case, it is true, dealt with certain rents, but they were not agricultural rents; they were rents and royalties in respect of coal mines, etc., and were governed by the Transfer of Property Act. It may be conceded that any realizations made by the new proprietor on account of rents accrued due in the life-time of his father are not and will not be his exclusive property and that his brother is entitled to share in the enjoyment of any such receipts. But the decisions under section 60 of the Bengal Tenancy Act make it quite clear that the registered proprietor of an estate is not barred from obtaining a full decree for the rents due to the estate to the extent of the interest for which he is recorded notwithstanding that he may in reality have title to a smaller interest or even to no

(1) (1922) I. L. R. 2 Pat. 319; L. R. 50 Ind. App. 1.
(2) (1924) I. L. R. 3 Pat. 367.

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interest at all. For instance, in *Shyama Charan Bhattacharjee* v. *Mustafizar Rahaman*(1), in spite of a finding of fact by the Courts below that the plaintiff was not entitled to get his name registered as heir of Naba Chandra nor in respect of the third share of Ram Kant the High Court applied section 60, held that the above plea could not be entertained in a rent suit and gave the plaintiff a full decree. It is not necessary to multiply the citation of decisions which are very numerous.

Mr. D. N. Varma for the appellants contended that the plea excluded by section 60 was a plea that the rent was due to any third person as proprietor. In support of this he referred us to cases in which rents which had accrued due to the proprietor of an estate became in certain circumstances payable to a person who was not the proprietor. It has been held in some cases that such a person was not required to be registered and was not barred by section 78 of the Bengal Land Registration Act from recovering what was due to him. The decision in *Nagendra Nath Basu* v. *Satadalbasini Basu*(2) was a case in which the arrear of rent fell due in the life-time of a registered proprietor, and on his death, the debt of course became the property of his heirs. The latter alienated the property within two months, but without assigning the arrears of rent. They were permitted to sue for those arrears, the Court observing that they were not suing as proprietors but as the legal representatives of the late registered proprietors, and section 78 does not apply to such a case. This is a stronger case than the decision of this Court in *Rai Brindaban Prasad* v. *Rai Banku Bihari Mitra*(3), in which the suit had been instituted by registered proprietors one of whom died during the pendency of the suit. It was held that the fact of his heirs not

(1) (1917) 41 Ind. Cas. 769.
(2) (1899) I. L. R. 26 Cal. 536.
(3) (1934) I. L. R. 14 Pat. 352.

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yet having got registration of their names did not bar them under section 78 of the Bengal Land Registration Act, from obtaining a decree which they claimed in the capacity of his heirs and representatives. But these cases were not cases under section 60 of the Bengal Tenancy Act at all. They fell to be decided under section 78 of the Bengal Land Registration Act. What we have to see here is not whether Kumar Biswanath Prasad Singh might have realised the money from the defendants if he had claimed it from them before they had made any payment to the Maharaja or had been sued by the latter, but what the position is in a suit instituted by the Maharaja in which the defendants are attempting to plead that the rent which they have not paid is due to the Kumar Shaib. Mr. D. N. Varma suggested that the claim for back rents was not really a suit for rent falling within the Bengal Tenancy Act but was a money claim, that what was due to the Kumar Sahib not being due to him as a proprietor was not to be regarded as rent. The argument on the face of it does not appear convincing and it seems quite impossible to accept it in face of the Full Bench decision of the Calcutta High Court in *Srish Chander Bose* v. *Nachim Kazi*(1). That, it is true, was not the case of a legal representative of a deceased proprietor, but it was an assignee of arrears of rent from a proprietor. The contention was raised that the claim was not a claim for rent and was not excepted from the cognizance of a Court of Small Causes. The Full Bench negatived the contention. It was pointed out that the debt in its inception was clearly in respect of that which is known as rent, and the character which it had while it belonged to the assignor was not changed when the right to it passed to the assignee. But the main argument on which Mr. Varma laid most stress was that the opening words

(1) (1900) I. L. R. 27 Cal. 827, F. B.

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of section 60 did not apply to the rent claimed in this suit. The words of the section are—

"Where rent is due to the proprietor, manager or mortgagee of an estate."

First he contended that what is due is not rent. This argument fails in view of what I have already said. The next argument was that it is not "due to the proprietor" of the estate because it belongs to the legal representatives of the late proprietor. Mr. Varma had to choose between taking the position that the plaintiff could recover as much of the rent as is due to himself but not what is due to his brother, and taking the position that the whole claim in respect of the years 1338, 1339 and 1340 should be dismissed. He adopted the latter contention: but it has implications which make us unable to accept it. If it were well founded, it would apply even in cases where a proprietor is succeeded by a sole heir and would lead to the conclusion that even such a person in suing for back rents cannot rely on section 60 in support of his claim. It would require us to draw a highly artificial distinction between rent due to a proprietor as such and rent due to the person who is the proprietor, but due to him as the successor in interest of his predecessor.

Had Mr. Varma's argument taken the other form, that the claim must fail to the extent of the share of Kumar Biswanath Prasad Singh, it would be equally untenable. For we should have the case that some rent was due to the proprietor and some of it was alleged to be due to a third person. That position is clearly within the terms of section 60. A plain reading of the section indicates that it is intended to apply to cases where rent has accrued due to the proprietor of an estate and is still unpaid. The fact that something happens to the proprietor, will not, I think, affect the character of the rent or the nature of this liability, nor will the rent cease to be rent due

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to the proprietor. The contrary case to which section 60 is meant not to apply is the case where rent is due to a tenure-holder by an under-tenure-holder or raiyat, or due to a raiyat by an under-raiyat. Now, it is not disputed that the plaintiff has got himself registered as the sixteen annas proprietor of the estate, and under section 60 he is competent to give a sufficient discharge for all rents due to the estate or to its proprietor as such. The section goes on to say that—

> "the person liable for the rent shall not be entitled to plead in defence to a claim by the person so registered that the rent is due to any third person."

Mr. Varma's concluding argument was that this only bars a plea that the rent is due to some third person as proprietor; the answer is that those words of limitation are not to be found in the section itself; it bars a plea that the rent is due to any third person. To the argument that if the rent in fact belongs to some third person, the section does not apply at all, the answer is that on this construction the whole section would be emptied of meaning. The plea which section 60 bars would only be barred if it fails on the merits. This is contrary to a very long series of decisions.

In my view the plea of the appellants is barred by section 60 and the decision of the Subordinate Judge should be affirmed and the appeal dismissed with costs.

CHATTERJI, J.—I agree.

The whole controversy in this appeal relates to the true construction of section 60 of the Bihar Tenancy Act, particularly with reference to the opening words—

> "where rent is due to the proprietor, manager or mortgagee of an estate",

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Mr. D. N. Varma for the appellants contends that these words imply that the section requires that the person to whom the rent is due must be the proprietor, manager or mortgagee of an estate. In the present case, it is said, the rents for the year 1338-40 which became payable to the late Maharaja devolved on his death not as part of his ancestral impartible estate on his eldest son, the present plaintiff, but as his separate property on his two sons and are therefore, due to them not as proprietors but as legal representatives of the late proprietor. At any rate the younger son admittedly not being a proprietor, his share of the rent cannot be said to be due to a proprietor. Consequently section 60 cannot apply. The construction thus sought to be put on the section is, in my opinion, erroneous. As I read the section, it seems to me that what it really requires is that the tenant should hold his land directly under the proprietor of an estate as distinguished from a tenure-holder or any other intermediate landlord. To accept Mr. Varma's contention, it would be necessary to decide who is really entitled to the rent sued for, but that is exactly the question which the Court is forbidden by the section to entertain. To make the section applicable it is only necessary to see whether the tenancy is held under a proprietor, manager or mortgagee of an estate. If this condition is satisfied, the registered proprietor suing for rent shall be deemed to be the person to whom the rent is due and no plea to the contrary by the tenant will be permissible. Admittedly the plaintiff in this suit is the registered proprietor and, therefore, section 60 bars the plea that he alone is not entitled to maintain this suit. The fact that the rents for the years 1338-40 accrued due during the life-time of the late proprietor makes no difference.

Appeal dismissed.

K. D.

REVISIONAL CIVIL.

1939.

August, 15.

Before Harries, C.J. and Khaja Mohamad Noor, J.

HAREKRISHNA DAS

v.

SUNAMANI DEI.*

Court-fees Act, 1870 (*Act VII of* 1870), *section* 7(*iv*)(*c*) *and Schedule II, Article* 17—*suit for declaration that several alienations by a Hindu widow were not binding on reversioners—prayer for interim injunction granted—suit, whether becomes one for a declaration with consequential relief—Court-fee of rupees fifteen, whether payable in respect of each alienation.*

Where the plaintiffs brought a suit claiming a declaration that several alienations made by a Hindu widow were not binding on them as reversioners and during the course of the proceeding the plaintiffs applied for and obtained an interim injunction to restrain the widow from making further alienations:

Held, that the suit was a declaratory one and the mere fact that the plaintiffs had prayed for and obtained an interim injunction could not change the nature of the suit so as to make it a suit for a declaration with consequential relief.

Gangadhar Misra v. *Rani Debendrabala Dasi*(1), not followed.

Deokali Koer v. *Kedar Nath*(2), distinguished.

Held, further, that the suit was in fact a suit for a large number of declarations, and, therefore, that a court-fee of rupees fifteen was payable in respect of each of the alienations in question.

Daivachilaya Pillai v. *Ponnathal*(3), followed.

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* Circuit Court, Cuttack. Civil Revision no. 86 of 1937, from an order of Babu S. M. Das, Subordinate Judge of Cuttack, dated the 29th May, 1937.

(1) (1925) I. L. R. 5 Pat. 211.

(2) (1912) I. L. R. 39 Cal. 704.

(3) (1894) I. L. R. 18 Mad. 459.

Application in revision by the plaintiffs.

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

B. N. Das, for the petitioners.

B. K. Das and *G. G. Das*, for the opposite party.

HARRIES, C. J.—This is a civil revision brought by the plaintiffs and directed against an order passed by the learned Subordinate Judge of Cuttack in a court-fee matter.

The plaintiffs brought the suit out of which this application arises alleging that they were the reversioners of a certain last male owner and they claimed a declaration that the widow of the last male owner had only a limited interest of a Hindu widow in the inheritance and that alienations made by her without legal necessity would not enure beyond her life-time and would not be binding upon the reversionary body.

During the course of the proceedings the plaintiffs asked for an interim injunction to restrain the widow from making further alienations and the learned Subordinate Judge acceded to their application and granted an ad interim injunction. The adequacy of the court-fee paid, namely, Rs. 15, was raised and eventually the learned Judge ordered that the plaintiffs should pay a court-fee calculated on an ad valorem basis. Against that order the plaintiffs have applied in revision to this Court.

It has been strenuously contended on behalf of the plaintiffs that this is not a case where there was a claim for a declaration and consequential relief and consequently court-fee on an ad valorem basis cannot be charged. On perusal of the plaint it is clear that the plaintiffs merely asked for a declaration that defendant no. 1 had only a life estate in her inheritance and that certain alienations would not be binding upon the reversionary body. That prayer as it

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stands is one purely for a declaration. There does follow a second prayer in these terms:

"That the suit may be decreed with costs and the plaintiffs may be allowed to any other relief to which they are entitled."

This is the usual omnibus relief clause which appears in practically every plaint in this country and we cannot construe a plaint as being a plaint for a declaration and consequential relief merely because this omnibus relief clause appears.

The learned Judge, however, came to the conclusion that as the plaintiffs had applied and had obtained an ad interim injunction the suit was clearly a suit for a declaration and consequential relief. It has been argued on behalf of the opposite party that the learned Judge's view is supported by authority of this Court and of the Calcutta High Court. In the case of *Gangadhar Misra* v. *Rani Debendrabala Dasi*(1) Jwala Prasad, J., sitting singly held on somewhat similar facts that the suit was a suit for a declaration and consequential relief and accordingly he directed that an ad valorem court-fee was payable. Jwala Prasad, J., in the main based his decision upon the case of *Deokali Koer* v. *Kedar Nath*(2) but in my view the Calcutta case does not support the view taken by Jwala Prasad, J. In the Calcutta case the learned Chief Justice in delivering judgment makes it clear that in his view the suit was not a suit for a declaration. It is true that two prayers for declarations had been made in the plaint but in the view of the learned Chief Justice neither of the matters included in those two prayers could be made properly the subject-matter of a declaration. In his view, though the suit was framed as a declaratory suit, it was a suit for something more and the learned Chief Justice points out that subsequent events showed that it was a suit for something more. The plaintiff in

(1) (1925) I. L. R. 5 Pat. 211.
(2) (1912) I. L. R. 39 Cal. 704.

that suit obtained an interim injunction and the learned Chief Justice uses that fact to support his view that the suit was not one properly for a declaration but was one for consequential relief also. The Calcutta case does not decide that because a plaintiff has obtained an ad interim injunction his suit must inevitably be a suit for a declaration with consequential relief. Further it would appear that in the Patna case decided by Jwala Prasad, J. there was at the time the appeal came to the High Court a subsisting injunction though how the injunction could have subsisted up to that time is not clear.

In the present case the prayer was the usual prayer in a case of this kind, namely, that it be declared that the widow's interest was the limited interest of a Hindu widow and consequently that certain alienations which she had made without legal necessity would not be binding upon the reversionary body. Looking purely at the relief claimed in the plaint this is a declaratory suit and a declaratory suit only.

Can the whole nature of the suit be changed by reason of the fact that the plaintiffs were so ill advised as to apply for an interim injunction which they ought never to have been granted? The plaintiffs as reversioners have no right to possession until the death of the Hindu widow and in this suit they have no right to anything while the widow is alive beyond a declaration. They had no right to ask for an injunction and it should never have been granted to them. In my view the fact that they applied during the suit for this ad interim injunction does not change the real nature of the suit. It still remains a suit for a declaration that certain alienations made by a Hindu widow were not binding upon the reversionary body. Upon the suit as framed no decree other than a purely declaratory decree could have been passed and even after the granting of this

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interim injunction no relief could have been given to the plaintiffs by the decree other than the declaration asked for. In my view this suit is a purely declaratory suit and even in the events that have happened it cannot now be regarded as a suit for a declaration coupled with some consequential relief. The suit is a pure declaratory suit and court-fees must be assessed from that point of view.

The question now arises what court-fee is payable. All that was paid was Rs. 15 and in my view this is not sufficient. Sixteen alienations were alleged by the plaintiffs to be without legal necessity and therefore not binding beyond the widow's lifetime. Each alienation without legal necessity gives the reversioners a cause of action and time would begin to run in a suit for a declaration from the time of each particular alienation. The plaintiffs in this case were in fact asking for a number of declarations and in my view they must pay a court-fee of Rs. 15 in respect of each of the alienations. The suit is in fact a suit for a large number of declarations. This view has been accepted and acted upon by the Madras High Court in the case of *Daivachilaya Pillai* v. *Ponnathal*(1). In that case a Bench held that when reversioners sue to have declared invalid as against them alienations made by a Hindu widow a court-fee of Rs. 10 (now Rs. 15) must be paid in respect of each of the alienations in question. I respectfully agree with that view and in my judgment the plaintiffs in this case must pay Rs. 15 in respect of each alienation which they propose to challenge.

As I have stated earlier, the plaintiffs originally intended to challenge some sixteen alienations but it would appear that compromises have been effected with respect to two or three of them. In my view the plaintiffs can only be compelled to pay court-fees

(1) (1894) I. L. R. 18 Mad. 459.

at this stage upon the alienations which they now propose to challenge. Credit of course must be given to them for the Rs. 15 they have already paid.

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It is quite clear that the plaintiffs had no right whatsoever to an interim injunction in this case. They have no right to possession and they have no right to restrain the widow in this suit. It is a suit purely for a declaration and consequently an interim injunction should not have been granted. As the matter is before us in revision the Court has power to discharge the interim injunction and I would, therefore, discharge it.

In the result, therefore, I would allow this application in part and vary the order of the court below and direct that Court to calculate the court-fee upon the lines indicated in my judgment. The ad interim injunction will also be discharged. Each party will bear its own costs.

KHAJA MOHAMAD NOOR, J.—I agree.

S.A.K. *Application allowed in part.*

APPELLATE CIVIL.

Before Rowland and Chatterji, JJ.

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August, 15, 16.

Execution—application for execution against surety—death of surety—heirs not brought on record—heirs entering appearance—Code of Civil Procedure, 1908 *(Act V of* 1908*), Order XXI, rule* 22*, notice under, whether necessary.*

Execution proceedings started against a surety cannot be continued, after his death, against his estate without bringing

* Appeal from Appellate Order no. 71 of 1939, from an order of T. G. K. N. Ayyar, Esq., I.C.S., District Judge of Saran, dated the 30th November, 1938, reversing an order of Babu Bijay Krishna Sarkar, Subordinate Judge at Chapra, dated the 24th June, 1938.

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on the record his legal representatives. While substituting the heirs the Court should issue notice under Order XXI, rule 22, Code of Civil Procedure, 1908, against them, and their objection, if any, should be heard before the execution proceeding can be further continued; the fact that the legal representatives have already entered appearance is immaterial.

Kanchamalai Pathar v. *Shahaji Rajah Sahib*(1), *Smith* v. *Kailash Chandra Chakraverty*(2) and *Raghunath Das* v. *Sundar Das Khetri*(3), followed.

Fakhrul Islam v. *Rani Bhubaneshwari Kuer*(4), distinguished.

Per Rowland, J.—The correct procedure for the initiation of proceedings against the surety is first to call on him to produce the judgment-debtor; next, on his failure to do so, to call on him to show cause against forfeiture and execution; next, on failure to show cause to the satisfaction of the Court, to obtain an order of the Court directing execution to proceed against the person and properties of the surety.

The correct procedure after the death of the surety is to substitute his heirs in the execution proceeding and obtain leave of the Court to continue the execution against them; thereafter, to serve them with notices under Order XXI, rule 22, and on their appearance the Court, after hearing and determining any objections that they might make, should permit or disallow the continuance of the execution.

Doraswami v. *Chidambaram Pillai*(5), not followed.

Kanchamalai Pathar v. *Shahaji Rajah Sahib*(1), *Raghunath Das* v. *Sundar Das Khetri*(3) and *Smith* v. *Kailash Chandra Chakraverty*(2), referred to.

Appeal by the legal representatives of the (surety) judgment-debtor.

(1) (1935) I. L. R. 59 Mad. 461, F. B.
(2) (1931) I. L. R. 11 Pat. 241.
(3) (1914) I. L. R. 42 Cal. 72, P. C.
(4) (1928) I. L. R. 7 Pat. 790.
(5) (1923) I. L. R. 47 Mad. 63.

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

S. K. Mitra and *M. Rahman*, for the appellants.

S. M. Mullick (with him *Jaleshwar Prasad* and *Thakur A. D. Sinha*), for the respondents.

CHATTERJI, J.—The respondents obtained a money decree against one Zafarullah. In execution of that decree in execution case no. 54 of 1935, Zafarullah was arrested. When brought to court he intimated that he would file an application for adjudication as insolvent and in accordance with the provisions of section 55 (*4*) of the Code of Civil Procedure, one Razaq Mian stood surety for him. In the surety bond Razaq hypothecated certain properties belonging to him. Zafarullah did file an application for insolvency, but it was dismissed by the District Judge. On appeal to the High Court, the order was confirmed. Soon after the disposal of that insolvency case by the District Judge the decree-holder filed on the 5th March, 1937, an application for execution of the decree against Razaq, the surety. On the 5th April, 1937, notice under Order XXI, rule 22, was issued on Razaq fixing the 26th April, 1937, for his appearance. On the 26th April, 1937, Razaq appeared and filed an objection mainly on the ground that the application for execution was not maintainable against him as the provisions of law had not been complied with. On the same day the Court issued a notice against Razaq calling upon him to produce the judgment-debtor and also to shew cause why the execution should not proceed against him. On the 22nd May, 1937, the date fixed in the notice, Razaq neither produced the judgment-debtor nor shewed cause; but he filed an application for time and it appears that time was allowed and the case was adjourned to 12th June, 1937. On the 12th June, the Court issued an order of attachment of the properties mentioned in the surety bond. In the meantime the execution proceedings

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were stayed pending the disposal of the High Court appeal arising out of the insolvency proceeding. As the execution proceeding was stayed, Razaq did not want to proceed with his objection which was dismissed for non-prosecution on the 21st September, 1937. After the High Court appeal was disposed of the decree-holder made an application to continue the execution proceeding which was allowed. On the 4th May, 1938, after the sale proclamation had been issued Razaq died. Thereafter on the 17th May, 1938, his legal representatives appeared and filed an objection stating that the execution could not proceed against them. This objection was allowed by the Subordinate Judge on the 24th June, 1938. He held that there were certain irregularities in the execution proceedings and in face of them he would not continue the execution. Against that order the decree-holder filed an appeal to the District Judge who allowed it. He took the view that the liability of Razaq under the surety bond having been admittedly incurred, the decree-holder was entitled to proceed in execution against his properties. He further held that it was not necessary in the execution proceeding to substitute the heirs of Razaq or to issue any notice against them. Against this decision this miscellaneous second appeal has been preferred by the heirs of Razaq.

Three points are urged in this appeal: *first*, that the execution which was started on the 5th March, 1937, against Razaq was not maintainable, because the requisite notices were not served on him;

second, that the decree-holder should have after the death of Razaq substituted his legal representatives under section 50 of the Code of Civil Procedure and issued notices against them under Order XXI, rule 22;

third, that the decree-holder could not proceed at the same time both against the surety and the judgment-debtor.

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In connection with this last point, I ought to have mentioned that when the Subordinate Judge allowed the objection of these appellants, the decree-holder prayed for arrest of the judgment-debtor which was granted.

I will deal with the second point first. Indeed the execution proceeding had already reached the stage of the sale proclamation having been issued when Razaq died; but it by no means follows that the decree-holder was at liberty to proceed with the execution against a dead man. The learned District Judge seems to be of opinion that in the circumstances the execution proceeding can be continued without substituting the heirs of Razaq. I am unable to support this view of the law. Suppose in an execution proceeding the judgment-debtor dies after attachment and issue of sale proclamation and the property is sold without substituting his heirs, who in that case will exercise the statutory right conferred by Order XXI, rule 89, of the Code of Civil Procedure and make the necessary application? A dead man is on the record and his legal representatives may have no knowledge of the proceedings. On principle I do not think the Court can sell the property of a dead man. I am, therefore, of opinion that the decree-holder before he could proceed with the execution should have substituted the heirs of Razaq. In this connection reference may be made to the Full Bench decision of the Madras High Court in *Kanchamalai Pathar* v. *Shahaji Rajah Sahib*(1), where though the facts were dissimilar, the principle was laid down that execution proceeding could not be continued against the estate of a dead man without bringing on the record his legal representatives. What happened there was that after the sale proclamation the judgment-debtor died and the sale was held without substituting his legal representatives. Subsequently they made an application to set aside the sale. It was held by their Lordships that the sale

(1) (1935) I. L. R. 59 Mad. 461, F. B.

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was void and was liable to be set aside at the instance of the legal representatives. The proper order, therefore, to be passed in the present case is that the decree-holder should, in order that he may continue the execution proceeding, substitute in the place of the deceased, Razaq, his legal representatives. While substituting them the Court should issue notice under Order XXI, rule 22, against them and their objections, whatever they may have to urge, should be heard before the execution proceeding can be further continued against them.

On behalf of the respondents, Mr. Jaleshwar Prasad contends that inasmuch as the legal representatives already entered appearance in the execution proceeding, there was no necessity of issuing a notice under Order XXI, rule 22. He has relied on a decision of this Court in *Fakhrul Islam* v. *Rani Bhubaneshwari Kuer*(1), where a notice under Order XXI, rule 22, was in fact issued but not served and the legal representatives entered appearance and filed objections. It was held that no fresh notice under Order XXI, rule 22, was necessary. That case is quite distinguished from the facts of the present case. It has been held by the Privy Council in *Raghunath Das* v. *Sundar Das Khetri*(2) and also by this Court in *Smith* v. *Kailash Chandra Chakraverty*(3) that the issue of a notice under Order XXI, rule 22, unless the Court dispenses with it, is necessary to give jurisdiction to the Court to execute the decree.

In this view it is not necessary to deal with the other objections because when the legal representatives, the appellants, have been substituted and been served with notices they will be at liberty to urge their objections and they will be dealt with according to law.

I would, therefore, allow the appeal, set aside the order of the District Judge and direct that the

(1) (1928) I. L. R. 7 Pat. 790.
(2) (1914) I. L. R. 42 Cal. 72, P. C.
(3) (1931) I. L. R. 11 Pat. 241.

Subordinate Judge do proceed with the execution in accordance with law giving opportunity to the decree-holder to substitute, in the place of deceased Razaq, his legal representatives, the present appellants. In the circumstances the parties should bear their own costs throughout.

I may mention that the attachment that has already been effected of the properties of Razaq should continue so long as the present execution proceeding is to last.

ROWLAND, J.—I agree. The case illustrates the difficulties that arise out of attempts to take short cuts in matters of procedure. The correct procedure for the initiation of proceedings against the surety was, first, to call on him to produce the judgment-debtor; next, on his failure to do so, to call on him to shew cause against forfeiture and execution; next, on failure to shew cause to the satisfaction of the Court, to obtain an order of the Court directing execution to proceed against the person and properties of the surety. The correct procedure after the death of Razaq was to substitute his heirs in the execution proceeding and obtain the leave of the Court to continue the execution against them; thereafter to serve them with notices under Order XXI, rule 22, and on their appearance the Court, after hearing and determining any objections that they might make, would permit or disallow the continuance of the execution. When the heirs of Razaq appeared in this case they seem to have appeared in their personal capacity as owners of property sought to be taken in execution of a decree not passed against them. They were not yet persons who had taken Razaq's place as judgment-debtors, a position which would not be theirs until the decree-holder had obtained substitution of their names in his execution petition. The Subordinate Judge's order seems to have been understood by the parties as meaning that the execution could not proceed against the heirs of Razaq though the point he had to decide was that

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the sale could not be held so long as no representative of Razaq was on the record. In that view he was certainly right and the District Judge was in error. Some colour is lent to the view of law taken by the District Judge by a decision in *Doraswami* v. *Chidambaram Pillai*(1), where it seems to have been held that a sale of the effects of a deceased judgment-debtor was merely irregular and not illegal. But this decision was overruled by the Full Bench of the same Court in *Kanchamalai Pathar* v. *Shahaji Rajah Sahib*(2), a decision based on the Privy Council authority in *Raghunath Das* v. *Sundar Das Khetri*(3), which was interpreted in a similar sense in this Court in *Smith* v. *Kailash Chandra Chakraverty*(4). The view taken by the Full Bench of the Madras High Court was that such a sale was void and not merely voidable. Such a sale cannot proceed.

When the execution case is properly constituted by bringing heirs of Razaq on the record, the time will come for them as his representatives to raise objections, if any, as to the result of the departure from the regular order of procedure in the matter of the initiation of execution proceedings against Razaq, and for the Court to consider those objections.

K. D.

Appeal allowed.

APPELLATE CIVIL.

Before Varma and Rowland, JJ.

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August, 21, 22.

SURAJ PRAKASH PURI

v.

SANT LAL SINGH.*

Code of Civil Procedure, 1908 (*Act V of* 1908). *Order XLI, rule* 33, *scope of—appellate court's power to interfere.*

* Appeal from Appellate Decree no. 491 of 1938, from a decision of Babu Bijay Krishna Sarkar, Subordinate Judge of Chapra, dated the 30th September, 1937, reversing a decision of Maulavi Syed Ali Jawad, Munsif at Chapra, dated the 30th June, 1936.

(1) (1923) I. L. R. 47 Mad. 63.
(2) (1935) I. L. R. 59 Mad. 461, F. B.
(3) (1914) I. L. R. 42 Cal. 72, P. C.
(4) (1931) I. L. R. 11 Pat. 241.

extent of—power not to be exercised in such a way as to interfere with the provisions of any other enactment.

Order XLI, rule 33, of the Code of Civil Procedure, 1908, is intended to enable the appellate Court, where its decision interferes with or modifies or extends the decision of the lower Court, to give effect to that decision by interfering, if necessary, even with rights and liabilities of those who have not in fact appealed from the decision of the trial Court; but it ought not to be applied to cases where there has been a distinct and separate decree against persons who have not chosen to appeal.

Although Order XLI, rule 33, gives wide power to the Court, it should not be exercised in such a way as to interfere with the provisions of other enactments as, for instance, the Court-fees Act, 1870.

Rangam Lal v. *Jhandu* (1), *Maharaja Bahadur Kesho Prasad Singh* v. *Narayan Dayal*(2), *Attorney-General* v. *Simpson*(3), *Ramprasad Singh* v. *Mohan Mandal*(4), *Musammat Chanda Bibi* v. *Mohanram Sahu*(5), *Ramlingam Chettiar* v. *Subramania Chettiar*(6), *Mukund Dharman Bhoir* v. *Shantaram Rajo Bhoir*(7) and *Padarath Mahto* v. *Hitan Singh*(8), reviewed.

Bhutnath Deb v. *Sashimukhi Brahmani*(9), discussed.

Kamalkanta Debnath v. *Tamijaddin*(10), distinguished.

Appeal by the plaintiffs.

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

S. M. Mullick and *Harnarayan Prasad*, for the appellants.

N. N. Sinha (with him *L. K. Jha*, *Ganesh Sharama* and *S. C. Ghose*), for the respondents.

(1) (1911) I. L. R. 34 All. 32, F. B.
(2) (1924) I. L. R. 4 Pat. 37.
(3) (1901) 2 Ch. D. 671.
(4) (1933) 150 Ind. Cas. 784.
(5) (1933) I. L. R. 13 Pat. 200.
(6) (1927) I. L. R. 50 Mad. 614.
(7) (1925) 98 Ind. Cas. 383.
(8) (1924) 5 Pat. L. T. 509.
(9) (1926) 45 Cal. L. J. 119.
(10) (1934) I. L. R. 61 Cal. 919.

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VARMA, J.—This is an appeal on behalf of the plaintiffs. They had filed a suit for a declaration that the property in dispute was the property dedicated to God Shiva appertaining to the muth in village Mirzapur Damodar of which Mahant Ramavatar Puri, defendant no. 20, was the mahant and that the mokarrari lease executed by him on the 25th May, 1926, in favour of the defendants first party was invalid and illegal as the mahant had no right to create that mokarrari as it was created without legal necessity. The defendants first party transferred the lease to the defendants second party. The plaintiffs alleged that as Mahant Ramavatar Gir had abdicated in his favour on the 20th January, 1934, he was entitled to file this suit. The reliefs sought in the plaint were that the mokarrari lease should be set aside and that he should be allowed to recover possession of the property valued at Rs. 300 and also for a money decree for a sum of Rs. 800 against the defendants on the ground that the defendants had cut away almost all the trees on the land. The defendants first party did not contest the suit. The suit was mainly contested by the defendants second party, although written statements were filed on behalf of the minor defendants nos. 22—24 and on behalf of defendants nos. 15—18 and on behalf of one Lachmi Rai. The defence was that the plaintiffs had no right to sue because Mahant Ramavatar Gir was still the mahant of the muth and that he had not abdicated. It was also alleged that they had not cut away the trees and the defendants second party urged that if the trees had been cut away they must have been cut away by the defendants first party before the defendants first party transferred the property to them; that the property which was the subject-matter of the mokarrari lease was the personal property of the mahant and, therefore, the transfer could not be questioned.

The trial Court held that the property appertained to the muth and as in the absence of any legal

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necessity no permanent lease should be created and as no legal necessity was proved in this case, therefore it held that the transfer was not valid against the successors. He also held in favour of the plaintiff on the question of abdication by Mahant Ramavatar Gir. Therefore he decreed the suit as against the defendants second party for possession and he decreed the suit against the defendants first party for money because he held that the trees were cut away before the defendants first party transferred the mokarrari property to the defendants second party. Then there was an appeal to the lower appellate court on behalf of the defendants second party. When the memorandum of appeal was looked at it appeared that the defendants second party had not paid court-fee on the full valuation of the appeal and when their attention was drawn to it they put in a petition praying that the appeal be valued only at Rs. 300 and not at Rs. 1,100 which was the amount of the decree. The memorandum of appeal was also allowed to be amended as prayed for by the defendants second party with the result that only the defendants second party remained as appellants on the record and the defendants first party did not appear anywhere on that memorandum of appeal as a party to the appeal. The lower appellate Court came to the conclusion that there was no abdication by Mahant Ramavatar Gir and, therefore, the plantiff's suit was premature because at least for the life-time of the mahant the alienation was valid and binding. So far as the nature of the property was concerned, he came to the conclusion that there being no presumption that the properties were trust properties, it must be assumed, in the absence of any evidence to the contrary, that the mahant was dealing with them as his personal properties; and then he holds that even if it were not so, the transfer was valid for the life-time of the mahant. After having come to these findings, he dismissed the suit altogether and it is this order that

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has chiefly been attacked by Mr. S. M. Mullick appearing on behalf of the plaintiff.

Mr. Mullick's argument is that Order XLI, rule 33, although it is very wide, should be read along with the provisions of other enactments like the Court-fees Act or the Limitation Act and for this purpose he has drawn our attention to a number of decisions beginning with *Rangam Lal* v. *Jhandu*(1) where a Bench consisting of three Judges held that the words of Order XLI, rule 33, are no doubt very wide; but they remarked as follows: " The words are no doubt very wide, but we think that care and judicial discretion must be used by appellate Courts in the exercise of the powers conferred by the rule. In a proper case the Court, of course, is quite entitled and should not hesitate to exercise them. It is not easy, nor perhaps expedient, to lay down any hard and fast rule. We think, however, that one principle may be safely stated. The Courts in the exercise of the powers conferred by Order XLI, rule 33, should not lose sight of the other provisions of the Code of Civil Procedure itself, nor of the Court-fees Act nor of the Law of Limitation ". Now this decision has been referred to in some of the decisions of our own High Court, for example, in *Maharaja Bahadur Kesho Prasad Singh* v. *Narayan Dayal*(2), where Dawson Miller, C. J. re-iterated the remark that although the provisions of Order XLI, rule 33, are very wide, he remarked that " the object of that Order is, speaking generally, to enable the appellate Court, where its decision interferes with or modifies or extends the decision of the lower Court, to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who are not in fact appealing from the decision of the trial Court. Unless it is necessary in the interests of justice to give effect to the appellate Court's decision by interfering in some way or other with the

(1) (1911) I. L. R. 34 All. 32, F. B.
(2) (1924) I. L. R. 4 Pat. 37.

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rights of those parties which are not the subject of appeal before us then it seems to me that the appellate Court has no right whatever to interfere". Their Lordships also referred to the case of *Rangam Lal* v. *Jhandu*(1) and also to the decision in *Attorney-General* v. *Simpson*(2).

The next Patna case is very much like the case in hand—*Ram Prasad Singh* v. *Mohan Mandal*(3)—where Mr. Justice Noor has emphasised the fact that Order XLI, rule 33, of the Code of Civil Procedure, is intended to enable the appellate Court, where its decision interferes with or modifies or extends the decision of the lower Court, to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who are not in fact appealing from that decision of the trial Court, but it ought not to be applied to cases where there has been a distinct and separate decree against those defendants who have not chosen to appeal. It is on the latter part of the observation that I chiefly rely. In the present case, before I go to any other cases, I will just observe that there are two distinct decrees, one against the defendants second party and the other against the defendants first party. The defendants second party, when they filed the appeal and were reminded that there was a decree for Rs. 800 more, deliberately avoided to pay court-fee on that amount which was realizable from the defendants first party. The defendants first party did not choose to come before the lower appellate Court and in these circumstances I am of opinion that no order should have been passed in favour of the defendants first party on this state of the record. The Court could certainly bring the defendants first party on the record under Order XLI, rule 20, and after the proper steps were taken by the defendants first party, he should have passed the orders that he has passed now. On this

(1) (1911) I. L. R. 34 All. 32, F. B.
(2) (1901) 2 Ch. D. 671.
(3) (1933) 150 Ind. Cas. 784.

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point I want to make my meaning clear. Supposing the whole decree was passed against the defendants second party instead of themselves and the defendants first party and that the defendants second party did not appeal against that amount of money about which the decree was passed against the defendants first party, could the Court as an appellate Court pass a decree in their favour with regard to the other item that was left out deliberately by the defendants second party? I am of opinion that it could not and here the force of the observation in the cases which I have cited becomes apparent because they emphasise the fact that although the wording of Order XLI, rule 33, gives wide powers to the Court, still it should not be exercised in such a way as to interfere with the provisions of other enactments. In this case I may point out the enactment against the provision of which the lower Court's judgment has offended seems to be the Court-fees Act.

The following cases were also cited: *Mussamat Chanda Bibi* v. *Mohanram Sahu*(1); *Ramlingam Chettiar* v. *Subramania Chettiar*(2) and *Mukund Dharman Bhoir* v. *Shantaram Rajo Bhoir*(3). On this point the opinion of most of the High Courts is that the view which I have expressed is the real interpretation of Order XLI, rule 33.

But as against this Mr. Nirsu Narain Sinha has drawn our attention to two cases, chiefly, *Kamalkanta Debanath* v. *Tamijaddin*(4). It appears that there it was an appeal against the whole decree and the provisions of Order XLI, rule 4, were referred to in that connection. The case that seems to support the view of Mr. Sinha most strongly is *Bhutnath Deb* v. *Sashimukhi Brahmani*(5). Looking at the placitum itself it does appear that it supports the contention raised

(1) (1933) I. L. R. 13 Pat. 200.
(2) (1927) I. L. R. 50 Mad. 614.
(3) (1925) 98 Ind. Cas. 383.
(4) (1934) I. L. R. 61 Cal. 919.
(5) (1926) 45 Cal. L. J. 119.

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by Mr. Sinha that an appellate Court could pass an order affecting the parties to the suit even if they were not parties to the appeal. But from the judgments it is clear that Mr. Justice Page has struck a note of warning in the following terms: "Care, of course, must be taken in each case to see that rule 33 is not utilized as a mode of evading the provisions of other statutory rules or orders". So far as this point is concerned, it seems that there is a good deal of force in the contention of Mr. Mullick. As to what orders we are going to pass, I will indicate later after I have dealt with the second point.

The second point is that the lower appellate Court may be perfectly justified in dismissing the suit as premature because the mahant was still alive; but Mr. Mullick questions the correctness of the finding of the lower appellate Court that the property was the personal property of the mahant. For this he has drawn our attention to the findings of the trial Court where the trial Court after referring to the various pieces of evidence has also referred to two entries in survey papers. The trial court said as follows:

> "The disputed mokarrari land bears C. S. khata no. 1252, plot no. 16 measuring 3.41 acres corresponding to R. S. plot no. 243. The R. S. khatian Ex. 6(*a*) shows that the property is a 'birit' land. A 'birit' land has been defined as a grant or endowment to a person for his maintenance or for religious or charitable objects";

and after referring to another exhibit, he has come to the conclusion that the properties are muth properties and not the personal properties of any particular mahant. Mr. Mullick urges that the judgment of the lower appellate Court being a judgment of reversal, it should have discussed or at least mentioned the evidence upon which the trial Court relied. The lower appellate Court's judgment is silent with regard to the evidentiary value of these two documents upon which the trial Court has relied. As against this Mr. Nirsu Narain Sinha urges that as the finding of the lower appellate Court is a finding

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of fact and as these two documents contradict each other, it might be that they were not referred to in the course of the arguments and, therefore, the lower appellate Court has not referred to them in its judgment. There is a statutory presumption of correctness attaching to the record-of-rights and when the trial Court had relied upon it as a piece of evidence, the lower appellate Court should not have come to a finding of its own after ignoring this important piece of evidence altogether. I am, therefore, of opinion that the finding arrived at by the lower appellate Court has not been arrived at in a satisfactory manner and in view of the fact that the old mahant was alive at the time the suit was filed, I am of opinion that this question as to whether the property belonged to the muth or was the personal property of the mahant did not really arise and should be left open at this stage.

But the matter does not end here. Mr. N. N. Sinha, although he appears for the defendants second party (the minor defendants of the first party have however appeared before this Court), has suggested that the defendants first party should be brought on the record and if necessary proper court-fee may be demanded from them; and for this purpose he has referred to the case of *Padarath Mahto* v. *Hitan Singh*(1) where it was laid down that the High Court has power in second appeal to add as respondents to the appeal persons who were parties to the suit in the original Court, who were not impleaded as respondents in the lower appellate Court, although the time in which the appeal might have been preferred as against them has expired. It was also laid down that no question of limitation arose under Order XLI, rule 20. In the present case I feel that the order passed by the lower appellate Court dismissing the suit even against the defendants first party, on the state of the record as it was at the time before him, was not right. He could, if he wanted, have brought

(1) (1924) 5 Pat. L. T. 509.

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the defendants first party on the record under Order XLI, rule 20.

I would, therefore, set aside the order of dismissal of the suit against defendants first party and send back the record of this case to the lower appellate Court who may add them as parties under Order XLI, rule 20, and the defendants first party will be entitled to file a cross-objection provided they pay the proper court-fee within time and then the matter may be disposed of in accordance with law so far as the defendants first party are concerned. If no cross-objection is presented within time it will be the duty of the lower appellate Court to affirm that part of the decree of the Munsif by which the defendants first party are directed to pay Rs. 800 to the plaintiff. The appeal, however, as against the defendants second party will stand dismissed because we have held that the suit is premature inasmuch as the mahant was alive at the time the suit was instituted. The defendants second party are entitled to their costs of this second appeal. The defendants first party are entitled to the costs actually incurred by them in this Court.

ROWLAND, J.—I agree.

K. D.

Appeal allowed in part.
Case remanded.

APPELLATE CIVIL.

Before Rowland and Chatterji, JJ.

1939.

August, 23, 24.

HARBALLAV PRASAD CHOWDHURY

v.

JAGBALLAV PRASAD CHOWDHURY.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XLIII, rule* 1(*w*), *and Order XLVII, rules* 4(1) *and* 7—

* Appeal from Original Order no. 142 of 1937, from an order of Babu Nand Kishore Chaudhuri, Subordinate Judge at Darbhanga, dated the 5th March, 1937.

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right of appeal, whether restricted by the grounds set out in rule 7 of Order XLVII—rule 4(1), meaning and scope of.

The right of appeal granted by Order XLIII, rule 1(*w*), Code of Civil Procedure, 1908, is subject to, and restricted by, the grounds set out in Order XLVII, rule 7, of the Code.

Jadunandan Singh v. *Shankar Sahu*(1) and *Sunder Mall* v. *Upendra Nath Seal*(2), followed.

Daso Keshav Panchbhavi v. *Karbasappa Kariyappa Mudhol*(3) and *Mukundsa* v. *Motiram*(4), not followed.

Order XLVII, rule 4(*1*), of the Code, cannot be interpreted to mean that its provision is contravened if the Court grants the application though there is not sufficient ground for a review.

Appeal by the plaintiffs.

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

B. N. Mitter (with him *R. Chowdhury* and *Ajit K. Mitter*), for the appellants.

Bhabananda Mukharji, for the respondents.

CHATTERJI, J.—This appeal arises out of proceedings in a partition suit instituted so far back as in the year 1917. Without going into the long history of the case, it will be enough to state that in pursuance of the preliminary decree which was passed in 1919, a commissioner was appointed who eventually submitted his report on the 26th April, 1935. According to his findings, the plaintiffs were entitled to get various sums from the defendant who was the karta of the joint family. The defendant filed objections to the report and those were disposed of by the Subordinate Judge by his order dated the 17th January, 1936. Accepting the commissioner's report in part, he passed a final decree. Before the

(1) (1936) 17 Pat. L. T. 766.
(2) (1916) 1 Pat. L. J. 193.
(3) (1926) A. I. R. (Bom.) 121.
(4) (1928) 116 Ind. Cas. 645.

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final decree was actually prepared the defendant made an application on the 17th February, 1936, for review of the judgment dated the 17th January, 1936. In the application certain items in the commissioner's report were specifically referred to and it was prayed that

"those items should be reconsidered with a view to rectify the mistakes and inequities that have crept in owing to a misapprehension."

This application was presented to and heard by the same Judge who passed the final decree on the 17th January, 1936. He granted the application by his order dated the 5th March, 1937, and by the same order he passed a fresh final decree. The present miscellaneous appeal is directed against that order in so far as it granted the application for review.

The substantial point urged in this appeal is that there were no sufficient grounds upon which the learned Subordinate Judge could review the final decree which was passed on the 17th January, 1936. In support of his contention Mr. Mitter has relied upon the decision of the Privy Council in *Chhajju Ram* v. *Neki*(1) where their Lordships laid down that "any other sufficient reason" in Order XLVII, rule 1, of the Code of Civil Procedure, means a reason sufficient on grounds at least analogous to those specified immediately previously. In the present case, however, the learned Subordinate Judge has held that there was an error apparent on the face of the record or something analogous to it. If that is so, certainly the review was permissible under the express provisions of Order XLVII, rule 1. But let us assume that the Subordinate Judge was wrong in his view of the facts with which he was dealing. The question is whether in this appeal we can examine the propriety of his decision. Indeed under Order XLIII, rule 1(*w*), an order granting an application for review is appealable; but Order XLVII,

(1) (1922) I. L. R. 3 Lah. 127, P. C.

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rule 7, specifies certain limits within which such an appeal can be entertained. The relevant portion of Order XLVII, rule 7, runs as follows :—

"(1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was—

(a) in contravention of the provisions of rule 2,

(b) in contravention of the provisions of rule 4, or

(c) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit."

Thus it is clear that an order granting an application for review can be objected to only upon the three grounds specified in the above rule and no other. Now in the present case the first and the third grounds unquestionably do not exist. An attempt was made by Mr. Mitter to support the appeal on the second ground, namely, that the application was in contravention of the provisions of rule 4. That rule runs as follows :—

"(1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

(2) Where the Court is of opinion that the application for review should be granted, it shall grant the same:

Provided that—

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for; and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation."

Sub-rule (1) does not obviously apply as it refers to a case where the Court rejects the application. It cannot be interpreted to mean that its provision is contravened if the Court grants the application though there is not sufficient ground for a review.

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Whether there is no such ground must appear to the Court which hears the application. If the Court considers that the application should be granted the case falls under sub-rule (*2*). Mr. Mitter wanted to rely on proviso (*b*) of that sub-rule, but the application was not based on the ground of discovery of any new matter or evidence nor was it granted on any such ground. The position, therefore, is that none of the grounds on which the order granting the application for review could be attacked by way of appeal exists in the present case.

Mr. Mitter has referred us to a decision of the Bombay High Court in *Daso Keshav Panchbhavi* v. *Karbasappa Kariyappa Mudhol*(1) and to the decision of the Nagpur Court in *Mukundsa* v. *Motiram*(2). In both these cases it was no doubt held that the right of appeal granted by Order XLIII, rule 1(*w*), is not restricted by the grounds set out in Order XLVII, rule 7. But there are decisions of this Court on this point in *Jadunandan Singh* v. *Shankar Sahu*(3) and *Sunder Mall* v. *Upendra Nath Seal*(4). In the latter case, though it was a decision of a single Judge, it was held that an appeal under Order XLIII, rule 1(*w*), is subject to the provisions of Order XLVII, rule 7. It was further held that an order granting a review merely for sufficient ground is not appealable. In the case of *Jadunandan Singh* v. *Shankar Sahu*(3) a Division Bench of this Court held that when a review is granted an appeal is permissible only on the grounds specified in Order XLVII, rule 7. The High Courts of Calcutta, Rangoon and Lahore have also taken the same view as this Court. This being the state of the authorities on the point, I am afraid we are unable to follow the decisions of the Bombay High Court and the

(1) (1926) A. I. R. (Bom.) 121.
(2) (1928) 116 Ind. Cas. 645.
(3) (1936) 17 Pat. L. T. 766.
(4) (1916) 1 Pat. L. J. 193.

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Nagpur Court referred to. It is to be observed that the Bombay High Court subsequent to its aforesaid decision deleted Order XLIII, rule 1(*w*), by virtue of its rule-making power.

Mr. Mitter further contends that the order now under appeal being the final judgment in the suit, it may be attacked on grounds other than those specified in Order XLVII, rule 7. The answer to this is that this is not a regular appeal against the final decree but a miscellaneous appeal from the order granting the application for review and it cannot be treated as a regular appeal in view of the fact that the question of court-fee would arise. Mr. Mitter has asked us to treat the appeal as a regular appeal on payment of the deficit court-fee; but it is now too late to accede to that prayer. The appeal was presented on the 19th July, 1937, and was not properly constituted as a regular appeal, being insufficiently stamped. There is no justification for converting it into a regular appeal so long after the expiration of the prescribed period of limitation.

Mr. Mitter lastly asked us to treat the memorandum of appeal as an application in revision as was done in *Sikandar Khan* v. *Baland Khan*(1). Under section 115 of the Code of Civil Procedure revision is permissible only where the order complained of is not appealable. In the present case the order sought to be revised amounts to a final decree and as such is appealable. Consequently section 115 cannot come in. In the Lahore case where the facts were quite peculiar there was no such appealable decree or order.

I would dismiss the appeal but in the circumstances the parties should bear their own costs.

ROWLAND, J.—I agree.

S.A.K. *Appeal dismissed.*

(1) (1927) I. L. R. 8 Lah. 617.

APPELLATE CIVIL.

Before Harries, C.J. and Khaja Mohamad Noor, J.

1939.
August, 16, 17.

PRAHLAD DAS

v.

DASRATHI SATPATHI.*

Hindu Law—sons' pious obligation to pay father's debt—suit against father and sons—decree against father only—creditor, whether entitled to execute the decree against sons.

Where a creditor of a Hindu debtor wants to enforce the pious obligation of his sons to pay his debts, the debt not being illegal or immoral, and impleads the sons also in the suit, but the Court, rightly or wrongly, refuses to pass a decree against the sons and passes a decree against the father only, the decree cannot be said to have been obtained against the father both in his individual capacity and also as representing the sons, and such a decree against the father, not being a decree against the sons, cannot be executed against them, not because they were not under a pious obligation to pay the debt of their father but because the procedure of enforcing their liability having been adopted the Court had refused to enforce it.

In order to enforce the pious obligation of a son to pay his father's debt there must be a decree against him obtained in a suit in which he was a party or can be deemed to have been a party through his father.

Atul Krishna Roy v. *Lala Nandanji*(1), *Kishan Sarup* v. *Brijraj Singh*(2) and *Raja Ram* v. *Raja Bakhsh Singh*(3), relied on.

Jai Narain Mahto v. *Janki Saran Singh*(4), not followed.

Appeal by the decree-holder.

* Circuit Court, Cuttack, Appeal from Appellate Order no. 36 of 1938, from an order of A. N. Banarji, Esq., District Judge of Cuttack, dated the 31st December, 1935, confirming that of Babu S. C. Mahanty, Subordinate Judge of Cuttack, dated the 3rd December, 1934.

(1) (1935) I. L. R. 14 Pat. 732, F. B.
(2) (1929) I. L. R. 51 All. 932.
(3) (1938) I. L. R. 13 Luck. 61, P. C.
(4) (1937) M. A. 253 of 1936 (unreported).

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

H. Mahapatra, for the appellant.

G. Dhal, for the respondents.

KHAJA MOHAMAD NOOR, J.—The facts of the case out of which this miscellaneous second appeal has arisen are these.

The appellant brought a suit to enforce a simple mortgage executed in his favour by the defendants nos. 1 to 3 of the suit impleading their respective sons as defendants nos. 4 to 6. The suit was decreed and the mortgaged properties were sold in execution of the decree. The sale proceeds were insufficient to satisfy the decree, and the appellant applied for a decree under Order XXXIV, rule 6, of the Code of Civil Procedure. In this application he specifically asked for a decree against defendants nos. 1 to 3 only, and not against their sons, defendants nos. 4 to 6. A money decree was passed against defendants nos. 1 to 3 and in execution of it the appellant brought to sale the shares of these defendants in the joint family property. The decree, however, still remained unsatisfied and he wanted to sell the shares of the sons (defendants nos. 4 to 6) also in the joint family property. The executing Court refused to do so and the order has been upheld in appeal by the learned District Judge. The decree-holder has preferred this miscellaneous second appeal.

In my opinion the orders of the Courts below are correct, though they have not given their reasons in detail. Mr. H. Mahapatra, who appears on behalf of the appellant, has very strenuously contended that the decree is executable against the shares of the defendants nos. 4 to 6 in the joint family property. His whole argument is based upon the pious obligation of a son to pay out of the joint family property his father's debts not tainted with illegality or

immorality. Nobody disputes this liability, but the question with which we are concerned is not the liability of defendants nos. 4 to 6 but whether it can be enforced against them under the decree as it stands. Because a son is liable to pay his father's debts it does not follow that his share in the property can be taken away without there being a decree in which either he is a judgment-debtor or can be deemed to be a judgment-debtor. Whether a decree against a father can be executed against his sons is not a question of the Hindu law, but of the Civil Procedure Code. Ordinarily a decree is enforceable only against the judgment-debtor named therein and on his death against his legal representatives to the extent the law makes them liable. But in cases governed by the Hindu law, if it is against a karta of a family and was obtained in a suit in which he was sued as such it is binding upon the junior members of the family also as they were represented in the suit by the karta. So if a father is sued for his personal debt, not tainted with immorality or illegality, he represents in the suit his sons who are joint with him and a decree thus obtained against him must be taken to be a decree against his sons also.

In a case where a creditor of a Hindu debtor wants to enforce the pious obligation of his sons to pay his debt, the debt not being illegal or immoral, if he so likes he can implead the sons also in his suit. If he obtains a decree against them as well no question can arise. The decree being against the sons in terms can be executed against their share of the joint family property. As the sons are parties to the suit the father cannot be said to have represented them in the suit. But if in such a suit the Court, rightly or wrongly, refuses to pass a decree against the sons and passes a decree against the father only, the decree cannot be said to have been obtained against the father both in his individual capacity and also as representing the sons and such a decree against the

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father, not being a decree against the sons, cannot be executed against them, not because they were not under a pious obligation to pay the debt of their father which, as I have assumed, was neither illegal nor immoral, but because the procedure of enforcing their liability having been adopted the Court refused to enforce it. The Court may be wrong but the decree is there.

The creditor may, however, sue the father only and a decree obtained in such a suit, if the debt was not illegal or immoral, is effective against the sons also as they though not parties by name were represented by their father and must be deemed to have been parties to the suit. If, however, the debt was for immoral or illegal purposes the father cannot represent the sons and the decree obtained in such a suit is not against the sons and the question of the nature of the debt can be gone into in the execution proceedings.

In *Atul Krishna Roy* v. *Lala Nandanji*(1), I had to deal with the question as to the circumstances under which a decree obtained against a father can be executed against his sons to enforce their pious obligation of paying his debts. I then following a decision of Niamat-ullah, J. in *Kishan Sarup* v. *Brijraj Singh*(2) was of the view that in order to enforce the pious obligation of a son to pay his father's debt there must be a decree against him obtained in a suit in which either he was a party or can be deemed to have been a party through his father. My brother Agarwala, J. was of the same view. Niamat-ullah, J. had held that a decree obtained against the father, when he was joint with his sons, was binding on the sons as they would be deemed to have been represented by the father in the

(1) (1935) I. L. R. 14 Pat. 732, F. B.
(2) (1929) I. L. R. 51 All. 932.

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suit, whether the sons were represented by the father or not depended upon the subject-matter of the suit and if it was a debt which, not being tainted with immorality, was binding on the sons, the sons must be deemed to have been parties to the suit through the father. In the Patna case the point was how far a decree obtained against a father after the disruption of the family was binding upon the sons and the majority of the Special Bench of the Court held that such a decree could not be executed against the sons. The ratio decidendi of the decision was that in such a case there was no decree against the son as the father having separated could no longer represent him.

The simple question, therefore, before us is whether the decree which in its terms is against the fathers can be deemed to be one against their respective sons also. I have said before that when the sons themselves are parties to a suit the question of their fathers representing them cannot possibly arise. The position, therefore, is that if the debt was not tainted with illegality or immorality, the appellant was entitled to obtain a simple money decree against defendants nos. 1 to 3 and also against their respective sons, defendants nos. 4 to 6, but he deliberately did not proceed against the sons though they were parties to the suit and wanted a decree against the fathers only. Such a decree passed in a suit in which the sons themselves were parties cannot be said to be a decree against the fathers and also against the sons represented by the fathers.

Mr. Mahapatra, who appears on behalf of the appellant, produced before us a copy of a decision of this Court by Courtney Terrell, C.J. and Chatterji, J. in *Jai Narain Mahton* v. *Janki Saran Singh*(1), decided on the 20th November, 1937. It was held in

(1) (1937) M. A. 253 of 1936 (Unreported).

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that case that though a suit brought against a father and his son was dismissed against the latter, the decree-holder could execute the decree against the share of the son in the joint family property on the ground of his being under a pious obligation to pay his father's debt not tainted with immorality. Mr. Dhal, appearing on behalf of the respondents, has, however, placed before us a decision of their Lordships of the Judicial Committee in *Raja Ram* v. *Raja Bakhsh Singh*(1) in which exactly an opposite view was taken. In that case, for the mortgage executed by the father, a suit was instituted against his sons and grandsons. The grandsons were dismissed from the suit. Thereafter the decree was sought to be executed against the shares of the grandsons in the family property. Their Lordships held that the suit having been dismissed against the grandsons, the decree could not be executed against their shares in the family property. The remedy of the decree-holder was to appeal from the dismissal of the suit against the grandsons. In the face of the decision of the Privy Council on this point we are bound to hold that the decision of this Court relied on by Mr. Mahapatra cannot now be held to be a good law.

In my opinion, the decree as it stands is not executable against defendants nos. 4 to 6 and I would, therefore, dismiss this appeal with costs.

HARRIES, C.J.—I agree.

Appeal dismissed.

S. A. K.

(1) (1938) I. L. R. 13 Luck. 61, P. C.

APPELLATE CIVIL.

Before Rowland and Chatterji, JJ.

1939.

August, 25.

SHEOKUMAR SINGH

v.

BECHAN SINGH.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order II, rule* 2—" *cause of action* ", *meaning of—identity of evidence, whether a true criterion—three sale deeds executed on the same date by Hindu male owner—suit by heirs for setting aside two of the deeds on the ground of undue influence and want of consideration—suit decreed—subsequent suit based on similar grounds in respect of the third deed—suit, whether barred.*

The expression " cause of action " in Order II, rule 2, Code of Civil Procedure, 1908, means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

The cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour.

The correct test is whether the claim in a new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit; the identity of evidence is not the true criterion.

* Appeal from Appellate Decree no. 104 of 1938, from a decision of Babu Dwarka Prasad, Subordinate Judge of Chapra, dated the 29th September, 1937, modifying a decision of Babu Damodar Jha, Munsif of Chapra, dated the 31st August, 1936.

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SHEOKUMAR SINGH v. BECHAN SINGH.

Read v. *Brown*(1), *Musammat Chand Kour* v. *Pratab Singh*(2), *Murti* v. *Bhola Ram*(3), *Hardeo Singh* v. *Bhawani Sahay*(4), *Payana Reena Saminathan* v. *Pana Lana Palaniappa*(5), *Rajah of Pittapur* v. *Sri Rajah Venkata Mahipatisurya*(6), *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*(7) and *Sonu vald Khushal Khadake* v. *Bahinibai*(8), relied on.

Darbari Lal v. *Gobind Saran*(9), dissented from.

Kumar Kamakhya Narain Singh v. *Ramraj Singh*(10), *Muhammad Hafiz* v. *Muhammad Zakariya*(11), *Abhaidat Singh* v. *Ragho Indar Partab Sahai*(12) and *'Anant Subrao Nadgir* v. *Mahableshwarbhat Gurunath Bhat*(13), distinguished.

Kitchen v. *Campbell*(14), *Brunsden* v. *Humphrey*(15), *Maung Pe* v. *Malon Ma Gale*(16), *Hanuman Kamat* v. *Hanuman Mandur*(17) and *Yashvant Narain Kamat* v. *Vithal Divakar Parulekar*(18), referred to.

Where, therefore, a Hindu male owner had conveyed his several parcels of land to the same persons by three sale deeds executed on the same date, and after his death the plaintiffs, as his next heirs, brought a suit (which was decreed) for setting aside two of these sale deeds and for recovery of possession of the land covered by them on the ground that the deeds were without consideration and were executed under undue influence, and thereafter the plaintiffs brought another suit, based on similar grounds, in respect of the third deed :

(1) (1888) 22 Q. B. D. 128.
(2) (1888) L. R. 15 Ind. App. 156.
(3) (1893) I. L. R. 16 All. 165, F. B.
(4) (1921) A. I. R. (Pat.) 143.
(5) (1913) L. R. 41 Ind. App. 142.
(6) (1885) I. L. R. 8 Mad. 580; L. R. 12 Ind. App. 116.
(7) (1867) 11 Moo. I. A. 551.
(8) (1915) I. L. R. 40 Bom. 351.
(9) (1924) I. L. R. 46 All. 822.
(10) (1933) 14 Pat. L. T. 663.
(11) (1921) L. R. 49 Ind. App. 9.
(12) (1925) I. L. R. 1 Luck. 1.
(13) (1931) A. I. R. (Bom.) 114.
(14) (1771) 2 W. Bl. 827.
(15) (1884) 14 Q. B. D. 141.
(16) (1911) I. L. R. 38 Cal. 629; L. R. 38 Ind. App. 140.
(17) (1891) I. L. R. 19 Cal. 123; L. R. 18 Ind. App. 158.
(18) (1895) I. L. R. 21 Bom. 267.

Held, that the causes of action of the two suits were not identical and, therefore, that the later suit was not barred under the provisions of Order II, rule 2, of the Code of Civil Procedure, 1908.

Appeal by the defendants.

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

The case was in the first instance heard by Rowland, J. who referred it to a Division Bench by the following order:

ROWLAND, J.—The only point of law in this appeal is whether the suit is barred under Order II, rule 2, Civil Procedure Code. The findings of fact are that the document in suit, a deed of sale executed by Muneshwar Singh for a consideration of Rs. 300 transferring certain property to the defendant, was without consideration, was executed in consequence of undue influence and was of no effect against the heirs of Muneshwar Singh. The objection is taken that Order II, rule 2, bars the suit because the relief claimed could have been claimed in a previous suit in which the same plaintiffs made identical allegations regarding two sale deeds, one for Rs. 600 and one for Rs. 200, executed by the same Muneshwar Singh in favour of the same defendant. That suit was decreed. The question is whether the cause of action in the present suit is the same as that for the former suit so as to make this suit not maintainable under Order II, rule 2. I may mention that one plot bearing no. 623 was subject-matter of the deed priced at Rs. 200 and the Courts below have held that as regards this plot Order II, rule 2, is a bar; but the question in this appeal is as to the other plots in the sale deed priced at Rs. 300.

The plaintiffs alleged that notwithstanding the disputed conveyance they got possession of the lands of this kebala and were subsequently dispossessed. But it has been found that in fact they never got possession and the cause of action for this suit arose at the same time as for the former suit.

The Munsif thought that there was but one cause of action in respect of the lands of all three sale deeds and that Order II, rule 2, was a bar to the suit. The Subordinate Judge held otherwise because the plaint set up a different cause of action, namely, dispossession at a later date. This case has been found to be false and I do not think the plaintiffs can get any benefit from it.

The real question is whether want of consideration for one sale deed is the same cause of action as want of consideration for another sale deed conveying different properties.

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The appellants rely on *Darbari Lal* v. *Gobind Saran*(1) and the respondents on *Payana Reena Saminathan Chetty* v. *Pana Lana Palaniappa Chetty*(2) and cases based on that decision. I have not, however, been able to find a decision of this Court directly in point. I feel some doubt as to the correctness of the reasoning in *Darbari Lal* v. *Gobind Saran*(1) and am of opinion that it is better that this appeal should be heard by a Division Bench.

S. N. Dutta, for the appellants.

Harinandan Singh, for the respondents.

CHATTERJI, J.—This appeal, which originally came up for hearing before my learned brother, was referred by him to a Division Bench. The relevant facts are briefly these. One Muneshwar Singh had about five bighas of land. On the 13th January, 1930, he executed three sale deeds in respect of all these lands, one for Rs. 600, another for Rs. 200 and the third for Rs. 300 in favour of the defendants 1—4. Muneshwar died on the 19th January, 1930. In 1933 the plaintiffs claiming to be his next heirs brought a suit to set aside two of the sale deeds, namely, those for Rs. 600 and Rs. 200 and to recover possession of the properties covered by them on the allegation that they were executed without consideration and under the undue influence of the defendants 1—4. From that suit however one plot no. 623 covered by the sale deed of Rs. 600 was omitted. The suit was decreed. Thereafter, in 1935 the plaintiffs brought the present suit to set aside the sale deed for Rs. 300 substantially on the allegation that it was executed without consideration and under undue influence, and with a prayer for confirmation, or in the alternative, recovery of possession over the properties covered by this sale deed as also the plot 623 which had been omitted from the previous suit. Defendant no. 5 was impleaded as a subsequent transferee from defendants 1 to 4 under a zarpeshgi deed. The suit was defended on various

(1) (1924) I. L. R. 46 All. 822.
(2) (1918) L. R. 41 Ind. App. 142.

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grounds, one of them being that it was barred under the provisions of Order II, rule 2, of the Code of Civil Procedure. The Munsif who tried the suit found that the sale deed in question was executed under undue influence and without consideration; but he dismissed the suit, holding that it was barred under Order II, rule 2, not only in regard to plot 623 but also with regard to the lands covered by the sale deed for Rs. 300. In the plaint it was alleged that the plaintiffs were in possession of the disputed lands but were obliged to bring the suit as the defendants had threatened to interfere with their possession. The Munsif found that this allegation was altogether false and the plaintiffs were never in possession of the lands. On appeal the findings of fact of the Munsif do not appear to have been challenged and the only question which was raised before the Subordinate Judge was whether the suit was barred under Order II, rule 2. He concurred with the Munsif so far as plot no. 623 was concerned; but with regard to the lands covered by the sale deed for Rs. 300 he came to a different finding and, reversing the Munsif's decision, passed a decree in favour of the plaintiffs. Hence this second appeal by the defendants.

The only question for decision in this appeal is whether the plaintiffs' claim with regard to the lands covered by the sale deed for Rs. 300 is barred under Order II, rule 2. That rule provides that

> "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action";

but if he

> "omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished".

The whole controversy turns on the meaning of the expression "cause of action". As explained in numerous decisions, "cause of action" means every

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fact which, if traversed, it would be necessary for the plaintiffs to prove in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved to entitle the plaintiffs to a decree. It is, in other words, a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the suit.

Mr. Dutt for the appellants contends that in the previous suit it was necessary for the plaintiffs to prove the same set of facts as in the present and, therefore, the cause of action of the two suits must be held to be the same. The test is this. The previous suit was in respect of two sale deeds, namely, those for Rs. 600 and Rs. 200. Was it necessary in that suit to allege or prove anything with regard to the sale deed for Rs. 300? The most important allegation of fact was that the sale deeds were without consideration. Was it at all necessary to allege and prove that the consideration for the sale deed now in question was not paid? Certainly not. The plaintiffs might have adduced evidence, but it was not necessary for them to prove, that the consideration of the sale deed for Rs. 300 was in fact not paid. What was necessary to be alleged and proved for the plaintiffs' success in that suit was that the sale deeds for Rs. 600 and Rs. 200 were without consideration. Indeed the question of undue influence was raised there as in the present case; but want of consideration was the most essential factor in invalidating the sale deeds, because consideration, if found to exist, would completely defeat the plea of undue influence. Each sale represents a distinct and separate contract. A cause of action founded on one contract is different from the cause of action founded on another distinct contract. There can be no doubt that the three sale deeds, although executed on the same date, furnished different causes of action. The

plaint in the previous suit has not been brought on the record of this case and having regard to the findings of the courts below, it cannot be suggested that the plaintiffs in the previous suit made out a case of conspiracy resulting in the execution of three deeds at one and the same time. Here we have a simple case of three sale deeds being executed for different considerations. Facts necessary to establish want of consideration of each separate sale deed must necessarily be different. In my view, therefore, the cause of action in the present suit is quite different from the cause of action in the previous suit. Consequently Order II, rule 2, does not apply.

Mr. Dutt has relied chiefly on the decision in *Darbari Lal* v. *Gobind Saran*(1). There a Hindu reversioner after the death of the widow brought two suits to recover possession of certain properties improperly alienated by her. Thereafter he brought another suit to set aside certain other alienation by her. In this later suit two points appear to have been raised in the High Court; first, that the suit was barred under Order II, rule 2; and, second, that the alienations were justified by legal necessity. Their Lordships found that the alienations were for legal necessity. That finding was sufficient for the disposal of the appeal and the suit; but their Lordships further held that the suit was barred under Order II, rule 2. This part of the decision may therefore be regarded as mere obiter dictum. On principle I do not understand how different alienations made by a Hindu widow can be said to form one and the same cause of action. No doubt the reversioner's right of suit in respect of every alienation accrues on the widow's death, but the accrual of his right to sue is not the same thing as the cause of action for the suit. Accrual of cause of action is only one out of the bundle of facts which constitute the cause of action. The question of legal necessity for a particular alienation

(1) (1924) I. L. R. 46 All. 822.

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depends upon its own circumstances. With all respect, therefore, to the learned Judges who decided the case of *Darbari Lal* v. *Gobind Saran*(1) I am unable to concur in the view expressed by them.

The next case relied on by Mr. Dutt is *Anant Subrao Nadgir* v. *Mahableshwarbhat Gurunath Bhat*(2) which was decided by a Single Judge. There the question was whether when an adopted son brought two successive suits to set aside alienations effected by his adoptive mother previous to the adoption, the subsequent suit was barred under Order II, rule 2, and *Explanation IV* to section 11 of the Code of Civil Procedure. His Lordship held that the right to impeach all the alienations of the mother accrued on the date of the adoption and the only facts necessary to be proved were, first, the adoption and, second, the alienations made by the mother, quite irrespective of whether they were for consideration or for legal necessity. The essential facts being common in both the suits, it was held that the subsequent suit was barred. This case, therefore, is quite distinguishable and is covered by the principle I have already discussed.

The next case referred to by Mr. Dutt is *Kumar Kamakhya Narain Singh* v. *Ramraj Singh*(3). There the suit was brought to resume a grant terminable on the death of the surviving grantee. There were two villages comprised in the same grant. On the death of the surviving grantee, the grantor or his representative brought a suit to resume one of the villages and got a decree. Thereafter he brought a second suit to resume the other village. Their Lordships held that this second suit was barred under Order II, rule 2. The reason was that the only facts necessary to be proved in both the suits were that there was a grant, there was the death of the surviving grantee

(1) (1924) I. L. R. 46 All. 822.
(2) (1931) A. I. R. (Bom.) 114.
(3) (1933) 14 Pat. L. T. 663.

and there was holding over. That being so, the cause of action was held to be the same in both the suits.

Mr. Dutt also relied on certain observations in *Sonu vald Khushal Khadake* v. *Bahinibai*(1) where the following passage was quoted from an English case: "And one great criterion of this identity is that the same evidence will maintain both actions". But in that very case, *Sonu vald Khushal Khadake* v. *Bahinibai*(1), their Lordships held that two succesive suits to set aside two separate sale deeds executed by a Hindu widow were maintainable as the causes of action based on the two deeds were separate.

I may refer here to the Full Bench decision of the Allahabad High Court in *Murti* v. *Bhola Ram*(2) where it was pointed out that section 43 of the Code of Civil Procedure (now Order II, rule 2) has nothing to do with the evidence which may be necessary or may be produced to support or defend a cause of action.

Mr. Harinandan Singh, on behalf of the respondents, relied chiefly on the decision of the Privy Council in *Rajah of Pittapur* v. *Sri Raja Venkata Mahipativirya*(3) where their Lordships observed as follows: "That section (now Order II, rule 2) does not say that every suit shall include every cause of action or every claim which the party has, but 'every suit shall include the whole of the claim arising out of the cause of action'—meaning the cause of action for which the suit was brought". Applying this principle, it cannot be said that the claim to which the present suit relates arose out of the cause of action for which the previous suit was brought.

Several other decisions were cited on both sides, but they are not of much assistance. The true principle deducible from all those cases is whether the

(1) (1915) I. L. R. 40 Bom. 351, 355.
(2) (1893) I. L. R. 16 All. 165, F.B.
(3) (1885) I. L. R. 8 Mad. 580; L. R. 12 Ind. App. 116.

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same set of facts, if proved, would entitle the plaintiffs to the reliefs not only claimed in the first suit but also in the second.

I should observe that the learned Subordinate Judge seems to have rather proceeded on the view that the cause of action in the present suit is different because the previous

"suit was based on defendants' resistance offered to the plaintiffs on the death of Muneswar Singh whereas there was no such resistance in the case of the lands that formed the subject-matter of the present litigation."

This view is entirely erroneous because in an earlier part of his judgment he remarks that neither party argued on points of fact; and the finding of the Munsif was that the plaintiffs were never in possession of the disputed lands.

In my opinion the suit was rightly decreed by the learned Subordinate Judge. The decree, however, should be for recovery of possession. With this modification in the decree I would dismiss the appeal with costs.

ROWLAND, J.—I agree.

There is no statutory definition of a cause of action and the question whether in a particular instance the cause of action of two successive suits is identical has to be considered in the light of judicial pronouncements, some of which explain the meaning of the expression "same cause of action" in general terms, while in others it has been held that on a particular set of facts the cause of action was or was not identical.

One line of general explanation derives through *Kitchen* v. *Campbell*(1) and *Brunsden* v. *Humphrey*(2) where it has been said "one great criterion of this identity is that the same evidence will maintain both

(1) (1771) 2 W. Bl. 827.
(2) (1884) 14 Q. B. D. 141.

actions ". On the other hand a cause of action is described in *Read* v. *Brown*(1) as " every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved ". This pronouncement by Lord Esher, M.R. had the assent of Fry, L.J. and Lopes, L.J. In *Musst. Chand Kour* v. *Partab Singh*(2) it was stated : " The cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour ".

Murti v. *Bhola Ram*(3), in a Full Bench decision, Sir John Edge, C.J., followed the pronouncement of Lord Esher in *Read* v. *Brown*(1) and dissented from the view which had been expressed in another High Court that " one test is whether the same evidence and the same arguments apply in the two cases ". It is in the light of these principles that particular cases fall to be decided. Of all these pronouncements that of their Lordships in *Musst. Chand Kour* v. *Partab Singh*(2) is the most authoritative for Indian Courts, and it does not refer to identity of evidence as a test. The court is no doubt entitled to see whether the evidence required in the two cases is identical, for instance in *Maung Pe* v. *Malon Ma Gale*(4) Lord Robson remarked " the evidence is different "; but that was alluded to, it would seem, merely as an aid to determining the

(1) (1888) 22 Q. B. D. 128.
(2) (1888) L. R. 15 Ind. App. 156.
(3) (1893) I. L. R. 16 All. 165, F. B.
(4) (1911) I. L. R. 38 Cal. 629; L. R. 38 Ind. App. 140.

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identity or otherwise of "the media upon which the plaintiff asks the court to come to a conclusion in his favour"; the latter, and not identity of evidence being the true criterion, as pointed out in *Chand Kour's* case(1), followed in this Court in *Hardeo Singh* v. *Bhawani Sahay*(2).

In applying these principles to particular cases it may be noticed that it does not necessarily follow because two claims arise out of one transaction that the cause of action will be identical. In *Payana Reena Saminathan* v. *Pana Lana Palaniappa*(3) a party who had failed on a technical ground in a suit on two promissory notes was allowed afterwards to sue to recover a part of the consideration for which the promissory notes had been given as it was said that the claims in the two actions though they arose out of the same transaction were in respect of different causes of action.

In *Hanuman Kamat* v. *Hanuman Mandur*(4) the first suit had been to recover possession on the strength of a sale deed. When that failed the plaintiff brought a second suit to recover the consideration money. The Calcutta High Court had held that the second suit was not barred as being a suit on the same cause of action; but their Lordships of the Privy Council disposed of the appeal on another ground and did not decide this point.

In *Raja of Pittapur* v. *Sri Rajah Venkata Mahipatisurya*(5) the plaintiff had been wrongfully dispossessed by the defendant both of his share in the landed estate and of his share of personal property to both of which he was entitled under a will. He was permitted to maintain successive suits, the one for recovery of the land and the second for the personal

(1) (1888) L. R. 15 Ind. App. 156.
(2) (1921) A. I. R. (Pat.) 143.
(3) (1913) L. R. 41 Ind. App. 142.
(4) (1891) I. L. R. 19 Cal. 123; L. R. 18 Ind. App. 158.
(5) (1885) I. L. R. 8 Mad. 580; L. R. 12 Ind. App. 116.

effects. Their Lordships pointed out that "the section does not say that every suit shall include every cause of action, or every claim which the party has, but 'every suit shall include the whole of the claim arising out of the cause of action'—meaning the cause of action for which the suit is brought". They relied on an observation in *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*(1) "that the correct test is, whether the claim in a new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit".

There may even be two separate contracts embodied in one instrument and those contracts may create separate causes of action as in *Yashvant Narain Kamat* v. *Vithal Dirakar Parulekar*(2). But ordinarily where a cause of action arises out of the execution of a single document, it may be considered to be but one cause of action though the document deals with more than one property or gives rise to a claim to two kinds of relief such as principal and interest on a mortgage: so held in *Muhammad Hafiz* v. *Muhammad Zakariya*(3). Where by a mortgage several properties had been hypothecated and a suit had been brought successfully challenging the validity of the mortgage in respect of one of the properties, it was held in *Abhaidat Singh* v. *Ragho Indar Partab Sahai*(4) that the mortgage being one and entire, the cause of action in both the suits was identical.

A case of this Court is in *Kumar Kamakhya Narain Singh* v. *Ramraj Singh*(5). The claim was to resume khas possession of properties which were the subject-matter of a mokarrari grant and became resumable on the death of the survivor of the grantees. There were two villages concerned. It was held that

(1) (1867) 11 Moo. I. A. 551.
(2) (1895) I. L. R. 21 Bom. 267.
(3) (1921) L. R. 49 Ind. App. 9.
(4) (1925) I. L. R. I Luck. 1.
(5) (1933) 14 Pat. L. T. 663.

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the plaintiff having in a former action claimed recovery of possession of one of these villages could not in a subsequent suit claim to recover possession of the other. The decision proceeded on the ground that the two villages were the subject-matter of the same grant and that the death of the grantee was the cause of action which entitled the plaintiff to resume both villages. The cause of action, it was said, consisted in the fact of the grant plus the fact of the death of the latter of the two grantees.

I now come to the decision in *Darbari Lal* v. *Gobind Saran*(1) which is most strongly relied on by the appellants. This was a case of successive suits by the reversioner of the last male holder of certain properties to recover possession from the alienees of portions of the property transferred to them by the widow. It was held that the later suit was barred under the provisions of Order II, rule 2, of the Code of Civil Procedure, on the ground that "he is the reversioner and rightful heir to Hoti Lal and that the property in suit in the possession of the defendant belongs to Hoti Lal. This is the whole cause of action. It is immaterial for him whether the defendant wants to justify his right to continue in possession on different grounds. The defence or the nature of it is immaterial for the purpose of finding out what is the cause of action of the plaintiff". The reasoning is based on the observations of their Lordships of the Judicial Committee in *Musst. Chand Kour* v. *Partab Singh* (2) and if the plaintiff rested his claim simply on the facts that the property was Hoti Lal's and that the plaintiff was Hoti Lal's heir, those observations may support the reasoning. It would however be otherwise if the plaintiff had in his plaint referred to alienations made by the widow and had alleged absence of necessity for such alienations among the facts on which the plaintiff based his claim

(1) (1924) I. L. R. 46 All. 822.
(2) (1888) L. R. 15 Ind. App. 156.

to relief. We do not know the exact terms in which the cause of action was stated in the plaint.

Be that as it may, the learned Judges appear to me, if I may say so with respect, to be on less firm ground when they give as a further reason for their view the following argument: "It is clear that when this suit of 1917 was brought, the plaintiff could have, if he was so disposed, brought a claim with respect to the properties now in dispute. There is no authority, so far as we are aware, to establish that any such suit would have been repugnant to any rule of law. On the other hand, there are numerous authorities to show that a reversioner is entitled to bring a single suit against any number of persons who may be holding different portions of the last male holder's property, though they may be holding under different title deeds, executed at different dates". With great respect, I cannot accept this as a valid piece of reasoning. It seems to assume that if a suit could be maintained (resisting an objection that it was bad for multifariousness) the consequence will be that it is to be inferred that all the reliefs in the suit are based on one cause of action. To assume this is to forget that "the section does not say that every suit shall include every cause of action" [*vide Raja of Pittapur's* case(1)] and to ignore the provisions of the Code which permit a plaintiff to join in one suit reliefs claimed against the same defendant in respect of different causes of action. The fallacy of such reasoning is exposed in *Sonu vald Khushal Khadake* v. *Bahinibai*(2) where it is said: "No doubt these two separate causes of action might have been joined together in one suit, as raising the common question of title arising out of the death of Bhagirthi and affecting to some extent each of the two different defendants, under the permissive provisions of Order I, rule 3, of the

(1) (1885) I. L. R. 8 Mad. 520; L. R. 12 Ind. App. 116.
(2) (1915) I. L. R. 40 Bom. 351.

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Schedule of the Civil Procedure Code, as in the cases of *Nundo Kumar Nasker* v. *Banomali Gayan*(1) and *Umabai* v. *Vithal*(2). But that is quite another thing from holding that these two separate causes of action ought to have been joined together in one suit against the two different defendants. The two causes of action were clearly separate.....There was, therefore, no legal necessity to join them in one suit ". It is pointed out that a clear distinction should be maintained between the permissive nature of the provisions of Order I, rule 3, and Order II, rule 3, and the peremptory nature of the provisions of Order II, rule 2, of the first schedule to the Code of Civil Procedure. With this part of the judgment of the learned Judges of the Bombay High Court, I would respectfully express my full agreement. It may however be noticed that in distinguishing the two causes of action they have referred to the fact that the evidence to establish both sets of facts was not the same, using the criterion that " the same evidence will maintain both causes of action " from *Kitchen* v. *Campbell*(3). This criterion is not accepted by Sir John Edge in the Allahabad Full Bench decision; is not referred to by the Privy Council in *Musst. Chand Kour* v. *Partab Singh*(4), and though a Court may be entitled to take it into consideration it ought not in my view to be deemed the decisive test. The Bombay case would no doubt have had the same result had the learned Judges taken the ground that the invalidity of the sale deed questioned in the later suit was not the same fact as the invalidity of the sale deed in the former suit and did not automatically follow from it. In the suits between the parties before us the invalidity of the sale deeds by Muneshwar was a necessary part of the cause of action of the plaintiff. It was not enough for him to allege in his plaint that the

(1) (1902) I. L. R. 29 Cal. 871.
(2) (1908) I. L. R. 33 Bom. 293.
(3) (1771) 2 W. Bl. 827.
(4) (1888) L. R. 15 Ind. App. 156.

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properties had belonged in his lifetime to Muneshwar and that the plaintiffs were his heirs. Such a suit would have been defeated by the mere production and proof of the sale deeds, for Muneshwar was a full owner with absolute right to transfer. Non-payment of the consideration of Rs. 300 in the present case was a fact that the plaintiff pleaded and was to establish and was not the same fact as non-payment of the consideration money of the other two sale deeds of Rs. 600 and Rs. 200 respectively. On these grounds I prefer to follow the Bombay decision rather than that in *Darbari Lal* v. *Gobind Saran*(1) (if, as is not quite clear, the latter case is on all fours with the one before us); and the result will be that, as stated by my learned brother, the appeal will be dismissed.

Appeal dismissed.

S. A. K.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

Before Fazl Ali and Manohar Lall, JJ.

1939.

August, 24, 25.

COMMISSIONER OF INCOME-TAX

v.

MAHARAJADHIRAJ KUMAR VISHESHWAR SINGH.*

Ref. 30 Pat. 799.

Income-tax Act, 1922 (*Act XI of* 1922), *sections* 2(*1*) (*a*) *and* 4—salami *for settlement of land, whether taxable—section* 66(*4*)—*High Court's jurisdiction to remit case to Commissioner for re-statement—Commissioner's duty—Transfer of Property Act,* 1882 (*Act IV of* 1882), *section* 105

*Miscellaneous Judicial Case no. 41 of 1936. In re: statement of case under section 66(2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bihar and Orissa, dated the 14th of July, 1936, regarding the assessment of Income-tax on Maharajadhiraj Kumar Visheshwar Singh of Darbbanga.

(1) (1924) I. L. R. 46 All. 822.

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—bemeadi *settlement of land for building permanent structure*—salami *paid*—kabuliyat *putting restraint upon alienation —rights descendible to heirs—lease, whether permanent*—salami, *whether premium or advance rent.*

Where the premium or salami represents the whole or part of the price of the land it cannot be income. Income connotes a periodical monetary return coming in with some sort of regularity, or expected regularity, from definite sources. The premium, or *salami*, which is paid once for all, and is not a recurring payment, hardly satisfies this test.

Commissioner of Income-tax, Bengal v. *Messrs. Shaw, Wallace and Company*(1), applied.

Where the assessee gave a *bemeadi* lease of certain lands for building a *gola* house and a platform for rice mill and received a certain sum of money as *salami*, and the *kabuliyat* further provided that the lessee or his representatives were not to put forward any objection as to the payment of rent, that the assessee or his heirs had the rights of realisation and enhancement of rent, that the lessee could not sell the residential rights to any one without obtaining the permission of the assessee or his heirs, and the assessee's own *challans* described the lease as a *mukarrari* settlement :

Held, that the lease was intended to be a permanent one : no term had been fixed in the lease and provision had been made for the exercise of certain rights by the heirs of the lessor and the lessee.

Musammat Parshan Kuer v. *Musammat Tulsi Kuer*(2), distinguished.

Raja Janaki Nath Roy v. *Dina Nath Kundu*(3), relied on.

Forbes v. *Hanuman Bhagat*(4), followed.

Kangali Charan Mukharji v. *Surja Narain Sah*(5), referred to.

Held, further, that the receipt of *salami* was not income; it must be treated as capital receipt and not as advance rent, and as such was not taxable.

(1) (1932) 6 I. T. C. 178.
(2) (1918) 2 Pat. L. J. 180.
(3) (1931) 35 Cal. W. N. 982, P. C.
(4) (1923) I. L. R. 2 Pat. 452.
(5) (1921) 6 Pat. L. J. 687.

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Sri Sri Raja Shiva Prasad Singh v. *The Crown*(1). followed.

Birendra Kishor Manikya v. *Secretary of State for India*(2), not followed.

Nawabzadi Meher Bano Khanum v. *Secretary of State for India in Council*(3), referred to.

Per MANOHAR LALL, J.—It would be impossible to lay down a hard and fast rule that a *salami* can in no case be taxable; the question would depend on the facts and circumstances of each case.

Forbes v. *Hanuman Bhagat*(4), *Raja Janaki Nath Roy* v. *Dina Nath Kundu*(5), *Attorney-General* v. *London County Council*(6), *Commissioners of Inland Revenue* v. *British Salmson Aero Engines, Limited*(7), *Gillatt and Watts* v. *Colquhoun*(8), *Commissioners of Inland Revenue* v. *Adam*(9), *Racecourse Betting Control Board* v. *Wild*(10), *Constantinesco* v. *Rex*(11), *Foley* v. *Fletcher*(12), *Commissioner of Income-tax* v. *Captain Maharaj Kumar Gopal Saran Narain Singh*(13), *Captain Maharaj Kumar Gopal Saran Narain Singh* v. *Commissioner of Income-tax, Bihar and Orissa*(14), *Scoble* v. *Secretary of State for India*(15), *Minister of National Revenue* v. *Catherine Spooner*(16), *Commissioners of Inland Revenue* v. *Thomas Nelson and Sons, Limited*(17), *Gooptu Estates, Limited* v. *The Commissioner of Income-tax, Bengal*(18), *Nawabzadi Meher Bano Khanum* v. *The Secretary of State for India in Council*(3) and *Sri Sri Raja Shiva Prasad Singh* v. *The Crown*(1), reviewed.

(1) (1924) I. L. R. 4 Pat. 73.
(2) (1920) I. L. R. 48 Cal. 766.
(3) (1925) 29 Cal. W. N. 969, F. B.
(4) (1923) I. L. R. 2 Pat. 452.
(5) (1931) 35 Cal. W. N. 982, P. C.
(6) (1900) 4 Tax Cas. 265.
(7) (1937) 22 Tax Cas. 29.
(8) (1884) 2 Tax Cas. 76.
(9) (1928) 14 Tax Cas. 34.
(10) (1938) 22 Tax Cas. 182.
(11) (1927) 11 Tax Cas. 730
(12) (1858) 3 H. and N. 769: 157 E. R. 678.
(13) (1934) I. L. R. 13 Pat. 661, F. B.
(14) (1935) I. L. R. 14 Pat. 552, P. C.
(15) (1902) 4 Tax Cas. 478.
(16) (1933) A. C. 684.
(17) (1938) 22 Tax Cas. 175.
(18) (1929) 4 I. T. C. 146.

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It is within the jurisdiction of the High Court to require the Commissioner to re-state a case which is not found satisfactory, and so long as that order stands, it should be carried out to the very letter and in the spirit in which the order is worded.

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

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

S. M. Gupta, for the Commissioner of Income-tax.

Sir Sultan Ahmed (with him *Murari Prasad*, *S. P. Srivastava*, *G. Misir* and *Prem Lall*), for the assessee.

FAZL ALI, J.—The question to be decided in this reference is whether a sum of Rs. 1,800 received by the assessee as *salami* for the settlement of certain lands during the years of assessment is taxable. The lands settled are 4½ bighas in area, and the terms of the settlement are to be found in a kabuliyat which is printed at page 16 of the paper-book. Under this kabuliyat the settlement was made for an indefinite (*bemeadi*) period with effect from the beginning of 1340 Fs. and it was provided that rent was payable by the lessee year after year, and

" neither the lessee nor his heirs and representatives shall put forward any plea or objection with regard to the payment thereof."

It was further provided that in the event of default of two consecutive instalments,

" the lessor or his heirs and representatives shall have the power to realize the arrear rent with interest thereon and dispossess the lessee by taking proceedings in Court ",

and that

" the landlord or his heirs and representatives shall have the power to enhance the rent if at any time the area of the land, as specified in the lease, is on measurement found increased."

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Lastly the lessee bound himself not to sell *the residential right* to any one without a reference to the landlord *or his heirs and representatives* and without obtaining his or their permission in writing. The lease clearly stated that the lands had been settled with the lessee to enable him to build a *gola* house and a platform for rice mill.

The first question which arose upon the terms of this lease was whether the lease was a permanent one or it created a mere tenancy at will or a tenancy from year to year. The learned Commissioner of Income-tax, relying upon the decision of this Court in *Musammat Parshan Kuer* v. *Musammat Tulsi Kuer*(1), held that the lease was not a permanent one. That case, however, is no authority for the proposition that a *bemeadi* patta can in no circumstance be regarded as a permanent lease and it has been fully explained in two subsequent cases, viz., *Kangali Charan Mukharji* v. *Surya Narain Sah*(2) and *Forbes* v. *Hanuman Bhagat*(3). In the last mentioned case where the lessee had obtained settlement of a parcel of land under a *bemeadi* lease for the purpose of erecting a *gola* on the demised land, it was held that the lease was intended to be a permanent one and not from year to year. In *Raja Janaki Nath Roy* v. *Dina Nath Kundu*(4) the Privy Council held a *bemeadi* patta to be a permanent lease in the following circumstances: the lease recited that the executant was already in possession of the premises (a hat, bazar, bandar and ghat) under a *meadi* settlement, that his request for a *bemeadi* settlement had been granted by the executee on receipt of a premium and on an annual rent being fixed, (such premium being a substantial sum and higher than previously), that the executant had been called upon to execute a *kabuliyat* whereupon he was executing the present

(1) (1918) 2 Pat. L. J. 180.
(2) (1921) 6 Pat. L. J. 687.
(3) (1923) I. L. R. 2 Pat. 452.
(4) (1931) 35 Cal. W. N. 982, P. C.

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bemeadi kabuliyat and promising to abide by the terms as set forth therein. Among the terms was one for an enhancement of rent in specified circumstances and another forbidding *bemeadi* settlements by the lessee whereas others imposed restrictions on the powers of the lessee to dig tanks and erect masonry structures and also provided for the lessor assuming khas possession in certain circumstances.

In my opinion the fact that the lands in the present case were let out for the purpose of enabling the lessee to build a *gola* and a platform for a rice mill strongly suggests that the lease was intended to be a permanent one. This inference is supported by two other facts, viz., (*1*) that no term was fixed in the lease and (*2*) provision was made for certain rights being exercised not only by the lessor and the lessee but by their heirs and legal representatives. It is abundantly clear on reading the lease that it was to continue as long as the terms settled between the parties were carried out by the lessee and his heirs or legal representatives, and this shows that the lease was intended to be a permanent one. Besides, the settlement was described as a mukarrari settlement in the landlord's own chalan—a contemporaneous document—to which reference has been made by the Commissioner of Income-tax as evidencing the payment of the *salami* of Rs. 1,800.

The next question to be determined is whether this *salami* is to be treated as capital receipt or as income. It may be stated here that this is not the first time that this case has come up before this Court. There was an earlier reference to this Court by another learned Commissioner of Income-tax, and in that reference the main argument advanced by him in favour of the view that the *salami* was taxable, was that the lease was not a permanent one but for a period of three years only. It was subsequently discovered that the learned Commissioner of Income-tax had by mistake overlooked the lease under which the

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salami was received and had proceeded to refer to another lease, with which we are not at all concerned in this case. The case was then sent back to the Commissioner and in the second reference also the learned Commissioner justified the taxation of *salami* on the ground that the lease was not a permanent one. The implication of the argument clearly was that if the lease was a permanent one, there was room for holding that the *salami* was a capital receipt and not income. Before us, however, learned Counsel for the Income-tax Department has adopted a bolder line of argument and contends that even if the lease is held to be permanent, the sum of Rs. 1,800 received as *salami* must be treated as income and not as capital receipt, and he relies, in support of this contention, on the following observations made by Mookerjee, A.C.J. in *Birendra Kishor Manikya* v. *Secretary of State for India*(1) :

" When a new tenancy is created in respect of unoccupied waste land or lands which had been abandoned by a previous tenant, the premium represents essentially the capitalised value of a portion of the rent. We are not unmindful that in the case of *Dinonath Mookerjee* v. *Debnath Mullick*(2) it was ruled that the money payable by a lessee in consideration of a lease granted, whether called *nazar* or *salami*, cannot be looked upon as rent, but is simply a debt due upon a contract and is recoverable by a suit in a Small Cause Court on the money bond executed in that behalf by the tenant in favour of his landlord. It is not necessary to hold that such *salami* is rent within the meaning of the definition given in the Bengal Tenancy Act or the Transfer of Property Act. The expression used in the Indian Income-tax Act is " rent or revenue ", and this is obviously wider than rent as defined in the Bengal Tenancy Act or the Transfer of Property Act.....There can

(1) (1920) I. L. R. 48 Cal. 766, 780.
(2) (1870) 13 W. R. 307.

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be little doubt that when a lease is granted, the amount fixed for periodical payment is not independent of the amount paid in a lump sum as premium. The capitalised value of the sum periodically payable taken along with the premium constitutes in the aggregate the consideration for the grant.....From this point of view, we must hold that the premium paid for the settlement of waste lands or abandoned holdings may reasonably be regarded as "rent or revenue" derived from land, within the meaning of that expression as used in the definition of "agricultural income" in section 2(*1*) (*a*)."

The view put forward by Mookerjee, A.C.J. was, however, not accepted by this Court in *Raja Shiva Prasad Singh* v. *The Crown*(1). In that case the question was, whether a sum of money received by the assessee by way of *salami* or premium for granting a mining lease was taxable. Sir Dawson Miller, who delivered the judgment in the case, dealt with the question as follows:

"There is a vast difference between a sum paid once for all for the lease of mineral rights and a rent or royalty paid annually to the lessor. The lessor in this case who holds an unfettered right of disposal would appear, in granting these leases, to have had two objects in view which are distinguishable. In so far as rent and royalty are reserved, he is founding an annual increment to the income of the Raj for himself and his successors, but with regard to *salami* it is the price he demands for parting with his direct enjoyment of the property by himself and his successors for a period of 999 years. He is parting with the capital to persons who, whilst not purchasers of the fee simple, are undoubtedly purchasers of a large interest therein. The purchase price is presumably not based upon the estimated out-turn but in exchange for the long term transferred. Possibly it may be objected that the distinction is one of degree rather

(1) (1924) I. L. R. 4 Pat. 73.

than of kind, recurring payments at short periods being treated as income and a single payemnt of a similar kind covering a long period being treated as capital, but after all this is a distinction acknowledged in section 4 of the Act itself, and, as has been observed, the Income-tax Acts are not cast upon absolutely logical lines. Nor does there appear to be any reason why we should extend the exception made in the case of rent and royalty to the case of a non-recurring payment made to cover a long period."

In my opinion these observations fully apply to the present case. If the document with which we are concerned in the present case is a permanent lease, then there can be no doubt that the lessor has by this document permanently parted "with the direct enjoyment of the property by himself and his successors" and the lessee though he is not a purchaser out and out of the entire interest in the land was undoubtedly purchaser of a large interest therein. In my opinion there is no difference in principle between the *salami* realised under the present lease and the *salami* realised on a lease for 999 years in regard to mineral rights. In both cases the real question is whether the *salami* or premium represents the price for parting with the land, or it is only advance rent. If it can be argued that the *salami* is in fact advance rent, I think that it will be equally plausible to say that rent is to be regarded as "deferred price" of the land. In my opinion there is vital distinction between a single payment made at the time of the settlement of the land and recurring payments made during the period of its enjoyment by the lessee. The distinction is clearly recognized in section 105 of the Transfer of Property Act which defines both premium and rent. In this section a lease of immoveable property is defined as

"a transfer of a right to enjoy such property"

and it is clearly stated that

"the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."

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It is obvious that if the premium represents the whole or part of the price of the land it cannot be income. As pointed out by Sir George Lowndes in *The Commissioner of Income-tax, Bengal* v. *Messrs. Shaw, Wallace and Company*(1) income in the Indian Income-tax Act connotes a periodical monetary return, coming in with some sort of regularity or expected regularity from definite sources. The premium or *salami*, which is paid once for all and is not recurring payment, hardly satisfies this test. I concede that in some cases where the rent is ridiculously low and the premium abnormally high, it may be possible to argue that the premium includes advance rent, but it has not been suggested anywhere that this is one of such cases.

In my opinion, upon the facts stated by the learned Commissioner of Income-tax the sum of Rs. 1,800 received in this case must be treated as capital receipt and not as income. I would, therefore, answer the question propounded by the learned Commissioner in the negative. The assessee will be entitled to a hearing-fee of ten gold mohars.

MANOHAR LALL, J.—I have come to the same conclusion. I have no difficulty whatsoever in construing the *kabuliats* printed at pages 16 and 18 of the paperbook. The terms of these *kabuliats* have a close resemblance to the *kabuliat* construed in *Forbes* v. *Hanuman Bhagat*(2). By these *kabuliats* a settlement was made for erecting a *gola* house and for putting a platform for the rice mill given in lease to the lessee by the assessee by another document. The settlement was for an indefinite period and was expressly made descendible to the heirs and representatives of the lessee. The usual covenant against alienation is also to be found obviously in the interest of the lessor so that he may not be compelled to

(1) (1932) 6 I. T. C. 178.
(2) (1923) I. L. R. 2 Pat. 452.

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recognise an undesirable tenant. In such circumstances the principle enunciated by their Lordships of the Judicial Committee in *Raja Janaki Nath Roy* v. *Dina Nath Kundu*(1) assists in coming to a decision. I hold in agreement with my learned brother that the terms of these *kabuliats* coupled with the description thereof given in the contemporaneous documents, namely, the chalan of the 14th of September, 1932, point to the clear conclusion that the settlement was in perpetuity. By the settlements evidenced by these *kabuliats* the assessee admittedly received a sum of Rs. 1,800 by way of *salami* or premium and also secured to himself a fixed annual income calculated at the rate of Rs. 100 a bigha.

The question which arises for consideration is whether the amount of Rs. 1,800 received by the assessee as the result of these transactions for a permanent settlement attracts income-tax.

I propose in the first instance to examine some cases which are of assistance in order to decide how this question is to be approached, bearing in mind that income-tax, as has been stated over and over again, is a tax on income; it does not tax capital [*see Attorney-General* v. *London County Council*(2)].

In the very recent case of *Commissioners of Inland Revenue* v. *British Salmson Aero Engines, Limited*(3) the Master of the Rolls pointed out the difficulty which arises in a large number of cases like the present, which fall upon the border line. At page 43 he makes this observation: "Indeed, in many cases it is almost true to say that the spin of a coin would decide the matter almost as satisfactorily as an attempt to find reasons, but that class of question is a notorious one, and has been so for many years". As I stated before, the only question which has to be decided in the present case is whether the amount of

(1) (1931) 35 Cal. W. N. 982, P. C.
(2) (1900) 4 Tax Cas. 265, 293.
(3) (1937) 22 Tax Cas. 29.

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Rs. 1,800 which was admittedly received by the assessee is an income for the purpose of the Indian Income-tax Act. The term 'income', as has been often pointed out, has not been defined in the Indian Act. It is always a matter of difficulty and embarrassment to draw a line between what is a capital receipt and what is a revenue receipt, but there is well-known distinction and a line must be drawn clearly and firmly.

The case already referred to, *Commissioners of Inland Revenue* v. *British Salmson Aero Engines, Limited*(1), is useful and will be of assistance in deciding the present case. In that case the assessee by a certain agreement granted to the licensees an exclusive right for a period of 10 years to construct, use and sell in a certain territory Salmson Aero Engines. The consideration for the license was that the licensees were to pay a fixed sum of £25,000 payable in three instalments and, in addition to these payments and as royalty, a sum of £ 2,500 and a like sum each twelve months during the following nine years. The question which required consideration was whether any of these sums, namely, the fixed amount paid in a lump sum in three instalments and the fixed sum to be paid annually for nine years, were assessable to income-tax—the Crown contending that all these payments were income and the assessee insisting, on the contrary, that all these payments were in the nature of capital receipts. The Master of the Rolls approached the subject in this way. He pointed out that in the agreement there was "a fundamental difference in the nature of the two classes of sums, in this sense, that the former class starts off by being a lump sum payment, definite and fixed, which is then to be payable by instalments. The other class is not of that description; no lump sum payment is referred to; it is, on the face of it, nothing but an undertaking to pay yearly sums as royalty.

(1) (1937) 22 Tax Cas. 29.

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Speaking quite apart from any close examination of authority, and simply regarding the distinction between those two things, it would appear upon the face of it that, with regard to the latter class, the parties are creating an obligation as between themselves which they choose to describe as a royalty payable each year at a fixed rate". He then considers the argument that it is illegitimate to look outside the terms of the contract under which the license was granted and observes: "I do not wish to lay down any such proposition. What has to be ascertained in these cases is the true nature of a payment, that is to say, the true nature from an accountancy point of view, and that is a question of fact. I do not wish to say anything which will have the effect of circumscribing the matters which may properly be looked into in answering that question of fact".

I now give another quotation from page 43: "It seems to me that in the case of patents, as in the case of any other matters, the fundamental question remains in respect to any particular payment: is it capital or is it income? and that question has to be decided, as it has to be decided in reference to other subject-matters, upon the particular facts of each case, including in those facts the contractual relationships between the parties. It has been said that the question is one of fact, and it is, when one gets to the bottom of it, an accountancy question. In saying that it is a question of fact, one does not mean that, in deciding it, questions of law may not have to be discussed and decided. For example, the construction of a contract may be one of the elements which must be taken into consideration in deciding that question; there may be cases where the construction of the contract is of itself the really decisive matter in answering the question. In this case the question of the contract and the terms of the contract is of cardinal importance.....".

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Gillatt and Watts v. *Colquhoun*(1) was a converse case but some observations of Grove, J. are relevant. In that case the question was as to the annual expenditure which should be allowed to an assessee who had taken a lease after paying £ 34,000 as a premium with a liability to pay a ground rent of £ 250 a year, the lease being for 20 years. Mr. Justice Grove makes this observation at page 79: "But in this case the lessee pays a ground rent of £ 250 a year and he paid £ 34,000 as a premium for the lease. The lease has virtually put him almost in the position of a free-holder with a quit rent, though not quite that, because it is terminable at a certain time, but the rent is swallowed up, or what we may call the rent is swallowed up in the premium, leaving really a very small rent, much less than what would be the real rent of the premises if they were let from year to year". At the bottom of that page he states: "I thought the fair mode would be, taking the premium into consideration and the ground rent, to take what an actuary would put as the fair rent for that lease for the time over which that lease extended; that is supposing a party had taken the lease upon an annual rent, and had paid no premium, and the ground rent was, so to speak, absorbed in the rack-rent or the annual rent of the premises. I still adhere to that idea as the fair mode of compensation". He puts the question to be decided at page 80 thus: "Therefore, we have virtually got to this question: Is that the proper sum to be deducted from the Income-tax, or is whatever fancy price the party pays for a speculative purchase to be deducted? I think the former of these two is the proper alternative, that is to say, the one insisted upon by the Crown in this case. The other would lead to extreme difficulty, and it would lead possibly to a great deal of fraud, because fictitious prices would be given; £ 50,000 would be handed over for a lease, and £ 20,000 out of that would be returned the next day,

(1) (1884) 2 Tax Cas. 76.

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or some arrangement of that sort would be made, and the price paid would afford no reasonable criterion for saying what annual deduction ought to be made from the annual profits or gains ". He finally adopts the test at page 82 that " the real and proper basis of calculation is the trade value or rent of these premises paid by persons who would take these premises as they would take any other premises which are in the market or for sale, a willing lessee and a willing lessor, the one anxious to make the most of his premises, and the other anxious to get the lease, who would settle the bargain upon fair terms, that is the proper criterion ". I take this case as deciding that such questions are really questions of fact which have to be determined by taking into consideration all the circumstances. Mr. Justice Smith at the end of his observations states : " It also seems to me that this case, as my Brother Grove says, resolves itself into a question of fact and not of law ".

Commissioners of Inland Revenue v. *Adam*(1) dealt with a situation where the assessee had obtained a right to deposit soil on a definite area of land at a certain rate for a period of 8 years by agreeing to pay to the owner a sum of £ 3,200 payable in 2 instalments of £ 200 each at the end of every six months each year. The question was whether the assessee was entitled to deduct from his assessable income a sum of £ 400 which he had paid in the year under consideration. The Lord President pointed out that in a question of this sort both form and substance must be considered and he pointedly referred to the fact that £ 3,200 and the instalments of £ 200 were payable whether the quantities referred to in the contract were actually deposited or not and came to the conclusion that in considering this difficult question, which was on the borderline, his opinion on the whole was that the price of £,3,200 whether paid in instalments or in a lump sum did

(1) (1928) 14 Tax Cas. 34.

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not alter the character of the price as a capital outlay and that the assessee could not be entitled to say that the instalments were paid out in each year for the purpose of earning the profits of that year, in any other sense than it would be true to say that any capital outlay is made for the purpose of earning profits of the years which follows its expenditure. Lord Sands took the same view and agreed that in a matter of this kind one cannot altogether ignore the form because " when parties contract in certain forms different results may flow according to the form of the contract, however little difference there may be in substance ". Lord Blackburn took a different view and gave a dissenting opinion. He makes some pertinent observations at page 43 : " If the site has been depreciated in value by the deposits laid upon it, it may very well be that the land-owner was fully justified in attributing each and all of the payments to be made to him as capital payments. But if the converse is the case and the value of the land remains unaltered, or possibly has appreciated for building purposes, it would hardly appear to be a good answer to a claim against him for Income-tax on the sums of £ 400 received annually, to refer to the agreement as evidence that he had received them as capital payments and not as fruits of his land ". This case was recently considered in *Racecourse Betting Control Board* v. *Wild*(1).

Constantinesco v. *Rex*(2) is the well-known case. The question there was as to the assessability of certain sums received by the patentee as the result of an award made in his favour by the Royal Commission of Awards to Inventors. The award was made after the user of the patent had taken place and the claim which had been settled was a claim by the assessee for successive uses of the invention. Lord Cave, in giving his opinion in the House of Lords, stated as one of the facts in the case that the

(1) (1938) 22 Tax Cas. 182.
(2) (1927) 11 Tax Cas. 730.

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corpus of the patent was not taken away from the assessee and having regard to a number of facts he stated: "In view of all the facts I am satisfied that the sum awarded is to be treated as profits or gains, and annual profits or gains, within the meaning of the Income-tax Act". Rowlatt, J., who decided the case in the first instance and whose view was upheld by the appellate Court and House of Lords, gives an apposite illustration at page 740. Suppose a patentee demands £ 25,000 as a sum down and tells the licensee "use it as much as you like for a definite time or for the whole length of the patent". In such a case the decision was "That will clearly be a lump sum. It would not be parting with the patent,.....but it would be clearly a capital sum in my judgment". The Master of the Rolls at page 743 notices one or two cases where a capital sum is reached by an estimate derived from income, e.g., so many years' purchase for a piece of land.

I will make reference to only one more case; it is needless to refer to the very large number of cases which are to be found in the English Reports in deciding whether the annual payment concerned in this case was in the nature of a capital payment or a capital receipt or was in the nature of a revenue payment or revenue receipt. For instance, see the annuity cases beginning from *Foley* v. *Fletcher*(1); the Tikari case which went up to the Privy Council from this Court [*Commissioner of Income-tax* v. *Captain Maharaj Kumar Gopal Saran Narain Singh*(2) and *Captain Maharaj Kumar Gopal Saran Narain Singh* v. *Commissioner of Income-tax*(3)], the Railway Cases of which the leading type is *Scoble's* case(4) and, lastly, *Minister of National Revenue* v. *Catherine Spooner*(5) [sale of land for cash and 10 per cent. mineral oil—decided as a question of fact.]

(1) (1858) 3 H. and N. 769; 157 E. R. 678.
(2) (1934) I. L. R. 13 Pat. 661, F. B.
(3) (1935) I. L. R. 14 Pat. 552, P. C.
(4) (1902) 4 Tax. Cas. 478.
(5) (1933) A. C. 684.

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The case which I wanted to refer was the case of *Commissioners of Inland Revenue* v. *Thomas Nelson and Sons, Ltd.*(1), a case decided in July, 1938, by the Court of Sessions, Scotland. The facts of the case were that the assessee company lent a sum of money to an Indian company under an agreement which provided that interest was to be paid at 3 per cent. per annum and that on repayment of the principal sum or any part thereof there should also be paid a premium varying with the date of repayment. The premiums prescribed by the agreement for each of the ten years of the currency of the loan are set out in the agreement; the first of them is at the rate of 2 per cent.; the second is at 4 per cent.; in each of the next five years there is an increase of $2\frac{1}{2}$ per cent. in arithmetical progression and for the last three years of the ten the rate of increase per annum is 3 per cent. The full amount of the loan was ultimately repaid to the assessee together with the accrued interest and the premiums payable under the agreement. The contention raised by the assessee was that the premiums were part of the principal sums repaid and were capital payments. The Lord President decided the question as a question posed on the particular terms of the contract. In his opinion the premiums were in the nature of annual profits or gains being part of the consideration given by the borrowers for the use of the capital lent to them, and part of the creditor's share of the profit which the borrower is presumed to make from the use of the money and he observed: "It is not irrelevant to notice that the agreement provides for a payment by way of premium which may be made in eacr year of the currency of the loan, and that, taken along with the stipulated interest, the effect of this provision is to give the lenders a return on their capital varying between 5 per cent. in the earlier years and something over $5\frac{1}{2}$ per cent. in later years, a rate which can only be regarded as a reasonable

(1) (1938) 22 Tax Cas. 175.

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return for the use of their capital and not as to any extent an accretion to it ". It was, however, pointed out that " the fact that the borrowers would, under the contract, pay a premium only when they chose to make a capital payment does not necessarily have the effect of making the premium a capital payment, any more than the lenders' waiver of their right to exact payment of interest each year as the effect of converting the payment of arrears of interest into a capital payment ". This case, therefore, may also be taken as deciding that each case ought to be decided by the facts and circumstances of that case. I respectfully agree with the observation made by Sir George Rankin in *Gooptu Estates, Limited* v. *The Commissioner of Income-tax, Bengal*(1), where that learned and distinguished Chief Justice pointed out that it would be impossible to lay down a hard and fast rule that a *salami* can in no case be taxable but that the question would depend upon the facts and circumstances of each case. I think that the above review of some leading cases suggests this as the proper way of approach while deciding a question like the present before us.

But the learned Standing Counsel wanted to rely, in support of his argument that a *salami* like the present is always taxable as an income, upon the observation to be found in the case of *Birendra Kishor Manikya* v. *Secretary of State for India*(2) where it was stated that a *salami* is a capitalised rent. But this decision was expressly overruled by a later Full Bench decision of that very Court in *Nawabzadi Meher Bano Khanum* v. *The Secretary of State for India in Council*(3). Walmesley, J., who was one of the learned Judges in the case of *Birendra Kishor Manikya* v. *Secretary of State for India*(2), adhered to the opinion which he expressed in that case, but he was overruled by his other learned colleagues. In

(1) (1929) 4 I. T. C. 146.
(2) (1920) I. L. R. 48 Cal. 766.
(3) (1925) 29 Cal. W. N. 969, F. B.

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a case of this Court, *Sri Sri Raja Shiva Prasad Singh* v. *The Crown*(1), this decision of the Calcutta High Court was disapproved. The Patna case dealt with a lease of a coalfield for 999 years for a fixed premium at an annual rent. The learned Chief Justice pointed out that the essence of the transaction was (*1*) that the *salami* was really in the nature of a premium paid for granting a lease, in other words, it was the purchase price of a leasehold interest and (*2*) that, "in so far as rent and royalty are reserved he (the assessee) is founding an annual increment to the income of the raj for himself and his successors but with regard to *salami* it is the price he demands for parting with his direct enjoyment of the property by himself and his successors for a period of 999 years. He is parting with the capital to persons who, whilst not purchasers of the fee simple, are undoubtedly purchasers of a large interest therein. The purchase price is presumably not based upon the estimated outturn but is paid in exchange for the long term transferred". With respect I agree with these observations and would hold that this applies *in proprio vigore* to the *salami* obtained by the permanent settlement in the present case. I notice that the Commissioner, Mr. H. D. Chatterji, was inclined to take the same view in his order of reference to this Court which is to be found at pages 9-10 of the original paper book, dated the 24th July, 1936, but as he thought that the period of the settlement in the document which he was considering was for three years only he came to the conclusion that the amount of *salami* was merely a rent in advance. That Commissioner expressly referred to the case of *Sri Sri Raja Shiva Prasad Singh* v. *The Crown*(1) and sought to distinguish it on the ground that in the present case the lease was for three years only and did not cover a long period.

The provisions of section 105 of the Transfer of Property Act were referred to in the course of

(1) (1924) I. L. R. 4 Pat. 73.

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the argument before this Court in *Sri Sri Raja Shiva Prasad Singh* v. *The Crown*(1). Section 105 distinctly defines a lease in this country as a transfer of a right to enjoy immovable property for a time or in perpetuity in consideration of a price paid or for a recurring rent or annual services or both; and also mentions that "the price is called the premium". The Legislature has thus drawn the very distinction between a price and a recurring payment which the eminent Judges in England have drawn while deciding cases under the Income-tax Act. In the present case there is no suggestion that the term embodied in the contract evidenced by the chalan and the *kabuliyats* was not a fair expression of what the parties intended.

It was argued, however, that the amount of premium will always bear some proportion to the amount of rent which is ultimately fixed, and, therefore, it ought to be held that the premium should be taken in law as an advance payment of rent. I think the argument is fallacious. The premium or the price will always be fixed on taking into consideration the amount of rent the lessor will receive, and he may vary it as he does in practice with the amount of *salami* which he insists on receiving as a condition precedent for parting with the land in favour of the lessee. It may be that in some cases the evidence might show that the parties fixed a particular *salami* as an advance payment of rent; in those cases I would not hesitate to treat that receipt as income, but I am of opinion that it is not open to me to treat a premium in the nature of a *salami* as in this case as a revenue receipt. It should be noticed that the amount of Rs. 1,800 was received not because of the use of the land but before the land was put into use by the assessee.

For these reasons, I have no hesitation in holding that this amount of Rs. 1,800 was a capital

(1) (1924) I. L. R. 4 Pat. 73.

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receipt in the hands of the assessee as it was a capital payment on behalf of the lessee.

I wish to make a few observations regarding the procedure adopted by the Commissioner of Income-tax in sending up the present reference. It appears that the assessee has been considerably harassed by the manner in which the proceedings for a reference to this Court were conducted by the Commissioner. On the 16th of November, 1937, when the reference came up for hearing before the learned Chief Justice and Agarwala, J., it was discovered that by some unforunate slip there was an error in the statement of the case. The learned Judges, in agreement with the submission on this point by the learned Advocates for the assessee and the Income-tax Department, directed that the case should be sent back to the Commissioner in order that he may restate the case with such finding of fact as may be considered necessary. The assessee was in no way to blame when the Commissioner gave his opinion regarding a document which admittedly referred to some other case. When the case went back to the Commissioner he sent up a re-statement of the case, but unfortunately without hearing the assessee. The restated case came up before this Court once again on the 28th of November, 1938, when the order which we passed was that the Court was compelled to send the case back to the Commissioner once again in order that the case might be re-stated with such further finding of fact as the Commissioner may consider necessary after hearing the assessee. The matter then went back to another Commissioner, who, instead of re-stating the case, as he was ordered by this Court to do, sent up a letter to this Court to the address of the Deputy Registrar (page 2 of the Supplementary Paper-book). In that letter he says:

"I have not heard the party in regard to the opinion of the Commissioner. In any event, I should not consider that I had power within section 66(4) to vary an opinion given under section 66((2) if no new facts were admitted."

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In my opinion the Commissioner was in duty bound to carry out the order of this Court. He should have reheard the parties, admitted such further evidence as he considered relevant on the point at issue and re-stated the case with his opinion thereon. It was also open to the Commissioner to make a submission that the High Court should decide the case not upon the case which he was re-stating (as ordered) but upon the finding of fact already arrived at by the previous Commissioner on the 4th of August, 1938. I do not agree with the view expressed by the Commissioner that the case did not stand at large, whether under section 66(*2*) or section 66(*4*). It was within the jurisdiction of the High Court to require the Commissioner to re-estate the case which was not found satisfactory by this Court; and, if the Commissioner was dissatisfied with this order, he should have moved their Lordships of the Judicial Committee against the order passed by this Court. But so long as that order stood, this Court expected that it should be carried out to the very letter and in the spirit in which the order was worded. The result of the procedure adopted by the Commissioner has been that a third hearing in this Court has been inflicted upon the assessee. The further evidence which Sir Sultan Ahmed wanted us to consider was the affidavit of the Chief Manager of the Raj regarding which, upon being supplied with a copy, the Standing Counsel agreed that this would amount to a decision on the construction of the document in favour of the assessee. I am doubtful, however, how this affidavit can be used to supply the meaning of the terms in this document which are in no way ambiguous, or to help us in construing the document. I have, therefore, ruled this affidavit out of my consideration entirely in coming to a conclusion as to the meaning to be attached to the word '*bemeadi*' in the documents or *kabuliyats* which fall to be construed.

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For these reasons I agree that the answer to the question should be in the negative and I also agree to the order of costs proposed by my learned brother.

Order accordingly.

K. D.

APPELLATE CIVIL.

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Succession Act, 1925 (*Act XXXIX of* 1925), *sections* 332 *and* 335—*Will—residuary legatee appointed executor—mortgage by executor in his capacity as residuary legatee—assent of executor, whether implied—renunciation of executorship without taking out probate—mortgage, whether valid—assent, whether inoperative—letters of administration granted to a legatee—such legatee, whether entitled to recover possession of mortgaged property—grant of letters of administration, whether raises a presumption that the estate remains unadministered—residuary legatees and their transferees, whether liable to have the property in their possession reduced in order to repay specific legatees.*

A legatee, to whom letters of administration with copy of the Will annexed have been granted, is not entitled to institute a suit for the recovery of possession of an estate which has passed out of the possession of the executor as a result of a transaction entered into by the executor in his character as the residuary legatee before he renounced his executorship without taking out probate.

The mere fact that a legatee has obtained letters of administration with Will annexed cannot raise a presumption that the estate remains unadministered or that all the legacies, or at least the legacy in favour of the particular legatee who obtains letters of administration, have not been paid in accordance with the tenor of the Will.

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*Appeal from Original Decree no. 120 of 1937, from a decision of C. E. Walze, Esq., Subordinate Judge of Deoghar, dated the 31st March, 1937.

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Adwait Ch. Mondal v. *Krishnadhone Sarkar*(1) and *Durgapada Bera* v. *Atul Chandra Bera*(2), relied on.

A mortgage, by a legatee under a Will, of immovable property left to him by the testator, before the assent of the executor to the legacy is obtained, is valid and the mortgagee is entitled to cut off the equity of redemption. The reason for this rule is that although the legatee has no property in the legacy by the devise until the assent of the executor is obtained, he has an interest therein which is capable of being transferred; in other words, though on the assent of the executor the full title passes to the legatee, the assent creates no new title but merely perfects the title acquired under the Will.

Khagendra Nath Mookerjee v. *Khetra Nath Pal*(3), followed.

Where an executor, in his capacity as a legatee, mortgages the property bequeathed to him and applies the money to his own use, and not for the purpose of administering the estate of the testator, the executor will be deemed to have assented to the legacy in his own favour on the date when he gave the property in mortgage.

Commissioners of Inland Revenue v. *Smith*(4) and *Attenbourough* v. *Solomon*(5), referred to.

An assent given to a legacy by the executor is not rendered inoperative by reason of the fact that the executor renounces the executorship without taking out any probate.

Kadiyala Venkata Subamma v. *Katreddi Ramayya*(6), relied on.

Satya Prashad Pal Chowdhry v. *Motilal Pal Chowdhry*(7), not followed.

The residuary legatees and their transferees are always liable to have the property in their possession reduced to a proper extent in order to repay the specific legatees.

(1) (1917) 21 Cal. W. N. 1129.
(2) (1937) 41 Cal. W. N. 1204.
(3) (1922) I. L. R. 50 Cal. 171.
(4) (1930) 1 K. B. 713.
(5) (1913) A. C. 76.
(6) (1932) L. R. 59 Ind. App. 112.
(7) (1899) I. L. R. 27 Cal. 683.

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Khagendra Nath Mookerjee v. *Khetra Nath Pal*(1), followed.

Appeal by the plaintiff.

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

S. N. Bose (with him *S. S. Rakshit* and *S. K. Sarkar*), for the appellant.

P. R. Das and *S. Mustafi*, for the respondents.

MANOHAR LALL, J.—This is an appeal by the plaintiff against a decision of the learned Subordinate Judge of Deoghar dismissing the suit of the plaintiff which was instituted by her, as a person to whom letters of administration were granted, for recovery of possession of the properties in suit belonging to the estate of the testator (who left a legacy in her favour) which passed to the possession of the respondents in the circumstances narrated below.

The case of the plaintiff very briefly stated is this. One Gopal Chandra Chatterji had three sons, namely, (*1*) Kali Prasanna Chatterji, (*2*) Siva Prasanna Chatterji and (*3*) Sarda Prasad Chatterji who died leaving the plaintiff as his widow and one Ganesh Chandra Chatterji as their son. Sometime before 1923, Shiva Prasanna Chatterji, after the death of his father, executed a Will regarding his property in favour of his nephew Ganesh Chandra Chatterji and nominated him as his executor. Shiva Prasanna died on the 18th of September, 1923. In the same year, on the 8th of December, Kali Prasanna Chatterji executed another Will in which he left a legacy to the plaintiff for Rs. 2,000 and three other legacies for a total sum of Rs. 4,200. By this Will Ganesh was appointed as the executor. Kali Prasanna died on the 13th of November, 1924,

(1) (1922) I. L. R. 50 Cal. 171.

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leaving the aforesaid Will as his last Will and testament, which is exhibit 1 in this case. In the Will he, after setting out the specific legacies stated by me just now, bequeathed

"all the rest residue and remainder of my estate.....after payment of my funeral and testamentary expenses and just debts and the legacies bequeathed.....unto and to the use of my said nephew Ganesh Chandra Chatterji for his own absolute use and benefit".

In other words, Ganesh Chandra Chatterji was both the executor and residuary legatee under this Will of his uncle.

On the 10th of September, 1925, Ganesh Chandra executed a mortgage (exhibit 2) by which he mortgaged the properties in suit in favour of the Hindustan Co-operative Insurance Society, Limited (hereinafter referred to as the Society) who is the second defendant and the only contesting respondent before us. The mortgage was to secure an advance of Rs. 1,05,000. The purpose of the loan was to administer the estate of Shiva Prasanna, who appointed the mortgagor as his executor under the Will of 18th of September, 1923, already referred to. So far as the properties in suit are concerned, the mortgagor expressly stated that he was absolutely seized and possessed of or otherwise well and sufficiently entitled to them and that he was executing the mortgage in his individual capacity. So far as other properties of Siva Prasanna were included in this mortgage bond, the mortgagor expressly purported to give the mortgage in his own capacity as executor of Siva Prasanna. It was further stipulated in this document that the mortgagor will, within six months, obtain a probate of the Will of his uncle Kali Prasanna under which he claimed the properties described in the third schedule and will execute a deed in favour of the mortgagees confirming these presents and, in case the mortgagor failed to do that within the period of six months, he will repay to the mortgagees a sum of Rs. 30,000 out of the principal sum of Rs. 1,05,000 on the said

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terms. The mortgagor did not carry out this undertaking and the mortgagee instituted a suit in 1927 in the Calcutta High Court to enforce the mortgage of 1925. The Society duly obtained a preliminary decree in January, 1928, and the decree was made final in December, 1928. The properties mortgaged were ordered to be put to sale and the date fixed for the sale was the 19th of June, 1931. The properties were accordingly sold and were purchased by the first defendant who subsequently transferred his interest to the Society, the second defendant. The sale certificate was duly granted on the 5th of August, 1931, to the auction-purchaser. The sale certificate was transferred to the court of Dumka for delivery of possession on the 23rd of July, 1932. An objection by the plaintiff to this delivery of possession was rejected and the delivery of possession was ordered on the 8th of September, 1932. That matter came to this Court and by an order of the 28th March, 1933, (exhibit F) in Civil Revision no. 619 of 1932, Mr. Justice Macpherson affirmed the order of the lower Court but set it aside in so far as the property consisted of the holdings of a raiyat or a part thereof on the ground that transfers of this kind of property were invalid under section 27 of Regulation III of 1872.

In the meantime, the plaintiff on the 16th of June, 1931, applied for letters of administration with the Will of the late Kali Prasanna annexed before the District Judge of Dumka. A notice was issued to the executor named in the Will who renounced his executorship on the 18th of July, 1931. The letters of administration were granted without any opposition on the 21st of September, 1932, and the present suit was instituted on the 5th of September, 1933, asking for reliefs in the form that the plaintiff has a right to hold possession over the properties in suit as administratrix of the estate of Kali Prasanna Chatterji. She desired possession of those properties from the Society after vacating the order of the

learned Subordinate Judge which was affirmed by this Court to the extent indicated by the order of the 28th of March, 1933.

The events narrated above are strong indications of the correctness of the view that the appellant applied for letters of administration simply with a view to avoid or obstruct the contemplated sale fixed for the 19th June, 1931; but this consideration is wholly irrelevant. The plaintiff is always entitled to rely upon her rights and if these are established in accordance with law the Court is bound to give proper relief to her irrespective of the motive which induced her to obtain letters of administration and then to institute the suit.

The real question is whether a legatee, to whom letters of administration with copy of the Will annexed have been granted, is entitled to institute a suit for recovery of possession of the estate which has passed out of the possession of the executor as a result of a transaction entered into with the defendants by the executor in his character as the residuary legatee before he renounced the executorship without taking out probate.

It is necessary in the first instance to determine whether the estate of Kali Prasanna Chatterji was unadministered on the date of the present suit. The plaintiff alleged in paragraph 5 of the plaint that the executor Ganesh Chandra Chatterjee did not take any steps for obtaining probate of the Will of the testator, nor did he make any payment to the plaintiff and other persons according to the directions in the Will and subsequently he openly renounced the executorship. The defendants refused to admit the correctness of these allegations in paragraph 4 of the written statement and they asserted that no legacies remained to be paid out of the estate of Kali Prasanna Chatterji. In the face of these pleadings the onus was upon the plaintiff to prove that the estate remained unadministered. No evidence at all

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was offered by the plaintiff in the present case; it is significant that neither of the three legatees are made parties to this action, nor has any of them including the executor and the plaintiff chosen to come forward to give evidence to support the allegation of the plaintiff that the legacies still remained unpaid. But it was argued by the learned Advocate for the appellant that as soon as it is established that letters of administration with Will annexed have been granted by the Court of the District Judge to the plaintiff it must be presumed in law that the specific legacies, or at least the legacy in favour of the plaintiff, were still due on the date when the letters of administration were granted on the 16th June, 1931, and that the same state of affairs should be assumed to continue on the 5th September, 1933—the date when the present suit was filed. The current of authority, however, is against this view. It is enough to refer to two cases of the Calcutta High Court, namely, *Adwait Ch. Mondal* v. *Krishnadhone Sarkar*(1) and *Durgapada Bera* v. *Atul Chandra Bera*(2). In the former case it was held that " where a Will has been propounded and proved, the Probate Court should grant probate even though it should appear that there were no debts due to or by the testator and the legatees have been in possession in accordance with the directions of the Will for a long time, it being absolutely necessary for the legatees to establish their title by proving the Will " and it was observed by the learned Judges that " the Probate Court cannot go into the question whether the legatees have acquired independent title by adverse possession ". The case of *Durgapada Bera* v. *Atul Chandra Bera*(2) expressly follows the case just referred to and it is directly laid down in this case that " in cases of testamentary succession, where there is a Will and it has never been probated, the question whether the estate has or has not been already fully administered is not relevant and cannot be gone into

(1) (1917) 21 Cal. W. N. 1129.
(2) (1937) 41 Cal. W. N. 1204.

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by the Court in dealing with an application for probate or letters of administration ". In my opinion, therefore, the mere fact that the plaintiff obtained letters of administration with Will annexed from the learned District Judge is no evidence to prove that the estate must be assumed to have been still unadministered, nor that this Court should presume that all the legacies or at least the legacy in favour of the plaintiff has not been paid in accordance with the tenor of the Will.

The respondent, as already stated, obtained a title to remain in possession of the lands in suit by virtue of the sale in execution of a mortgage decree obtained on the footing of a mortgage bond which, in my view, must be taken to be executed by the executor in his personal capacity as a residuary legatee. Mr. P. R. Das, relying upon the case of *Doe* v. *Sturges*(1), argued that it must be held that the mortgage was executed by the mortgagor in his capacity as an executor; but I am not able to place such a construction upon the mortgage bond as this will involve, apart from straining the language used in the document, the inference that the executor committed a breach of trust. The recitals in the bond are clear that Ganesh Chandra Chatterji was executing the mortgage in order to raise funds not to administer the estate of Kali Prasanna Chatterji but to administer the estate of Shiva Prasanna Chatterji. Unless I am forced to come to the conclusion by the clear words used in the bond I must hold that no breach of trust was committed by the executor.

It is now well settled that where a legatee under a Will mortgages an immovable property left to him by the testator before obtaining the assent of the executor to the legacy, the property could form the subject-matter of a valid mortgage, and the mortgagee is entitled to cut off the equity of redemption. The reason for the rule is that although the legatees have

(1) (1816) 129 E. R. 87.

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no property in the legacies by the devise until the assent of the executor is obtained, they have an interest in them which is capable of being transferred. In other words, as pointed out in the case of *Khagendra Nath Mookerjee* v. *Kheira Nath Pal*(1), " though on the assent of the executor, the full title passes to the legatee, the assent creates no new title; it merely perfects the title acquired under the Will ".

The question which is relevant to consider in these circumstances is whether the executor assented to the legacy. The facts speak for themselves. A useful illustration of how to determine whether there was an assent by an executor, which may be by conduct, to a legacy is afforded by the case of *Commissioners of Inland Revenue* v. *Smith*(2). The Master of the Rolls at page 733 observes: " All the relevant matters must be taken into consideration and, as Rowlatt, J. says in his judgment in the present case, you may have an assent by conduct: ' When it is said that the executor assents to a bequest ', what is meant is not that he assents to the disposition of the testator, but that he assents to its taking effect upon the specific property if the bequest is specific, upon a sum of money if it is pecuniary, or upon the residue brought out by the executor at the end of the administration if it is a residuary bequest. Lord Haldane's exposition in *Attenborough* v. *Solomon*(3) makes this clear. The assent of the executor, it is important to add, may be inferred when there is clearly nothing more to be done by way of administration ". The other Lord Justices took the same view.

It was faintly argued that until the residue is ascertained the residuary legatee was not in a position to transfer his rights to the defendants. In the present case it is admitted and proved that all the outgoings, as provided by the testator in the Will, had been paid off before the mortgage of 1925, at

(1) (1922) I. L. R. 50 Cal. 171.
(2) (1930) 1 K. B. 713.
(3) (1913) A. C. 76.

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least there is no evidence to the contrary. The principle applicable is expressed by Sir George Jessel in *Trethewy* v. *Helyar*(1) where he says: "It appears to have been long-settled law that there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of the testator. Therefore until you have paid the costs, you do not arrive at the net residue at all, and when you do arrive at it, it is distributed according to law. That is the principle" [*See* also *King* v. *Commissioners*(2)].

Applying these tests to the present case, as I have stated just now, the facts speak for themselves. There is no proof in the present case that any of the specific legacies remained to be paid out. Section 332 of the Succession Act (Act XXXIX of 1925) provides that the assent of the executor is necessary to complete the legatee's title to his own legacy and by section 335 it is provided that when the executor is a legatee his assent to his own legacy is necessary to complete his title to it and his assent may be express or implied. Sub-clause (*2*) provides that assent shall be implied if in his manner of administering the property he does any act which is referable to his character of legatee and is not referable to his character of executor. The illustration to the section is of an executor who took the rent of a house or the interest of government securities bequeathed to him and applied it to his own use and this is stated to be an assent. In the present case the mortgage was by the executor in his individual capacity as a legatee with respect to the properties bequeathed to him. He applied the money to his own use, because, I have pointed out already, the loan was taken by him not to administer the estate of his testator Kali Prasanna Chatterji. It follows, by applying the principles in the English cases referred to above and also as

(1) (1876) 4 Ch. Div. 53.
(2) (1920) 1 K. B. 468.

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provided by the sections of the Succession Act referred to above, that the executor assented to the legacy in his own favour on the date he gave the mortgage to the defendants.

It was then argued by Mr. S. N. Bose appearing for the appellant that the executor has no power to give assent as an executor before he obtained the probate of the Will and as in this case no probate was ever obtained the assent given by the executor to himself as a residuary legatee was no assent in the eye of the law. A short answer to this contention is afforded by the case of *Kadiyala Venkata Subamma* v. *Katreddi Ramayya*(1) where their Lordships have authoritatively laid down that " the estate of the testator vests in the executor, if he accepts office, from the date of the testator's death, and he has the powers of an executor under the Probate and Administration Act, 1881, even though probate has not been obtained ". In the present case the Will has been duly proved before the Probate Court anterior to the suit.

Mr. Bose sought to get over the difficulties thus created in his way by arguing that Ganesh Chandra Chatterji, the executor, having renounced his executorship in July, 1931, and he never having taken out any probate, the assent by him would be inoperative to pass any title to the defendants. He relied upon the case of *Satya Prashad Pal Chowdhry* v. *Motilal Pal Chowdhry*(2), where the learned Judges made this observation at page 688: " It is only the executors who have obtained probate that can act as representatives of the testator; and we think it but reasonable that an executor who renounces or refuses or is unable to act should be regarded as if he had never been appointed ". This view seems to have been the older view of the Calcutta High Court but this was negatived by their Lordships of the Judicial Committee in the case referred to above.

(1) (1932) L. R. 59 Ind. App. 112.
(2) (1899) I. L. R. 27 Cal. 683.

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The present suit is not a suit by a legatee to recover his specific legacy from the person in possession of the testator's estate. The learned Subordinate Judge observes that Kali Prasanna Chatterji left two other houses worth about Rs. 4,000 in Jasidih Bazar. Be that as it may, if the testator left no other property than the property in suit, it is always open to the legatee to recover his specific legacy, if he brings an appropriate action and there is no other obstacle by way of limitation or otherwise in his way, by suing for the amount from the persons in possession of the property of the testator as transferees. The transferees of the residuary legatee or the residuary legatees are always liable to have the property in their possession reduced to a proper extent in order to repay the specific legatees [*See Khagendra Nath Mookerjee* v. *Khetra Nath Pal*(1) already referred to].

For the reasons given above I am of opinion that the appeal fails and should be dismissed with costs.

VARMA, J.—I agree.

S. A. K.

Appeal dismissed.

LETTERS PATENT.

Before Harries, C. J. and Fazl Ali, J.

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August, 3, 29.

Transfer of Property Act, 1882 (*Act IV of* 1882), *sections* 6 *and* 130—*assignment of a part of a debt, whether valid—enforcibility—Code of Civil Procedure,* 1908 (*Act V*

* Letters Patent Appeal no. 1 of 1939, from a decision of Mr. Justice Rowland, dated the 11th November, 1938.

(1) (1922) I. L. R. 50 Cal. 171.

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of 1908), *Order II, rule* 2—*one sum representing two distinct debts—assignment of a portion representing one item, whether amounts to assignment of a portion of a debt—deed, construction of.*

A executed a zarpeshgi lease in favour of *B* and subsequently mortgaged the same property to *C*. Later *A* borrowed a certain sum from the mortgagee *C* on a handnote. Thereafter the mortgagor sold to *B* the mortgaged property for a sum of Rs. 5,000. It was recited in the sale deed that out of the consideration money a sum of Rs. 2,125 had been set off against the mortgage debt due to the vendee, and a sum of Rs. 2,227 had been left in deposit with him for the purpose of paying off *C*, the balance having been paid to the vendor in cash. It appeared that the sum of Rs. 2,227 left in deposit with *B* represented the entire debt due to *C*, both on the mortgage and the handnote. As the debt due to *C* on the handnote was not paid by the vendee, the vendor borrowed a sum of Rs. 450 from the plaintiff for the purpose of paying off *C* and in consideration of the advance made by the plaintiff, the vendor executed a registered deed whereby he assigned to the plaintiff his right to realize from *B* ' a portion of Rs. 2,227 ', besides interest, which was, under the terms of the sale deed, payable to *C* on the handnote. After the assignment the plaintiff brought a suit to recover the sum from *B*. The defence was that a part of the debt could not be assigned, and, therefore, that the plaintiff had no right to sue:

Held, (*i*) that the sum left in deposit with *B* represented two distinct sums payable to *C*, one on the basis of the mortgage deed and another on the basis of the handnote;

(*ii*) that the two items being quite separate, what was assigned to the plaintiff was a distinct and separate debt and not merely a part of a debt.

Per FAZL ALI, J.—The answer to the question whether a part of a debt can be validly assigned under the Transfer of Property Act, 1882, depends on whether a part of a debt is " property " within the meaning of section 6 of the Act.

A claim to a debt which cannot be enforced by action, as for example, when the debt is barred by limitation, is not property. The same limitation must apply to a part of a debt. Thus, if a claim to a part of a debt cannot be enforced under Order II, rule 2, Code of Civil Procedure

1908, it is not an actionable claim and section 130 of the Transfer of Property Act has no application to it.

The Transfer of Property Act, 1882, does not recognise any distinction between a whole debt and a part of a debt. Both may be transferred under that Act if they come under the category of actionable claims, as an actionable claim is "property". The transferee of a part of a debt may, however, find that what is transferred to him is not an actionable claim, as under Order II, rule 2, a single cause of action cannot be split up into several causes of action. Order II, rule 2, being a rule of procedure, it does not affect the right of transfer, that is to say, it cannot make what is transferable non-transferable. It does, however, bar the right of suit in certain cases and it may prevent the transferee of a part of a debt from enforcing his claim and thereby make the transfer nugatory.

Sabjan Sahib v. *Abdul Azeez Sahib*(1), *Doraiswami Mudaliar* v. *Doraiswami Aiyangar*(2), *Raja of Ramnad* v. *Subramaniam Chettiar*(3), *Ghisulal Ganeshi Lal* v. *Gambhirmal Pandya*(4), *Brice* v. *Bannister*(5), *Durham Brothers* v. *Robertson*(6), *Jones* v. *Hamphreys*(7), *Forster* v. *Baker* (8), *Hughes* v. *Pump House Hotel Company, Limited*(9), *Skipper* v. *Holloway*(10), *Steel Wing Company, Limited. In re*(11) and *Bank of Liverpool and Martins, Limited* v. *Holland*(12), reviewed.

Appeal by the defendants 1st party under clause 10 of the Letters Patent.

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

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(1) (1916) 42 Ind. Cas. 684.
(2) (1924) 48 Mad. L. J. 432.
(3) (1928) I. L. R. 52 Mad. 465.
(4) (1934) I. L. R. 62 Cal. 510.
(5) (1878) 3 Q. B. 569.
(6) (1898) 1 Q. B. 765.
(7) (1902) 1 K B. 10.
(8) (1910) 2 K. B. 636.
(9) (1902) 2 K. B. 190.
(10) (1910) 2 K. B. 630.
(11) (1921) 1 Ch. 349.
(12) (1926) 43 T. L. R. 29.

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K. Sahai and *Avadhesh Nandan Sahai*, for the appellants.

Bhubaneshwar Prasad Sinha, for the respondents.

FAZL ALI, J.—This is an appeal from a decision of Mr. Justice Rowland in a suit brought by the respondents to recover a certain sum of money from the appellants. The suit was decreed by the trial Court, but was dismissed on appeal by the lower appellate Court. Mr. Justice Rowland has, in second appeal, set aside the judgment of the lower appellate Court and restored the judgment of the trial Court. The defendants first party who contested the suit have accordingly preferred this appeal under the Letters Patent.

The circumstances which gave rise to this litigation may be briefly stated as follows: On the 6th November, 1923, defendant no. 11 executed a zarpeshgi lease in respect of a seven-pies share in mauza Bahpuri Majurahi in favour of the appellants (defendants first party). On the 10th November, 1928, he mortgaged the same property to defendant no. 12 for a sum of Rs. 1,000 and on the 13th October, 1932, he borrowed a sum of Rs. 330 from the latter by executing a hand-note in his favour. On the 23rd June, 1933, he sold to the appellants the property already mortgaged to them and defendant no. 12 for a sum of Rs. 5,000. It was recited in the sale deed that out of the total sum of Rs. 5,000, Rs. 2,125 had been set off against the mortgage debt due to the vendees on the basis of the mortgage, dated the 6th November, 1923, and a sum of Rs. 2,227 had been left in deposit with them for the purpose of paying off the mortgage dues of defendant no. 12. The balance of the consideration money, namely, Rs. 648 was paid in cash. As the debt due to defendant no. 12 from defendant no. 11 on the hand-note was not paid by the appellants, defendant no. 11 had to borrow a sum of Rs. 450

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from the plaintiff for the purpose of paying it off and on 28th January, 1935, in consideration of the advance made by the plaintiff to him he executed a registered deed (Ext. 1) by which he assigned to him (the plaintiff) his right to realise a sum of Rs. 500 from the appellants. It was recited in the deed of assignment that the sum of Rs. 2,227 which had been left with the vendee represented the total sum due on the date of the sale to defendant no. 12 from defendant no. 11, both on the mortgage bond, dated the 10th November, 1928, and the hand-note, dated the 13th October, 1932. It was also stated that by mistake the dues under the hand-note had not been mentioned in the sale deed though the understanding between the parties was that this debt should also be paid off out of the money left with the appellants. After the assignment the plaintiff brought the present suit to recover the sum of Rs. 500 with interest up to the date of the suit calculated at the rate mentioned in the hand-note, dated the 13th October, 1932, and prayed that the money claimed should be charged on the property which had been sold by defendant no. 11 to the defendants first party. The suit was decreed by the Munsif but his decision was reversed by the Subordinate Judge on the ground that in law a part of a debt could not be assigned and, therefore, the plaintiff had no right of suit. This view was not accepted in second appeal by Mr. Justice Rowland who accordingly set aside the judgment of the Subordinate Judge and restored the decree of the Munsif. The principal point, therefore, which arises in this appeal is whether the assignment of a part of a debt is valid.

The point is a somewhat difficult one and it does not appear to have been fully discussed in any of the Indian authorities cited at the Bar. In *Sabjan Sahib* v. *Abdul Azeez Sahib*(1) Seshagiri Ayyar, J., sitting singly, made an observation to the effect that

(1) (1916) 42 Ind. Cas. 684, 693.

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the omission of the word "absolute" from section 130 of the Transfer of Property Act which deals with the assignment of actionable claim "was a deliberate departure from the rule of English Law and indicated that an assignment of part of a chose in action can be given effect to under the Transfer of Property Act". In *Doraiswami Mudaliar* v. *M. Doraiswami Aiyangar*(1) Ramesam, J. (also sitting singly) dissented from the observation of Seshagiri Ayyar, J. and after referring to certain English cases expressed the view that the assignment of part of a debt is not valid. In *Raja of Ramnad* v. *Subramaniam Chettiar*(2) a Bench of two Judges of the Madras High Court followed an earlier case of 1919 in preference to the decision of Ramesam, J. in *Doraiswami Mudaliar* v. *M. Doraiswami Aiyangar*(1) but all that they said on the point is to be found in the following passage:—

"The transfer of a part of a debt was not recognised in English Common Law, but the assignment of a part of a debt was always held to be good in equity and was deemed to pass the property in that portion of the debt. In enforcing such claim it would be necessary to implead the owner of the other portion of the debt, but apart from that there is no objection in equity to enforcing a claim for part-payment of a debt [*vide In re Steel Wing Company* (3)]. It has also been held that the partial transfer of a debt is valid in Appeal no. 53 of 1919 in this Court, and this objection must therefore be disallowed although there is a remark in *Doraiswami Mudaliar* v. *M. Doraiswami Aiyangar*(1) which throws some doubt upon this conclusion."

In *Ghishulal Ganeshi Lal* v. *Gambhirmal Pandya*(4) a Division Bench of the Calcutta High Court consisting of Lort Williams and Jack, JJ.

(1) (1924) 48 Mad. L. J. 432.
(2) (1928) I. L. R. 52 Mad. 465.
(3) (1921) 1 Ch. 349.
(4) (1934) I. L. R. 62 Cal. 510.

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expressed a contrary view but they did not discuss the point and based their decision wholly on *Doraiswami Mudaliar* v. *M. Doraiswami Aiyangar*(1) decided by Ramesam, J.

It will not be out of place here to refer to certain cases decided in England after the passing of the Judicature Act of 1873. It is well known that according to the Common Law of England choses in action could not as a rule be assigned but in equity such assignments were allowed to be made from a very early date and even at Common Law an assignee was generally allowed to sue in the name of the assignor and in some cases under a power of attorney obtained from him. After the passing of the Judicature Act, 1873, however, section 25 (*6*) of that Act enabled the legal right in debt or other thing in action to be transferred to the assignee together with all remedies including the right to sue in his name. Section 25 of the Judicature Act has now been superseded by section 136 of the Law of Property (15 *Geo. V. Ch.* 20) which runs as follows:—

"Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor.....is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice (*a*) the legal right to such debt or thing in action; (*b*) all legal and other remedies for the same and (*c*) the power to give a good discharge for the same without the concurrence of the assignor....."

Now, the question as to whether a part of a debt was assignable under section 25 of the Judicature Act appears to have been raised in many cases, but it has not yet been authoritatively answered. In *Brice* v. *Bannister*(2) Lord Coleridge expressed the view that such an assignment fell within the Act, but on appeal Cotton, L. J. treated the particular assignment as a case of equitable assignment. In *Durham Brothers* v. *Robertson*(3) Chitty, L. J. questioned the

(1) (1924) 48 Mad. L. J. 432.
(2) (1878) 3 Q. B. 569.
(3) (1898) 1 Q. B. 765.

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correctness of the view expressed by Lord Coleridge in *Brice* v. *Bannister*(1) and observed—

"The decision of Lord Coleridge, C. J. in *Brice* v. *Bannister*(1) that the case fell within the 25th section appears to me to be open to question..... The section speaks of an absolute assignment of any debt or other chose in action. It does not say "or any part of a debt or chose in action". It appears to me as at present advised to be questionable whether an assignment of part of an entire debt is within the enactment. If it be, it would seem to leave it in the power of the original creditor to split up the single legal cause of action for the debt into as many separate legal causes of action as he might think fit. However, it is not necessary to decide the point in the present case, and I leave it open for future consideration."

In the same case Collins, L. J. while agreeing with Chitty, L. J. refrained from pronouncing any opinion on the question whether an assignment of a part of a debt was within section 25, sub-section (*6*), of the Judicature Act of 1873. In *Jones* v. *Hamphreys*(2) an assignment of "so much and such part of my income, salary and other emoluments from *H* as shall be necessary to pay a definite sum and any further sums in which I may hereafter become indebted to you" was held by Darling, J. to be not such an assignment as was contemplated by section 25, sub-section (*6*), of the Judicature Act. The learned Judge observed that "having regard to the expression of opinion by Chitty, L. J. in *Durham Brothers* v. *Robertson*(3) it is extremely doubtful whether the assignment being of part of a debt only would come within the Act. Lord Alberston, C. J. and Channel, J., however, refrained from expressing any opinion in that case as to whether an assignment of a part of a debt fell within the section. In *Forster* v. *Baker*(4) a judgment-creditor having

(1) (1878) 3 Q. B. 569.
(2) (1902) 1 K. B. 10.
(3) (1898) 1 Q. B. 765.
(4) (1910) 2 K. B. 636.

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assigned a part of the judgment-debt for valuable consideration, the assignee applied for leave to issue execution. It was held by Bray, J. that there could not be an absolute assignment within section 25(*6*) of the Judicature Act of a definite part of an existing debt or other legal chose in action. The Court of Appeal, however, without expressing an opinion on the point held that as the original judgment-creditor could only issue a single execution upon his judgment and could not split up the judgment-debt and issue separate executions upon the different parts he could not give to an assignee of a part of the judgment-debt a right which he himself did not possess. In *Hughes* v. *Pump House Hotel Company, Limited*(1) Mathew, L. J. did not express any definite opinion on the question, but observed—

"In the course of the argument the question was raised whether an assignment of part of a debt comes within section 25 of the Judicature Act, 1873. We are not called upon to decide that question in this case, and I will express no opinion upon it further than to say that, as at present advised, I think, when that question arises for decision, much may be said in favour of the view that an assignment of part of a debt could not be an absolute assignment within the section."

In *Skipper and Tucker* v. *Holloway and Howard*(2) Darling, J. [notwithstanding the fact that he had expressed a contrary view in *Jones* v. *Humphreys*(3)] held that an assignment of part of a debt came within section 25 of the Judicature Act, but in *Forster* v. *Baker*(4) Bray, J. refused to follow the decision and observed as follows:—

"But if an absolute assignment of part of a debt is valid under section 25, sub-section (*6*), the consequence is that the assignee is able to sue the debtor

(1) (1902) 2 K. B. 190.
(2) (1910) 2 K. B. 630.
(3) (1902) 1 K. B. 10.
(4) (1910) 2 K. B. 636.

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without joining the assignor or the assignee of the other part of the debt, if there have been two assignments; and it may happen that if the debt had been split up into two, three or four parts, there might be two, three or four actions with different results. All sorts of difficulties would arise, and a great burden, an unnecessarily great burden, would be placed upon the debtor. In the case of a judgment-debt that consideration applies with even greater force because the remedy on a judgment-debt is execution, and the result would be that if a judgment-debt was divided into, say, three or four parts, each of which was assigned to a different person, there might be three or four executions, and three or four petitions in bankruptcy, and the debtor might be considerably and unnecessarily harassed. These considerations, in my opinion, point to the fact that I ought not, unless compelled by the language of the section, to construe the words "legal debt or chose in action" as including part of a legal debt or part of a chose in action."

In *In re Steel Wing Company, Limited*(1) P. O. Lawrence, J. agreed with the opinion of Bray, J. as expressed in *Forster* v. *Baker*(2) and held that the assignment of part of a debt does not operate to pass the legal right to that portion of the debt as it is not an assignment within section 25, sub-section (*6*), of the Judicature Act. He, however, held at the same time that such an assignment does operate in equity to transfer the part assigned and it constitutes the assignee a creditor for the original debtor. It may be stated here that this view was perfectly in consonance with the opinion expressed in a long line of cases and even in *Durham Brothers* v. *Robertson*(3) Chitty, L. J., though he questioned the correctness of Lord Coleridge's dictum in *Brice* v. *Bannister*(4),

(1) (1921) 1 Ch. 349.
(2) (1910) 2 K. B. 636.
(3) (1898) 1 Q. B. 765.
(4) (1878) 3 Q. B. 569.

conceded that the assignment in question before him was valid as an equitable assignment.

In *Bank of Liverpool and Martins, Limited*, v. *Holland*(1) which was decided in 1926 it was held, first, that an assignment of a debt which limited the amount to a certain sum was good on the ground that it was an assignment of the whole debt with a proviso that any excess of certain sum must be held by the assignee as trustee for the assignor and, secondly, that even if it was an assignment of part only of the debt, it would still be a good equitable assignment and the plaintiffs were entitled to recover.

It will thus appear that though the point cannot be taken to have been finally settled in England, the weight of authority in that country seems to be in favour of the view that the assignment of a part of a debt does not operate to pass the legal right to that portion of the debt under section 25, sub-section (*6*), of the Judicature Act, but such an assignment would operate in equity to transfer the part assigned and constitute the assignee a creditor for the original debtor. In India, however, the position is somewhat different, because if it is found that a part of a debt cannot be assigned under the Transfer of Property Act, it will be difficult to hold that such an assignment can still be valid in equity. The first question to be answered, therefore, is whether a part of a debt can be validly assigned under the Transfer of Property Act. The answer to this question depends on whether a part of a debt is " property ", because section 6 of the Act clearly provides that " property of any kind may be transferred except as otherwise provided by this Act or by any other law for the time being in force ".

Now, at the first sight it would seem that if the whole debt is property, as it undoubtedly is, a part of the debt must be so. The matter is, however, not

(1) (1926) 43 T. L. R. 29.

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so simple as it seems. Under the Transfer of Property Act "debts" belong to a particular species of property, namely, actionable claims. An actionable claim has been defined as "a claim to a debt..... which the Civil Courts recognise as affording grounds of relief". It follows that a claim to a debt which cannot be enforced by action, as for example, when the debt is barred by limitation, is not property. The same limitation must, in my opinion, apply to a part of a debt; and, in order to determine whether or not it is property, we must find out whether an action can be sustained to recover it.

At this point it seems necessary to refer to Order II, rule 2, Code of Civil Procedure, which runs as follows:

"(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."

This rule in my opinion meets the point so emphatically raised in the judgments of Chitty, L. J. in *Durham Brothers* v. *Robertson*(1), and of Bray, J. in *Forster* v. *Baker*(2). Both the learned Judges have pointed out that if a part of a debt can be legally transferred it would seem to leave it in the power of the original creditor to harass his debtor by splitting up the single cause of action of his debt into as many legal causes of action as he might think fit. This rule will in my opinion prevent him from doing so. It appears to me to be elementary that a creditor cannot confer upon his assignee a higher right than what he himself possesses. Thus if he himself could not sue the debtor twice with regard to parts of the same debt under Order II,

(1) (1898) 1 Q. B. 765.
(2) (1910) 2 K. B. 636.

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rule 2, he cannot be allowed to defeat that provision by assigning one part of a debt to one person and another part to another. There is, however, nothing to prevent him from relinquishing one part of the debt and transferring another part, as such an assignment will be tantamount to an assignment of the whole debt which remains unpaid after a part of the debt has been relinquished. He may also transfer one part of the debt to one person and another part to another person and the two assignees may possibly jointly sue the debtor in a common action and ask for a joint decree in respect of the whole debt. But once a suit has been brought on a part of the debt, then no suit can be brought subsequently for the remaining part either by the creditor or by any person to whom he assigns the remainder. It appears to me that the assignment of the remainder in such a case must be ineffectual because as the creditor himself cannot sue upon it, it ceases to be his property and he cannot, by transferring it to another person, confer upon him a higher right than what he himself possessed.

Reference may also be made in this connection to section 130 of the Transfer of Property Act which provides the mode of transferring an actionable claim. The language of this section bears some resemblance to the language of section 25(*6*) of the Judicature Act, 1873, and section 136 of the Law of Property, 1925, but it is not precisely the same. One of the points of difference which alone need be pointed out here is that while the two English Acts speak of the assignment of "any debt or other legal chose in action", section 130 of the Transfer of Property Act purports to deal with the "transfer of an actionable claim" only. The difference may at the first sight appear to be one without distinction as the definition of "actionable claim" includes a claim to a debt, but that definition also provides that it must be such a claim "as the Civil Courts recognise as affording grounds of relief". Thus if a

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claim to a part of a debt cannot be enforced under Order II, rule 2, it is not an actionable claim and section 130 can have no application to it.

Thus the conclusion which I have arrived at may be summed up in a few words. The Transfer of Property Act does not recognise any distinction between a whole debt and a part of a debt. Both may be transferred under that Act if they come under the category of actionable claims as an actionable claim is "property". The transferee of a part of a debt may, however, find that what is transferred to him is not an actionable claim as under Order II, rule 2, a single cause of action cannot be allowed to be split up into several causes of action. Order II, rule 2, being a rule of procedure, it does not affect the right of transfer, that is to say, it cannot make what is transferable non-transferable. It does, however, bar the right of suit in certain cases and it may prevent the transferee of a part of a debt from enforcing his claim and thereby make the transfer nugatory.

I have dealt with the question as to whether or not a part of a debt can be transferred at some length in view of its general importance as well as because we have been pressed to do so by learned Counsel for the appellants. In my opinion, however, the present case can be decided on a short and simple ground apart from this question. As I have already said, it was recited in the appellants' own sale deed that a sum of Rs. 2,227 had been left in deposit with them for the purpose of paying off the mortgage dues of defendant no. 12. On calculation it appears that the mortgage dues of defendant no. 12 amounted only to Rs. 1,855 odd on the date of the sale deed and the dues on the hand-note amounted to Rs. 371 odd on that date and to Rs. 501 on the 28th January, 1935, when exhibit 1 was executed by defendant no. 11 in favour of the plaintiff. Thus defendant no. 11 had left with the appellants a surplus sum of

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money over and above the amount which was payable to defendant no. 12 on the basis of his mortgage. This sum clearly represented a single and whole debt and not part of a debt and there can be no doubt that it could be validly assigned by defendant no. 11 to the plaintiff. The appellants' Counsel has pointed out that in the deed which was executed by defendant no. 11 in favour of the plaintiff it has been expressly stated that what had been transferred to the plaintiff was a part of Rs. 2,227. That is undoubtedly so, but the deed must be read as a whole and when read as a whole, it clearly shows that according to the statement made by defendant no. 11 in that deed, he left with him two distinct sums, one payable to defendant no. 12 on the basis of a mortgage deed and another on the basis of a hand-note. These two items being quite separate, there was nothing to prevent defendant no. 11 from recovering them by two separate suits brought on two different occasions especially when in the deed executed by defendant no. 11 in favour of the appellants no time was fixed for the payment of the two debts due to defendant no. 12. Thus the debt of Rs. 500 which was assigned by defendant no. 11 to the plaintiff was a distinct and separate debt and not merely part of a debt. In my opinion, therefore, even if we were inclined to hold that a part of a debt cannot be assigned under the Transfer of Property Act, the assignment in favour of the plaintiff could not be held to be invalid.

Another point which was raised on behalf of the appellants was that the amount decreed by the trial Court cannot be charged on the property sold to them. It is unnecessary to decide this point as the respondent does not press for a charge. I would, therefore, direct that instead of a decree for charge, a money decree only be passed in this case and, subject to this modification, I would dismiss the appeal with costs.

HARRIES, C. J.—I agree that this appeal should be dismissed. Upon the facts of the case I agree

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that two sums were left in deposit with the purchaser, one sum to pay off what was due on the mortgage and one sum to pay off what was due on the hand-note.

What the assignor assigned was the sum left with the purchaser to pay off the hand-note dues together with interest thereon. The assignment was not an assignment of part of a debt but was in substance and in fact an assignment of a distinct and separate debt. It was accordingly a valid assignment which gave the assignee a right to sue. This is sufficient to dispose of the appeal, and the point whether part of a debt is assignable does not strictly arise. In these circumstances, I prefer to express no opinion in this judgment upon the very difficult point as to whether a part of a debt is assignable.

S.A.K.

Appeal dismissed.

R. 30 Pat. 366.

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September, 7.

LETTERS PATENT.

Before Harries, C. J. and Fazl Ali, J.

MANGTU LAL BAGARIA

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Cess Act, 1880 (*Beng. Act IX of* 1880), *section* 45—"*recovered*", *meaning of—decision by Revenue Court that cess was recoverable and was not barred by limitation—suit to set aside the decision, whether maintainable.*

Section 45 of the Cess Act, 1880, provides :—

"If any instalment of local cess or part thereof payable to the Collector shall not be paid within fifteen days from the date on which the same becomes due, the amount of such instalment or part thereof may be recovered at any time within three years after it becomes due, with interest....."

* Letters Patent Appeal no. 15 of 1939, from a decision of Mr. Justice Varma, dated the 23rd January, 1939.

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Held, that the word "recovered", occurring in the section, means "sued for" or "recovered by means of an action".

Held, further, that the question whether cess is recoverable in a particular case under section 45 is one to be decided by the Revenue Court which issues the certificate, and if that Court decides, rightly or wrongly, that the cess is recoverable and the claim made for the recovery is not barred by limitation, a suit to set aside that decision is not maintainable.

Appeal by the plaintiff under clause 10 of the Letters Patent.

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

S. K. Mitra, for the appellant.

The Government Pleader, for the respondent.

FAZL ALI, J.—This is an appeal under the Letters Patent from a decision of Varma, J. in a second appeal.

It appears that plaintiff is the receiver of an estate which owns certain coal-mines in Dhanbad. In 1929-30 a certificate was issued under the Public Demands Recovery Act to recover certain arrears of cess payable by the estate and a sum of Rs. 52 was realised in May, 1930. In 1934-35 a fresh proceeding was started to realise the balance, and the plaintiff was obliged to deposit a sum of Rs. 438-2-3. Thereafter he brought the present suit to recover this amount on the allegation that the assessment of cess was wholly illegal and the proceeding by which the sum of Rs. 438-2-3 was realised from him was without jurisdiction.

The suit was resisted by the Secretary of State on various grounds and the trial Court as well as the first Court of appeal held that the suit could not succeed. The plaintiff thereupon preferred a second appeal which was heard by Varma, J. In this

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appeal the points raised by him were—first, that the proceedings of 1934-35 were without jurisdiction inasmuch as two certificates could not be issued in respect of the same demand; and, secondly, that the certificate Court could not under section 45 of the Cess Act recover the said amount more than three years after it became due. Both these points have been decided against the plaintiff by Varma, J., and hence this appeal under the Letters Patent.

As to the point that two certificates were issued in regard to the same demand, Varma, J. observed as follows:—

"Now, with regard to the first part of the argument I must say at once that in spite of the strenuous efforts of Mr. Mitra he has not been able to refer to any materials on the record which could satisfy me that two certificates were actually issued, and although I agree with the proposition of law that two certificates could not be issued for the same period, on the question of fact this part of his contention must fail."

Notwithstanding these observations, it was contended on behalf of the appellant that in fact two certificates were issued, and learned Counsel for the appellant pressed us to allow him an opportunity to produce certain papers as additional evidence to establish his contention.

Now, the judgments of the first two Courts clearly show that the contention raised on behalf of the appellant is an entirely new one. From the judgment of the learned Munsif it appears that one of the issues framed in the suit was—

"whether the certificate proceedings of 1934-35 were illegal, without jurisdiction and barred by limitation."

In discussing this issue, the learned Munsif has set out the case put forward before him on behalf of the plaintiff in these words:—

"His next contention is that there was certificate of non-payment issued against him which was put into execution in certificate

execution Case no. 107-R.C. 1929-30, that case was struck off in 1930 and then more than three years after in 1934 a fresh execution of recovery of the unpaid amount was instituted by the certificate officer of Dhanbad, against him under case no. 171/R.C. of 1934-35; that this latter case was clearly time-barred....."

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From this it is quite clear that what the appellant contended before the Munsif was not that a second certificate had been issued in 1934-35 but that the execution proceedings of that year were time-barred inasmuch as they were instituted more than three years after the first execution proceeding. The learned District Judge also states in his judgment that the proceedings of 1934-35 were attacked before him on the ground that they were time-barred and the plea of limitation was

" based on an assertion of fact, viz., that the previous certificate case of 1929-30 was struck off in May, 1930, so that more than three years elapsed between the disposal of that certificate case and the filing of the next."

Thus it seems to me that neither before the Munsif nor before the District Judge it was seriously contended by the plaintiff that there were two successive certificates for the same dues. On the other hand, it appears that one of the main points urged on behalf of the plaintiff was that the proceedings of 1934-35 were execution proceedings and they were barred by limitation inasmuch as they were started more than three years after the termination of the first execution proceedings. In my view, the plaintiff cannot be allowed to abandon the case put forward by him before the Munsif and the District Judge and set up a new case in this Court. I am also of the opinion that the plaintiff cannot be allowed to produce any additional evidence at this stage. The power of this Court to admit additional evidence is limited by the provisions of Order XLI, rule 27, of the Code of Civil Procedure. This rule provides, amongst other things, first, that additional evidence shall be allowed only when the appellate Court requires any such evidence to be produced to enable it to pronounce judgment, or for any other

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substantial cause; and, secondly, that additional evidence shall not be allowed to be adduced unless the party who wishes to adduce it satisfies the appellate Court that such evidence, notwithstanding exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made. The present case does not satisfy any of these conditions. On the other hand, it appears to me that the plaintiff could have very well produced the documents which he is trying to produce now in the Courts which had to deal with the facts of the case. It is not the case of the plaintiff that these documents, notwithstanding exercise of due diligence, were not within his knowledge or could not be produced by him when the matter was before the trial Court or the lower appellate Court. The first point raised by the appellant must fail.

The next point urged on behalf of the appellant is that the proceeding of 1934-35 was without jurisdiction inasmuch as under section 45 of the Cess Act, the arrears of cess cannot be recovered more than three years after they became due. Section 45 of the Cess Act runs as follows:—

> "If any instalment of local cess or part thereof payable to the Collector shall not be paid within fifteen days from the date on which the same becomes due, the amount of such instalment or part thereof may be recovered at any time within three years after it became due, with interest, etc., etc....."

I entirely agree with the view expressed by Varma, J. that the word "recovered" in the section, means "sued for" or "recovered by means of an action". In my opinion, this is the only reasonable meaning which can be attributed to the expression. The cess which is payable under the Act may be recovered either under the Public Demands Recovery Act or by a suit. If the meaning attributed by the plaintiff to the expression is the meaning which the expression was intended to convey, it follows that in many cases cess will become

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irrecoverable, because the proceedings instituted to recover it may be delayed for reasons beyond the control of the plaintiff. In my opinion, it would be wholly unreasonable to construe the expression in the manner in which the plaintiff asks us to construe it.

There is also a further answer to the plaintiff's contention. The question whether cess was recoverable in this case under section 45 of the Act was one to be decided by the Revenue Court which issued the certificate, and if that Court has decided, rightly or wrongly, that the cess was recoverable and the claim made for the recovery was not barred by limitation, a suit cannot be entertained in a Civil Court to set aside that decision. A Civil Court can entertain a suit only if the order of the Revenue Court is without jurisdiction and not because the decision pronounced by the Court is not correct. In my opinion no question of jurisdiction arises in this case and the plaintiff's suit was rightly dismissed.

I would, therefore, uphold the decision under appeal and dismiss the plaintiff's appeal with costs.

HARRIES, C. J.—I agree.

S.A.K.

Appeal dismissed.

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2——*Compromise—parties agreeing to be bound by the decision of the court—appeal, whether lies from the decision—test—intention of the parties.*

Where the parties agree to be bound by the decision of the Court with regard to a dispute which they specifically ask it to decide, no appeal lies from the decision.

Where the party invites the Court to adopt a procedure which is not contemplated by the Code of Civil Procedure, 1908, and in fact the procedure is extra cursum curiae, he cannot turn round and say that the Court is to blame for the very procedure which he invited the Court to follow. In each case the appellate Court will try to find as to what the true intention of the party was and the question whether an appeal lies or not will depend upon the conclusion arrived at by the Court. *Central India Spinning, Weaving and Manufacturing Company, Limited* v. *Khemraj Marwari* 261

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1——————*sections* 86(*6*) *and* 167—*landlord purchasing under a rent decree, whether bound to annul encumbrance—section* 86(*6*), *whether applies to non-transferable occupancy holding—Bihar Tenancy Act,* 1885 *(Act VIII of* 1885), *sections* 26-*B and* 26-*N, whether protect a mortgagee.*

Section 86(*6*) of the Bengal Tenancy Act, 1885, does not apply to a non-transferable occupancy holding.

A purchaser under a rent decree as such is bound by an encumbrance which he has not annulled under section 167 of the Bengal Tenancy Act, 1885, but if the purchaser happens to be the landlord, he, in his capacity as landlord, is entitled to disregard the encumbrance if not made with his consent, and may take possession of the purchased holding and may successfully maintain it in opposition to the claims of the encumbrancer.

Sections 26-B and 26-N of the Bihar Tenancy Act, 1885 (since repealed by Bihar Act XI of 1938), which in terms apply to transfers by sale, exchange, gift or will do not apply to mortgages and cannot, therefore, protect a mortgagee. *Sree Sree Ramchanderji* v. *Hem Chandra Singh* 184

2——————*section* 167. *See* no. 1, *supra* 184

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BIHAR AND ORISSA MUNICIPAL ACT, 1922—*sections* 58, 62 *and* 172—*municipality, whether has an unrestricted power to sell or lease roadway—sections* 62 *and* 172(*f*), *scope of—owner of land abutting on a roadway, whether entitled to access at all points on his boundary.*

The owner of land abutting on a roadway is entitled to access to that roadway at all points along the whole length of his boundary.

The power to sell, lease, exchange, or otherwise dispose of any land, given to the Commissioner by section 62 of the Bihar and Orissa Municipal Act, 1922, is not confined to land which has been acquired by the municipality under that section but extends to land which is vested in the municipality by reason of section 58 of the Act.

The word " land " in section 62 includes a road.

But section 62 does not give an unrestricted power to the municipality; it does not give it a right to lease a road or any part of it if such road is still required for the purposes of the Act, that is, as a public road.

Clause (*f*) of section 172 of the Act must be read with the preceding clauses and, therefore, the power of sale or of leasing given in that clause must be confined to cases coming within the general scope of the section. *Patna City Municipality* v. *Dwarka Prasad Sinha* ... 735

BIHAR MONEY-LENDERS ACT, 1938—

1——————*section* 11, *whether void—Government of India Act*, 1935 (25 *and* 26 *Geo. V., Ch.* 42), *sections* 100 *and* 107.

Per curiam :—The Provincial Legislature in enacting section 11 of the Bihar Money-Lenders Act, 1938, has also legislated with regard to the subject " contracts " of the Concurrent List, and, therefore, this section, being repugnant to an " existing Indian law ", is void under section 107(1) of the Government of India Act, 1935.

Per WORT, J.—Section 100 of the Government of India Act, 1935, makes it clear that the Federal Legislature is given exclusive power to legislate with regard to subjects enumerated in List I of the Seventh Schedule, and those powers are untramelled by the powers given to the Provincial Legislature in respect to the subjects enumerated in the Provincial List and the Concurrent List. The power given to the Provincial Legislature in the concurrent field is cut down by the exclusive power granted to the Federal Legislature, and, finally, the exclusive power given to the Provincial Legislature to legislate in its own field under List II is conditioned by the exclusive power granted to the Federal Legislature with regard to List I and the concurrent power under List III.

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BIHAR MONEY-LENDERS ACT, 1938—*contd.*

The expression " subject to the provisions of this section " in section 107(*1*) of the Government of India Act, 1935, refers to those provisions in sub-section (*2*) under which on certain conditions a Provincial law, although repugnant to an " existing Indian law ", may yet have effect in the Province in which it was enacted; it has no reference to the validity or otherwise of the Federal or Provincial legislation.

The principle *generalibus specialia derogant* may be applied in testing the question under the first part of section 107(*1*) whether the Federal Legislature is competent to enact legislation with regard to a subject, as, for instance, the power to legislate in the field of Contract may be limited by the application of the principle by excluding from that subject the special subject ' money-lending '. But it cannot be applied for the purpose of deciding whether the " existing Indian law " relates to a subject in the Concurrent List.

Section 11 of the Money-Lenders Act, 1938, deprives the court of the discretion given to it under section 3 of the Usurious Loans Act, 1918, in cases in which the circumstances proved admit of the exercise of a discretion, and is opposed to the express provision of the law laid down in the Usury Laws Repeal Act, 1855, in cases to which the Usurious Loans Act does not apply; that being so, section 11 is repugnant to an " existing Indian Law " and is, to the extent of the repugnancy, void.

Per DHAVLE, J.—Section 2 of the Usury Laws Repeal Act, 1855, is the part of the " existing Indian law " as defined in section 311(*2*) of the Government of India Act, 1935, and relates to the law of " contract ". Section 11 of the Bihar Money-Lenders Act, 1938, is repugnant to it and, therefore, section 2 of the Usury Laws Repeal Act prevails over section 11 of the Money-Lenders Act which must, to the extent of the repugnancy, be treated as void.

Conflicts might arise not only when the two kinds of Legislatures operate in the concurrent field, but also when one Legislature operates in its exclusive field and another in its exclusive or in the concurrent field; and these all seem to have been provided against by the double method of imposing a limitation on the powers of Provincial Legislatures by making them " subject to " the powers of the Federal Legislature, while conferring powers on the latter " notwithstanding " the powers of the former in the Provincial no less than in the concurrent field; which legislation is to prevail in case of actual conflict in any fields is laid down in the first sub-section of section 107 of the Government of India Act, 1935.

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BIHAR MONEY-LENDERS ACT, 1938—*concld.*

The exclusive power given to the Provincial Legislature over " money-lenders and money-lending " cannot be enlarged so as to include an incidental invasion of the dominant law in the concurrent field, even if such invasion could be regarded as necessarily incidental to the effective exercise of the powers by such legislature.

Per MANOHAR LALL, J.—It will be worse than useless, if not dangerous, to apply the principles which have been enunciated by the Privy Council to govern the construction of the Canadian Act, as governing the construction of the Bihar Money-Lenders Act, 1938, which is framed entirely on different lines and based upon wholly different schemes of policy. The two Acts are not in *pari materia.*

It is not permissible to apply the doctrine of " the general and special " as laid down in the Canadian cases to the consideration of the Indian Act.

Section 11 of the Money-Lenders Act, 1938, comes into conflict with, and is repugnant to, the provisions of section 2 of the Usury Laws Bengal Act, 1855, section 3 of the Usurious Loans Act of 1918 and section 37 of the Contract Act, 1872. *Sadanand Jha* v. *Aman Khan* 13

2——————*section* 11, *whether controls the powers of Courts with respect to final decrees. See* Mortgage, no. 4 ... 141

BIHAR RESTORATION OF BAKASHT LANDS AND REDUCTION OF ARREARS OF RENT ACT, 1938—*section* 15, *whether void—section, whether applies to proceedings for execution of decrees—Government of India Act,* 1935 (25 & 26 *Geo. V, Ch.* 42), *section* 107—*Bihar Tenancy Act,* 1885 (*Act VIII of* 1885), *section* 143—*order reducing amount of decree in execution, whether appealable—revisional powers, whether to be exercised when order is appealable—Code of Civil Procedure,* 1908 (*Act V of* 1908), *sections* 47 *and* 115.

The procedure and regulation of rent and revenue Courts being exclusively within the purview of the Provincial Legislature, it is open to that Legislature to amend section 143 of the Bihar Tenancy Act, 1885 (which, with certain reservations, makes the provisions of the Code of Civil Procedure applicable to rent suits) and provide a new procedure for the trial of rent suits.

Therefore, section 15 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938, which by implication authorizes the Court not to execute decrees for arrears of rent beyond a certain sum, is not repugnant to any existing law relating to the Concurrent List so as to be void under section 107 of the Government of India Act, 1935.

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BIHAR RESTORATION OF BAKASHT LANDS AND REDUCTION OF ARREARS OF RENT ACT, 1938—*concld.*

Held, further, that section 15 of the Act applies to proceedings for the execution of decrees.

An order reducing the amount of decree in execution, under section 15 of the Act, comes within the purview of section 47 of the Code of Civil Procedure, 1908, and is therefore appealable.

It is the established practice of the High Court not to exercise its revisional powers in cases where a party entitled to appeal has not appealed. *Syed Razaur Rahman* v. *Udit Singh* 694

BIHAR TENANCY ACT, 1885—

1 ————*sections 26-B and 26-N, whether protect a mortgagee. See* Bengal Tenancy Act, 1885, no. 1 ... 184

2————*section 60, scope and applicability of—arrears of rent—proprietor's right to such arrears devolving on his heir—elder son registered under Bengal Land Registration Act, 1876 (Beng. Act VII of 1876)—suit for rent by elder son—tenant's plea that rent was due to younger son also, whether tenable.*

The registered proprietor of an estate is not barred from obtaining a full decree for the rents due to the estate to the extent of the interest for which he is recorded notwithstanding that he may in reality have title to a smaller interest or even to no interest at all.

Section 60, Bihar Tenancy Act, 1885, is intended to apply to cases where rent has accrued due to the proprietor of an estate and is still unpaid. The fact that something happens to the proprietor will not affect the character of the rent or the nature of this liability, nor will rent cease to be rent due to the proprietor.

K was the proprietor of an impartible estate in which the defendants held an occupancy holding. On *K*'s death the estate devolved on his leder son *R*. The name of *R* was registered as sixteen annas proprietor under the Bengal Land Registration Act, 1876. *R* instituted a suit for arrears of rent for four years. The rent for the first three years had accrued due in the life-time of *K*. The defence was that *R* and *B*, the younger son, both were entitled to the rent of the first three years, and the suit for the whole rent by *R* alone was not maintainable.

Held, that the defence was barred under section 60 of the Bihar Tenancy Act, 1885. *Rama Prasad* v. *Maharaja Bahadur Ram Ran Vijay Prasad Singh* .. 746

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BIHAR TENANCY ACT, 1885—*contd.*

3——————*sections* 65 *and* 167—*mortgagee of a part of holding, rights of, against purchaser in execution of rent decree—mortgage not annulled—purchaser, whether has priority over mortgagee—mutual rights of redemption, whether exist.*

A purchaser (not being a landlord) of a holding in execution of a decree for rent has a charge for the amount of the decree for rent as against the holder of a mortgage of a part of the holding executed before the purchase, and is entitled to the same rights as the purchaser of a holding in execution of a decree passed on a prior mortgage.

If a purchaser in execution of a rent decree fails to annul an incumbrance under section 167 of the Bihar Tenancy Act, 1885, the incumbrance will continue but he will not thereby lose his priority over the holder of the incumbrance.

Therefore, a mortgagee is entitled to redeem or otherwise exercise his right of redemption against a purchaser of the holding at a rent sale who has taken no steps to annul the mortgage under section 167. The latter too, being also a purchaser of the equity of redemption, is entitled to redeem the mortgage, if it has not been formally annulled. *Mahadev Maharaj* v. *Jagdev Singh* 676

4——————section 74—kathiari, *whether is an abwab——landlord, when entitled to* kathiari—abwab, *meaning of.*

The law as to *abwab* has not been changed by the Bihar Tenancy Act; what was *abwab* before is *abwab* now and what was not an *abwab* before has not been made an *abwab* by the new Act. *Kathihari* is payable by weavers to their landlords not on the basis of land occupied by them but on the basis of looms which they work and is not an *abwab*. ...

A landlord is entitled to *kathihari*, (*i*) when the homestead is recorded as belagan and the kathiari is payable in respect of it, or (*ii*) where *kathihari* was one of the terms on which land was settled. *Haluman Prasad Mahaseth* v. *Puran Tatma* 190

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6——————*section* 153—*occupancy holding—mafi on condition of rendering service as jeth raiyat—tenant's claim to remission on dispensation with services—nature of tenancy—decision as to annual rent payable or dispute regarding tenant's status—second appeal, whether maintainable. See* Landlord and Tenant no. 3 502

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7——————*section* 167—*mortgagee of a part of holding, rights of, against purchaser in execution of rent decree—mortgage not annulled—purchaser, whether has priority over mortgagee—mutual rights of redemption, whether exist. See* Bihar Tenancy Act, 1885, no. 3 676

8——————*Schedule III, article* 2(*b*)(*ii*), *whether retrospective—suit for produce rent instituted after the amending Act came into force, whether would be governed by shorter period of limitation—Bihar Tenancy (Amendment) Act,* 1934 (*Bihar and Orissa Act VIII of* 1934).

There is a difference between a case where a statute amending the law of limitation comes into force immediately and a case where a period of time is given between the passing of the Act and the date upon which it comes into force during which suits could be brought which would otherwise be barred by the amending Act.

Where, in an Act amending and shortening a period of limitation, a period of time is given between the passing of the Act and the date upon which it is intended that it should come into force, such an Act must be given a retrospective effect.

Therefore, the shorter period of limitation of one year as embodied in the new Bihar Tenancy Act is applicable to a suit for produce rent, the cause of action for which had accrued before the passing of the amending Act, and which is instituted after the 10th of June 1935, when the new Act came into force.

Per AGARWALA, J.—The law of limitation being a branch of the adjectival law, the statute of limitation applicable to a particular suit or legal remedy is that which is in force at the date when the suit is instituted or the remedy is sought and not the statute which was in force at the time of the transaction or vesting of the cause of action on which the suit or remedy is based. *Shaikh Reyasat* v. *Gopi Nath Missir* 1

9——————*Schedule III, Article* 2(*b*)(*ii*), *whether retrospective—suit for produce rent instituted after the Act came into force—accrual of cause of action before passing of the Act—suit, whether governed by shorter period of limitation.*

A suit for produce rent instituted after the Bihar Tenancy Act, 1885, came into force is governed by the period of limitation provided by that Act, although the cause of action for the claim accrued before the passing of the new Act.

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BIHAR TENANCY ACT, 1885—*concld.*

A statute which takes away or impairs rights acquired under the existing law must not be construed to have a retrospective force, unless by express words or necessary implications it appears that such was the intention of the legislature which passed it.

An Act of limitation, being a law of procedure, will ordinarily govern all proceedings, to which its terms are applicable, from the moment of its enactment; but this rule must admit of the qualification that when the retrospective application of the statute of limitation would destroy vested rights, or inflict such hardship or injustice as could not have been within the contemplation of the legislature, then the statute is not, any more than any other law, to be construed retrospectively.

There is no rigid rule that where an Act does not come into force immediately but allows some time for the enforcement of existing causes of action, it must be inferred that the Act was intended to be retrospective.

Where, however, it appeared that the litigants had a reasonable opportunity of enforcing their existing causes of action between the date when the Bihar Tenancy Act, 1885, was published in the Gazette and the date when it came into force, *held*, that the provision embodied in article 2(*b*)(*ii*) of Schedule III of the Act was intended to be retrospective so as to affect existing causes of action. *Biranchi Singh* v. *Nand Kumar Singh* ... 355

BIHAR TENANCY (AMENDMENT) ACT, 1934—*suit for produce rent instituted after the amending Act came into force, whether would be governed by shorter period of limitation. See* Bihar Tenancy Act, 1885, nos. 8 and 9 ... 1, 355

CENTRAL PROVINCES LAND-REVENUE ACT, 1881—*section 65A—protected thikadar, whether liable to ejectment for non-payment of rent—sub-section (7), meaning and significance of.*

A landlord is not entitled to obtain a decree for ejectment against a protected thikadar, within the meaning of section 65-A of the Central Provinces Land-Revenue Act, 1881, on the ground of the latter's failure to pay the thika rent.

All that sub-section (7) of section 65-A of the Act means is that nothing in the previous sub-sections is to affect the landlord's right to eject a protected thikadar on the grounds given in sub-clauses (*a*) and (*b*) of the sub-section, provided such a right is given to him by any substantive law for the time being in force which is not inconsistent with the provisions of the Act. The sub-section gives the landlord no new right but merely saves rights in certain instances which he may have under the general law for the time being in force. *Lal Sadanand Singh* v. *Madan Mohan Sahu Gaontia* 509

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CESS ACT, 1880—*section* 45—" *recovered* ", *meaning of —decision by Revenue Court that cess was recoverable and was not barred by limitation—suit to set aside the decision, whether maintainable.*

Section 45 of the Cess Act, 1880, provides :—

" If any instalment of local cess or part thereof payable to the Collector shall not be paid within fifteen days from the date on which the same becomes due, the amount of such instalment or part thereof may be recovered at any time within three years after it becomes due, with interest....."

Held, that the word " recovered " occurring in the section means " sued for " or " recovered by means of an action ".

Held, further, that the question whether cess is recoverable in a particular case under section 45 is one to be decided by the Revenue Court which issues the certificate, and if that Court decides, rightly or wrongly, that the cess is recoverable and the claim made for the recovery is not barred by limitation, a suit to set aside that decision is not maintainable. *Mangtu Lal Bagaria* v. *Secretary of State for India in Council* ... 854

CHOTA NAGPUR ENCUMBERED ESTATES ACT, 1876—*sections* 2 *and* 12*A—joint Hindu family, whether entitled to protection under the Act—karta applying for protection in a representative capacity—whole family, whether deemed to be " holder "—disqualification under section* 12*A, whether attaches to entire family property—subsequent partition—disqualification, whether still exists—person affected by the Act, whether debarred from borrowing money—acknowledgment of liability by a co-mortgagor not acting as agent of other mortgagors—effect—Limitation Act,* 1908 (*Act IX of* 1908), *sections* 19 *and* 21.

When an estate is placed under the management of the Collector or some other officer under the provisions of the Chota Nagpur Encumbered Estates Act, 1876, upon the application of a person who is the karta of a joint Hindu family governed by the law of Mitakshara, such person being described as a " holder " in the notification issued under section 2 of the Act, the disqualification referred to in section 12A of the Act applies not only to that person but to all the members of the joint family who were the owners of the estate on the date of the application.

The expression " holder " is used in the Act in the same sense as the expression " holder of land " which occurs in the preamble to the Act and as such applies to all such person or persons as own any particular property.

There is nothing in the Act to prevent the manager of a joint Hindu family from applying for protection under

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the Act on behalf of the entire family, and when such an application is made by him in a representative capacity, the whole family and not he alone will be deemed to be the holder of the estate.

There is also nothing in the Act to suggest that a Mitakshara joint family is not entitled to protection under the Act.

If a disqualification under section 12A of the Act attaches to the alienation of the entire estate as it existed at the time of the assumption of charge, a subsequent partition after the release of the estate can in no way get rid of that superimposed disqualification.

Section 12A only prohibits the alienation of the property or the creation of a charge thereon, but does not debar the person affected by the Act from borrowing money.

An acknowledgment of liability by a co-mortgagor, who is not acting as the agent of the other mortgagors, gives a fresh start to the period of limitation only against the mortgagor who makes the acknowledgment. *Rameshwar Dayal Singh* v. *Ram Das Sahu* 434

CHOTA NAGPUR TENANCY ACT, 1908—

1——*sections* 181, 182 *and* 231—*decree for rent—Deputy Commissioner, whether has power to transfer it for execution to a Civil Court—application for execution before Civil Court on transfer, whether loses its character as a proceeding under the Act—limitation—section* 181, *whether applicable—previous execution dismissed on part satisfaction—succeeding application, whether can be treated as one in continuation—limitation—section* 231, *applicability of—matter agitated and decided in earlier execution—same matter, whether can be raised in subsequent execution—res judicata.*

Where a matter is agitated and decided against a judgment-debtor in an earlier execution, it is not open to him to raise it in a subsequent execution, the principle of res judicata being a bar to the contention.

Section 182, Chota Nagpur Tenancy Act, 1908, provides :—

"A decree or order passed by a Deputy Commissioner under the Act may be executed either by his own Court or by any other prescribed Court."

"Deputy Commissioner" in this section includes any Deputy Collector trying a rent suit and a "prescribed Court", under the Government notification, includes any Court to which the Deputy Commissioner of the district transfers the application for execution.

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CHOTA NAGPUR TENANCY ACT, 1908—*contd.*

Held, (*i*) that the " prescribed Court " contemplated by section 182 of the Act and the notification thereunder is not confined to a revenue Court having powers under the Act, but includes a Civil Court;

(*ii*) that, therefore, a rent court has power to transfer its decree for execution to the Court of a Munsif;

(*iii*) that when an application for execution is before a Civil Court on transfer it does not cease to be a proceeding under the Act, and, therefore, that the limitation for such an application would be that provided by section 181 (or other section) of the Act.

M obtained a decree for rent in the Rent Court on the 11th July, 1932, and on an application by the decree-holder the decree was transferred for execution to the Court of a Munsif and execution proceedings were started on the 19th January, 1933. The properties under attachment were proclaimed for sale; but on the 16th April, 1934, an order of the Commissioner under section 2 of the Chota Nagpur Encumbered Estates Act protecting from sale one of the judgment-debtors was received in the executing Court. In the mean time some amounts of cash had been realised in the course of the execution and the Munsif ordered on the same date that the execution case be dismissed on part satisfaction with costs. The next step taken was the presentation on the 23rd December, 1935, of another application to execute the decree.

Held, (*i*) that the order of the 16th April was a final order disposing of the execution and the succeeding application to execute the decree must be considered to be a fresh application and to be barred by limitation.

(*ii*) that even if the second application be treated as an application to revive or restore the previous execution, it was barred under section 231 of the Chota Nagpur Tenancy Act, 1908. *Lal Inderjit Nath Sahi Deo* v. *Maharaja Pratap Udai Nath Sah Deo* 378

2——————*section 215(3)—orders made on applications for setting aside sale, whether appealable—practice—phrase " strike off ", inappropriate use of—appellate Court, whether entitled to call for a private report from lower Court—procedure, whether irregular.*

The terms of section 215(3) of the Chota Nagpur Tenancy Act, 1908, make it clear that orders passed on applications to set aside sales are within the section and are, therefore, appealable.

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CHOTA NAGPUR TENANCY ACT, 1908—*concld.*

If an executing Court wants to dispose of an application finally, it should use clear and unambiguous language, such as "the application is dismissed". The phrase "strike off" which is really meaningless and is at any rate capable of a number of meanings, should not be used.

An appellate Court is not entitled to call for a private report from the lower Court for its information; it must decide an appeal upon the materials before it and if it cannot do so, it can only act in the manner provided by the Code of Civil Procedure, 1908. *Maharaja Pratap Udai Nath Shah Deo* v. *Sukhdeo Prasad Bhagat* 649

CODE OF CIVIL PROCEDURE, 1908—

1——————*section* 21—*sale by executing Court of property outside its territorial jurisdiction—no objection to confirmation of sale—judgment-debtor, whether estopped from impugning the sale—estoppel, whether extends to another execution creditor purchasing the same property. See* Execution, no. 6 670

2——————*section* 47—*Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act*, 1938 (*Bihar Act IX of* 1938), *section* 15—*order reducing amount of decree in execution, whether appealable under section* 47. *See* Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938 694

3——————*section* 48—"*decree sought to be executed*", *meaning of—Limitation Act*, 1908 (*Act IX of* 1908), *article* 182(4)—*section* 48 *of the Code, whether affected by article* 182(4)—*amendment of decree—period of twelve years under section* 48, *whether is to be calculated from the date of amended decree.* ...

Section 48, Code of Civil Procedure, 1908, is not controlled by the provisions of Article 182(4) of the Limitation Act, 1908, and, therefore, the amendment of a decree does not afford a new starting point for limitation so as to extend the period of twelve years fixed by section 48. *Musammat Dulhin* v. *Mahanth Harihar Gir* 395

4——————*Section* 60 *and Order XXI, rule* 53(4)—*preliminary decree in a suit for dissolution of partnership and accounts, whether is attachable.*

A preliminary decree in a suit for dissolution of partnership and account is attachable under section 60 of the Code of Civil Procedure, 1908, and may be attached in the manner prescribed by Order XXI, rule 53(4). *Ratanshi Hirji Bhojraj* v. *Tricumji Jiwandas* ... 688

5——————*section* 66—*plaintiff's claim based on allegation that auction-purchase was made by him jointly with certified purchaser—suit not against certified purchaser—section, whether operates as a bar.*

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CODE OF CIVIL PROCEDURE, 1908—*contd.*

Section 66, Code of Civil Procedure, 1908, operates as a bar to a claim by a person who alleges that the actual purchase was either on behalf of himself exclusively or of himself jointly with the certified purchaser, whether the purchase is alleged to be in execution of an express agreement or otherwise. The fact that the principal claims only to have provided a part of the purchase money and to be entitled to only a share in the property purchased does not make any difference in principle.

Held, further, that section 66 would be a bar even if the suit is not brought against the certified purchaser, so long as the success of the plaintiff in the suit depends on proof of the alleged agreement. *Shiva Shanker Sah* v. *Manbharan Ray* 181

6——————*section 73 and Order XXI, rule 55—money deposited by judgment-debtor under rule 55 for satisfaction of a particular decree, whether is asset available for rateable distribution among other creditors.*

A sum of money paid into Court by a judgment-debtor, under Order XXI, rule 55, Code of Civil Procedure, 1908, to satisfy the decree of certain creditors at whose instance his property has been attached is an asset available for rateable distribution among his other creditors under section 73 of the Code.

Where there are several decrees outstanding against a judgment-debtor, and all the requirements of section 73 are complied with, the judgment-debtor cannot prevent rateable distribution by merely earmarking his payments for the benefit of one of the decree-holders.

Per MANOHAR LALL, J.—It is a well-known rule of construction that each part of a statute should be endeavoured to be construed in such a way that there may be no conflict with any part, if it can be done without doing any violence to the plain meaning of the language adopted by the legislature. If rule 55(*a*) is so read along with section 73 it seems clear that the decree can only be satisfied if the amount is available to the decree-holder in full satisfaction of his decree. *Satnarain Prasad Choudhury* v. *Mahabir Prasad Choudhury* 404

7——————*section 115—practice not to interfere where party entitled to appeal has not appealed. See* Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938 694

8——————*Order I, rule 8, and Order XXII, rule 4—abatement of appeal—some of the respondents permitted to represent the others in appeal—death of one or more of the respondents so representing—legal representatives not brought on record—appeal, whether abates—Court, duty of, in such cases.*

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CODE OF CIVIL PROCEDURE, 1908—*contd.*

The provisions of Order XXII of the Code of Civil Procedure, 1908, which relate to the death of a plaintiff or defendant cannot be applied to a case instituted or defended by a few persons on behalf of numerous persons under Order I, rule 8, of the Code.

Where, therefore, there are numerous respondents some of whom have been allowed, under Order I, rule 8, of the Code, to represent the others, the appeal does not abate if any of the persons appointed to represent the others dies and the legal representatives of the deceased are not brought on the record within time.

In such cases a duty is cast upon the Court to decide whether the respondents should be allowed to be represented by the surviving persons, or the original number should be maintained by adding some more respondents. *Rani Harsamukhi Dasi* v. *Agadhu Mohapatra* ... 723

9——————*Order II, rule 2—" cause of action ", meaning of—identity of evidence, whether a true criterion—three sale deeds executed on the same date by Hindu male owner—suit by heirs for setting aside two of the deeds on the ground of undue influence and want of consideration—suit decreed—subsequent suit based on similar grounds in respect of the third deed—suit, whether barred.*

The expression " cause of action " in Order II, rule 2, Code of Civil Procedure, 1908, means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

The cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour.

The correct test is whether the claim in a new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit, the identity of evidence is not the true criterion.

Where, therefore, a Hindu male owner had conveyed his several parcels of land to the same persons by three sale deeds executed on the same date, and after his death the plaintiffs, as his next heirs, brought a suit (which was decreed) for setting aside two of these sale deeds and for recovery of possession of the land covered by them on the

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CODE OF CIVIL PROCEDURE, 1908—*contd.*

ground that the deeds were without consideration and were executed under undue influence, and thereafter the plaintiffs brought another suit, based on similar grounds, in respect of the third deed;

Held, that the causes of action of the two suits were not identical and, therefore, that the later suit was not barred under the provisions of Order II, rule 2, of the Code of Civil Procedure, 1908. *Sheokumar Singh* v. *Beehan Singh* 789

10——————*Order II, rule 2—assignment of a part of a debt, whether valid. See* Transfer of Property Act, 1882, no. 1 839

11——————*Order XX, rule 11—instalment decree passed under rule 11(1)—Court, power of, to amend the decree under rule 11(2). See* Security Bond 719

12——————*Order XXI, rule 2—entry of satisfaction, when can be claimed—payment must be to decree-holder or his agent—plea as to decree-holder being benamidar, whether can be taken by judgment-debtor in execution proceedings. See* Execution no. 5 318

13——————*Order XXI, rule 22—application for execution against surety—death of surety—heirs not brought on record—heirs entering appearance—notice under rule 22, whether necessary. See* Execution, no. 1 761

14——————*Order XXI, rule 53(4)—preliminary decree in a suit for dissolution of partnership and accounts, whether is attachable. See no. 4, supra* 688

15——————*Order XXI, rule 54—attachment, whether creates any interest in or charge upon attached property. See* Mortgage no. 3 155

16——————*Order XXI, rule 55—money deposited by judgment-debtor, under rule 55, for satisfaction of a particular decree, whether is "asset" available for rateable distribution among other creditors. See* no. 6, *supra* 404

17——————*Order XXI, rule 63, suit under—prayer for injunction—Court-Fees Act*, 1870 (*Act VII of* 1870), *article* 17(*1*), whether still applicable. *See* Court-Fees Act, 1870, no. 3 828

18——————*Order XXI, rule 89—full decretal amount and compensation deposited in court within thirty days—application for setting aside sale not filed—sale, whether can be set aside.*

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CODE OF CIVIL PROCEDURE, 1908—*contd.*

An execution sale cannot be set aside under Order XXI, rule 89, Code of Civil Procedure, 1908, in the absence of an application for setting aside the sale, even though the full decretal amount together with compensation is deposited in court within thirty days. *Bhari Jena v. Gauranga Charan Sahu* 210

19——————*Order XXI, rule* 90(*1*), *proviso* (*i*) (*b*)—*deposit of security, whether must be made within thirty days of the sale—proviso, meaning of—amendment of rule* 90, *whether is ultra vires the rule-making powers of the High Court.*

All that the substituted proviso (*i*) (*b*) to sub-rule (*1*) of Order XXI, rule 90, of the Code of Civil Procedure, 1908, requires is that before the *admission* of an application to set aside the sale the necessary sum of money or security, unless dispensed with, must be deposited. The applicant can then be said to have deposited "with his application" such sum or security within the meaning of the proviso.

The Limitation Act only requires that the application be made within thirty days of the sale, and there is nothing in the substituted proviso to suggest that the money or other security must be deposited within limitation.

Where, therefore, no deposit accompanies an application to set aside a sale, the Court has no power to reject such application forthwith. On the other hand, it must give the applicant an opportunity to urge that the deposit should be dispensed with or to deposit the full or lesser amount or other security before some date fixed for admission. If the orders of the Court are complied with, the application must be admitted and heard on the merits provided that it complies also with proviso (*i*) (*a*).

Query: Whether the amendment made by the Patna High Court to Order XXI, rule 90, of the Code of Civil Procedure, 1908, is ultra vires the rule-making powers of the High Court? *Brij Behari Lal* v. *Firm Srinivas Ram Kumar* 327

20——————*Order XXI, rules* 100 *and* 103—*suit—limitation, See* Mortgage, no. 3 155

21.——————*Order XXII, rule* 4—*abatement of appeal—some of the respondents permitted to represent the others in appeal—death of one or more of the respondents so representing—legal representatives not brought on record—appeal, whether abates—Court, duty of, in such cases. See* no. 8, *supra* 723

22——————*Order XXII, rule* 10—*transfer pendente lite—assignee not made party—effect. See* Mortgage, no. 4 ... 141

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CODE OF CIVIL PROCEDURE, 1908—*contd.*

23——————*Order XXXII, rule 3(5)—minor defendant attaining majority during pendency of suit—no step taken to proceed against the defendant as major—decree, whether is a nullity.*

There is no provision in law which makes it incumbent upon a plaintiff to keep himself informed as to the date when a minor defendant, who was sued as such, became a major and then to apply to have the guardian discharged and to proceed with the suit against the defendant as a major.

A minor defendant who comes of age may, if he thinks fit, come on the record and conduct the defence himself. If, however, he does not do so and allows the case to proceed as though he was still a minor without bringing to the notice of the Court the fact of his having attained majority, then he must be deemed to have elected to abide by the judgment or adjudication by the Court with respect to the matters in controversy on the basis of the suit at the time.

Therefore, a decree by a competent court against a minor, who had during the pendency of the suit attained majority but who continued to be shown on the records as a minor represented by a guardian, is not a nullity. *Ratan Prasad Marwari* v. *Bridhi Chand Shoroff* ... 539

24——————*Order XXXII, rules 5 and 7—minor—reference to arbitration in contravention of rule 7—decree based on award, whether void or voidable—minor, whether can impeach the decree in execution proceeding—void and voidable decrees, difference between—minor effectively represented by a guardian—absence of formal appointment—effect—questions of effective representation and prejudice, whether can be investigated in execution proceeding.*

A decree based on an award made on a reference which is in contravention of Order XXXII, rule 7, Code of Civil Procedure, 1908, is not void but voidable at the instance of the minor, and, therefore, cannot be impeached in an execution proceeding relating to that decree.

A decree is void when the Court which passed it had no jurisdiction, whether territorial or pecuniary or over the subject-matter or in respect of the judgment-debtor's person, to make it. Where, however, the Court has complete jurisdiction to hear a case but passes a decree in disregard of some provisions of law, the decree is voidable and is binding until it is set aside in an appropriate proceeding.

Where a guardian for a minor defendant appears in the suit and effectively represents him, although no formal order of appointment is made, the decree cannot be said to be invalid against the minor unless prejudice is shown.

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But the questions whether in a particular case a minor was effectively represented and whether he had suffered any prejudice cannot be investigated in an execution proceeding. *Umar* v. *Mahabir Lal Sahu* 708

25——————*Order XXXII, rule 7, and Schedule II, paragraph 1—reference to arbitration by guardian or next friend of a minor party—leave of court, whether must be obtained—paragraph 1 of Schedule II, whether is subject to the provisions of Order XXXII, rule 7—omission to obtain leave, whether renders the award and the decree voidable against the minor.*

Paragraph 1 of the second Schedule to the Code of Civil Procedure, 1908, is subject to the provisions of Order XXXII, rule 7, of the Code.

Where, therefore, the next friend or guardian ad litem of a minor party agrees to join in a reference to arbitration, the leave of the court to do so on behalf of the minor must first be obtained by the next friend or guardian ad litem and expressly recorded in the proceedings in compliance with the terms of Order XXXII, rule 7, of the Code; the omission to obtain leave renders an award or any decree based upon it voidable at the instance of the minor. *Kedar Nath Sahu* v. *Basant Lal Sahu* 271

26——————*Order XXXIV, rule 1—attachment, whether creates any interest in or charge upon attached property—attaching creditor whether is necessary party to mortgage suit. See* Mortgage, no. 3 155

27——————*Order XLI, rule 33, scope of—appellate court's power to interfere, extent of—power not to be exercised in such a way as to interfere with the provisions of any other enactment.*

Order XLI, rule 33, of the Code of Civil Procedure, 1908, is intended to enable the appellate court, where its decision interferes with or modifies or extends the decision of the lower Court, to give effect to that decision by interfering, if necessary, even with rights and liabilities of those who have not in fact appealed from the decision of the trial Court; but it ought not to be applied to cases where there has been a distinct and separate decree against persons who have not chosen to appeal.

Although Order XLI, rule 33, gives wide power to the Court, it should not be exercised in such a way as to interfere with the provisions of other enactments as, for instance, the Court-fees Act, 1870. *Suraj Prakash Puri* v. *Sant Lal Singh* 768

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CODE OF CIVIL PROCEDURE, 1908—*contd.*

28——————*Order XLIII, rule 1(w), and Order XLVII, rules 4(1) and 7—right of appeal, whether restricted by the grounds set out in rule 7 of Order XLVII—rule 4(1), meaning and scope of.*

The right of appeal granted by Order XLIII, rule 1(*w*), Code of Civil Procedure, 1908, is subject to, and restricted by, the grounds set out in Order XLVII, rule 7, of the Code.

Order XLVII, rule 4(*1*), of the Code, cannot be interpreted to mean that its provision is contravened if the Court grants the application though there is not sufficient ground for a review. *Harballav Prasad Chowdhury* v. *Jagballav Prasad Chowdhury* 777

29——————*Order XLVII, rules 4(1) and 7—right of appeal given by Order XLIII, whether restricted by the grounds set out in rule 7—4(1), meaning and cope of. See* no. 28, *supra* 777

30——————*Schedule II, paragraph 1, whether is subject to the provisions of Order XXXII, rule 7—omission to obtain leave, whether renders the award and the decree voidable against the minor. See* no. 25, *supra* 271

31——————*Schedule II, paragraphs 14 and 16(2)—arbitration—award—decree based on award, when appealable—decree based on an invalid award, whether appealable—commissioner and arbitrator, difference between the powers of.*

No appeal lies from a decree based on an award unless the decree is in excess of or not in accordance with the award. No appeal is maintainable on the ground that the award is void or invalid or illegal.

There is ample provision in paragraphs 14 and 15 of Schedule II of the Code to enable the court to which the award is submitted to refuse to give effect to the award if in its opinion it is either void or invalid or illegal. If, however, the award is accepted it means that in the opinion of the court it is neither void nor invalid and the Legislature does not appear to have intended that the opinion of the court should be challenged in appeal.

Paragraph 16 merely gives effect to the principle of finality of awards and the intention of the Legislature evidently is that an award should be subjected to the scrutiny of one court only, namely, the court through whom the reference is made to arbitration and not that court and an appellate court.

The essential difference between a commissioner appointed to effect a partition and an arbitrator appears to be that the former is an officer selected and appointed by the court, in whose selection the parties have not, as of

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right, any choice, whereas the latter is a person selected by the parties in whose selection the court has no choice. In the former case the parties have expressed no consent to be bound by the decision of the commissioner who is appointed by the court and whose decision the parties may challenge before the court passing a final decree. In the latter case they have expressed such consent and cannot challenge the arbitrator's decision on questions of law and fact except on the limited grounds mentioned in the Second Schedule of the Code. *Radhey Lal* v. *Kanhai Lal* ... 193

CODE OF CRIMINAL PROCEDURE, 1898.—

1——————*sections 54(1) and 83—magistrate of a Native State, whether can issue warrant directing officers in British India to arrest a State subject—Indian (Foreign Jurisdiction) Order in Council, 1902—notifications, dated March, 1912, and January, 1937, effect of—arrest and detention in terms of later notification, whether legal—notifications, whether ultra vires—Extradition Act, 1903 (Act XV of 1903) —absence of warrant—arrest, whether permissible—section 54(1), scope of.*

A magistrate of a native State cannot issue a warrant directing the police or officials in British India to arrest a person accused of committing a crime within a native State.

Section 83 of the Code of Criminal Procedure, 1898, contemplates cases where a magistrate in British India issues a warrant for the arrest of a person in some place in British India outside his jurisdiction. It does not empower the magistrate of a native State, which is outside British India, to issue a warrant for the arrest of a person in British India, even if such native State may have adopted the Code as a part of the law of the State.

Where, however, by a notification, dated the 14th of January, 1937, the Governor-General in Council in exercise of the powers conferred by the Indian (Foreign Jurisdiction) Order in Council, 1902, and all other powers enabling him in that behalf directed that—

"all criminal processes issued in a manner similar to that prescribed by the Code of Criminal Procedure, 1898, by a Magistrate having jurisdiction in any State in India shall be acted upon and executed in railway lands lying within such state by all magistrates and police officers having jurisdiction in such railway lands under the same conditions and in the same manner as if such processes had been issued by a Magistrate having jurisdiction in such railway lands.....".

Held, (*i*) that under the terms of the notification the arrest by the Government Railway Police of a subject of a native State on the premises of a railway station within the State (which, by an earlier notification, were placed under the jurisdiction of certain magistrates and officers in British India) in pursuance of a warrant issued by the State authorities was legal;

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(*ii*) that the notification contemplates that there should be some enquiry as to whether the person arrested is or is not a subject of the State which has issued the warrant;

(*iii*) that, therefore, the only course which the railway police could follow in executing the warrant issued by the magistrate was to produce the arrested person before a magistrate having jurisdiction over railway lands: such a magistrate could then make the necessary inquiry and order detention of the arrested man until arrangements were made for taking him to the native State;

(*iv*) that the notifications respectively, dated the 28th of March, 1912, and the 14th of January, 1937, were not ultra vires the Indian (Foreign Jurisdiction) Order in Council, 1902.

Held, further, that in order to justify an arrest under section 54(*1*), paragraph 7, Code of Criminal Procedure, 1898, there must be in existence as a fact, as opposed to any belief which may be entertained by any person, a warrant which has been issued under the Extradition Act, 1903.

What is a reasonable complaint or suspicion within section 54(*1*) depends on the circumstances of each case but it must be founded on some definite fact or some tangible proof which is sufficient to establish in the mind of a reasonable police officer the reasonableness or credibility of the charge, information or suspicion. *Haramohan Patnaik* v. *King-Emperor* 121

2——————*section* 83—*magistrate of a native State, whether can issue warrant directing officers in British India to arrest a State subject. See* no. 1, *supra* 121

3——————*sections* 133 *and* 139*A*—*Penal Code*, 1860 (*Act XLV of* 1860, *section* 12—"*public*", *meaning of right of cultivators to irrigate, whether is a* '*public*' *right.*

The word "public" is not defined in the Code of Criminal Procedure, but for the purpose of the Code the definition given in the Penal Code is to be adopted.

Section 12 of the Penal Code says that "public" includes any class of the public or any community. This defintion is inclusive and does not define the word "public". It only says that class of public or community is included within the term "public".

A class or community residing in a particular locality may come within the term "public". The number of persons claiming the right and the nature of right itself will no doubt be the criteria on which conclusions may be

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arrived. The best criterion will be to see whether the right is vested in such a large number of persons as to make them unascertainable and to make them a community or class.

Where some cultivators claimed the right to use a certain channel to bring water from a reservoir for irrigating their fields and contended that this right was a public right within section 133 of the Code of Criminal Procedure, *held*, this was a private right and not a public one.

Per VARMA, J.—A public right does not depend on the number of individuals who enjoy it. It is, generally speaking, that which must be enjoyed by members of the general unascertained mass of the public. *Harnandan Lal* v. *Rampalak Mahto* 76

4————*sections* 145, 423, *and* 439—*order under section* 145, *effect of—forcible or surreptitious possession by unsuccessful party, whether amounts to dispossession of successful party—party restrained, whether can be allowed to assert possession unlawfully retained or obtained—High Court, power of, to convert an order of acquittal into one of conviction.*

Where a person, against whom an order under section 145, Code of Criminal Procedure, 1898, is passed, is able on some occasions either surreptitiously or forcibly to cultivate the lands, the subject-matter of the proceeding, these could be no more than isolated acts of trespass (and offences punishable under section 188 of the Penal Code, 1860) but not acts amounting to a dispossession of the party in whose favour the order is made.

The possession of the party which succeeds in a proceeding under section 145 cannot be put an end to by the unsuccessful party by mere violence or surreptitious invasion.

When there has been no change in the position of the parties since the order under section 145, Code of Criminal Procedure, 1898, the party prohibited from interfering with the possession of another party cannot be heard to say against that party that he has disobeyed the order and has been able to retain or obtain possession.

Query: Whether the High Court under its combined appellate and revisional powers can convert an acquittal (under section 302 read with section 149, Penal Code) into a conviction (under section 326/149) and then pass a sentence where none was passed by the lower Court. *Ambica Thakur* v. *King-Emperor* 544

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5——————*section* 145—*proceeding under the section, whether can be instituted in cases of dispute relating to possession of minerals—questions relating to title, when can be considered—actual physical possession, nature of—owner of unworked minerals, when can be deemed to be in actual physical possession—trespasser wrongfully working minerals, whether can be said to be in possession of any of the unworked minerals—permanent tenure-holders, whether can claim subsoil rights in the absence of express grant.*

Proceedings under section 145 of the Code of Criminal Procedure, 1898, can be instituted in cases of dispute relating to the possession of minerals.

In a proceeding under section 145 the court can properly consider questions relating to title where such is necessary in order to ascertain who is in possession.

Actual physical possession, such as is contemplated by section 145 of the Code, must of necessity vary with the subject-matter. The owner of unworked minerals is in actual possession of the same if he is in a position, at any moment, to work them or to permit others to do so.

If the owner of unworked minerals under a defined area begins to work the minerals in that area, he can properly be said to be in actual physical possession of the whole of the minerals in that area. In the same way if the owner of minerals under a defined area grants to third parties mining leases of the minerals under portions of such area, he exercises acts of ownership over those minerals and he can truly be said to be in possession of the whole of the minerals under that defined area.

A trespasser wrongfully working minerals is in possession of only such of the minerals as he has actually mined, but he cannot be said to be in possession of any of the unworked minerals.

Holders of permanent, heritable and transferable tenures created by a zamindar can have no claim to subsoil rights unless they are granted in express terms by the zamindar. *Ranchi Zamindari Company, Ltd.* v. *Maharaja Pratap Udainath Sahi Deo* 215

6——————*section* 162—*statement by accused person to a police officer during investigation under special circumstances mentioned in section* 27 *of the Evidence Act, whether admissible—section* 162 *of the Code, whether a bar. See* Evidence Act, 1872, no. 1 450

7——————*section* 162, *as amended by Act XVIII of* 1923—*statement of accused to police during investigation—admissibility of statement. See* Evidence 234

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8——————*sections* 215 *and* 240—*Sessions Trial—procedure —commitment, whether can be quashed—all charges to be disposed of. See* Sessions Trial, no. 2 82

9——————*section* 235, *test for applying. See Evidence Act,* 1872, no. 1 450

10——————*section* 423. *See* no. 4, *supra* 544

11——————*section* 439. *See* no. 4, *supra* 544

COMPROMISE—*parties agreeing to be bound by the decision of the court—appeal, whether lies from the decision—test—intention of the parties. See* Appeal no. 2 261

CONFESSION—*when admissible against a co-accused—nature of corroboration required—rule of prudence. See* Sessions Trial, no. 2 82

COURT-FEES ACT, 1870—

1——————*section* 7(*iv*)(*c*) *and Schedule II, Article* 17—*suit for declaration that several alienations by a Hindu widow were not binding on reversioners—prayer for interim injunction granted—suit, whether becomes one for a declaration with consequential relief—Court-fee of rupees fifteen, whether payable in respect of each alienation.*

Where the plaintiffs brought a suit claiming a declaration that several alienations made by a Hindu widow were not binding on them as reversioners and during the course of the proceeding the plaintiffs applied for and obtained an interim injunction to restrain the widow from making further alienations:

Held, that the suit was a declaratory one and the mere fact that the plaintiffs had prayed for and obtained an interim injunction could not change the nature of the suit so as to make it a suit for a declaration with consequential relief.

Held, further, that the suit was in fact a suit for a large number of declarations, and, therefore, that a court-fee of rupees fifteen was payable in respect of each of the alienations in question. *Harekrishna Das* v. *Sunamani Dei* 756

2——————*section* 7, *sub-section* (*iii*), (*iv*)(*c*) *and* (*v*)—*partition suit partaking of the nature of title suit—plaintiff out of possession of a portion of the subject-matter—ad valorem court-fee payable on the amount by which plaintiff's share in possession is of less value than the share claimed.*

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COURT-FEES ACT, 1870—*concld.*

So far as a partition suit may actually be in the nature of a title suit, ad valorem court-fee is payable by the plaintiff whether the suit is regarded as governed by section 7(*iv*)(*c*) or by sub-sections (*iii*) or (*v*) of section 7 of the Court-fees Act, 1870.

Where the plaintiff is out of possession of a portion of the property of which he seeks partition, he has to pay ad valorem court-fee on the amount by which his share in possession is stated to be of less value than the share which he claims. *Sital Prasad Sah* v. *Ramdas Sah* 267

3——————*Schedule II,—article 17(1)—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXI, rule* 63, *suit under—prayer for injunction—Article* 17(*1*), *whether still applicable—plaint rejected for non-payment of court-fee—appeal—court-fee payable on memorandum of appeal—appeal, value of.*

The plaintiffs instituted a suit under Order XXI, rule 63, Code of Civil Procedure, 1908, and also made a prayer for an injunction. The plaint bore a stamp of Rs. 15 but the trial court called upon the plaintiffs to pay ad valorem court-fee. The plaintiffs having refused to pay, the plaint was rejected. The plaintiffs appealed from the order of rejection paying a court-fee of Re. 1. The District Judge demanded ad valorem court-fee which was not paid and the memorandum of appeal was rejected. The plaintiffs then appealed to the High Court.

Held, (*i*) that the memorandum of appeal against the order rejecting the plaint must be stamped ad valorem and the value of the appeal for that purpose should be taken to be the difference between the value of the stamp on the plaint and the value of the stamp demanded by the trial court.

(*ii*) that the prayer for an injunction cannot be treated as taking the plaint out of the operation of article 17(*1*) of the second schedule of the Court-fees Act, 1870. *Gorakh Sahu* v. *Sheo Nandan Singh* 323

CROWN GRANTS ACT, 1895—*grant of Jagir by Government—stipulation as to restraint against alienation—tenure, whether can be sold in execution of money decree—measure of liability to involuntary transfer.*

In 1842 a tenure was granted as jagir in favour of *G's* ancestor in consideration of certain services, but the estate was subsequently forfeited to Government. In 1881 there was a formal dispensation with the services and a new grant, freed of those services, was made at a fixed annual rent. The new grant created a jagir for the

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descendants of an earlier jagirdar to enjoy so long as any descendants of the jagirdar should survive. There was a stipulation that the jagirdar had no power to transfer by sale or by creation of mukarrari tenures with a liability to resumption if unauthorised transfer should be made. When the tenure was sought to be sold in execution of a money decree against the jagirdar, the latter objected, but his objection was overruled by the executing Court.

Held, on appeal (*i*) that the tenure was a crown grant affected by the Crown Grants Act of 1895 in such a manner that the provisions of the Transfer of Property Act, 1882, did not apply to it, and that the grant took effect according to its tenor whatever might be the conditions laid down;

(*ii*) that the grant was of a limited interest which was not transferable either by operation of law or by voluntary alienation, and that the measure of liability to involuntary alienation was the power of voluntary transfer.

Per ROWLAND, J.—Where a lessee accepts from his lessor a new lease of the property leased to take effect during the continuance of the previous lease, this is an implied surrender of the former lease which is thus determined.

When a Crown grant contains a prohibition against alienation of the estate, that prohibition must take effect in accordance with its terms. *Ganjhu Upendra Singh* v. *Ganjhu Meghnath Singh* 870

DECREE—
1——————*difference between void and voidable decrees. See* Code of Civil Procedure, 1908, no. 24 708

2——————*preliminary decree in a suit for dissolution of partnersip and accounts, whether is attachable. See* Code of Civil Procedure, 1908, no. 4 688

EVIDENCE—*Criminal trial—statement by deceased person—conditions governing admissibility—Evidence Act,* 1872 (*Act* I *of* 1872), *section* 32(*1*)—*statement of accused to police during investigation—Admissibility of statement—Code of Criminal Procedure,* 1898 (*Act V of* 1898), *section* 162 *as amended by Act XVIII of* 1923.

On March 20, *K* told his wife that he was going to Berhampore as *P*'s wife had written and asked him to come and receive payments due to him. On March 21, *K* left his house in time to catch a train, for Berhampore where P lived with his wife. On March 23, K's dismembered body was found in a trunk which had been purchased for *P*.

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EVIDENCE—*concld.*

Held, that, on the trial of *P* for the murder of *K*, the statement made by *K* to his wife was admissible in evidence under section 32(*1*) of the Evidence Act as a circumstance of the transaction which resulted in *K*'s death. The phrase " Circumstances of the transaction " in the section conveys some limitations. It is not as broad as " circumstantial evidence " which includes evidence of all relevant facts. It is narrower than " res gestae ". The circumstances must have some proximate relation to the actual occurrence and must be of the transaction which resulted in the death of the declarant.

Statements made to a police officer by an accused person under section 162 of the Code of Criminal Procedure are not admissible in evidence even when the person making them was not accused at the time of making the statements but was so at the time the statements were tendered. *Pakala Narayana Swami* v. *The King-Emperor* 234

EVIDENCE ACT, 1872.—

1——————*sections* 27 *and* 114—*Code of Criminal Procedure*, 1898 (*Act V of* 1898), *sections* 162 *and* 235—*statement by accused person to a police officer during investigation under special circumstances mentioned in section* 27, *whether admissible—section* 162 *of the Code, whether a bar—section* 235, *test for applying—charge of murder and robbery—recovery of stolen property—nature of presumption to be drawn—Sessions trial—index to map containing objectionable material, whether should be put to the Jury—proper course to be adopted.*

Section 162 of the Code of Criminal Procedure, 1898, is no bar to the admissibility of a statement made by an accused person to a police officer in the course of an investigation when it is made under the special circumstances provided for in section 27 of the Evidence Act, 1872.

Section 27 of the Evidence Act is a special law within the meaning of section 1(*2*) of the Code of Criminal Procedure and is not specifically repealed by section 162 of the Code.

The course of criminal trials in India is to be governed by the provisions of the Indian statute and not by a criterion derived from the law of some other country.

The test for applying section 235, Code of Criminal Procedure, 1898, is to see whether the acts alleged form a series that can be regarded as one transaction; this question cannot be answered in the negative when the evidence to prove the one offence is identical with that by which the other is to be established.

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EVIDENCE ACT, 1872—*concld.*

When persons have been tried at one trial for robbery and murder, possession of recently stolen property if unexplained, such as would be presumptive evidence against the prisoners on the charge of robbery, is similarly admissible in evidence against them on the charge of murder; but when the question arises whether the presumption of the graver offence or of the lesser offence is to be drawn, it is for the prosecution to establish the graver presumption rather than for the graver presumption to be drawn in the absence of an explanation from the accused.

In a Sessions trial the notes in the index to a map, embodying statements regarding things said to have happened at the various points referred to, are not properly to be put before the Jury or assessors and where the index contains such objectionable material the better course is to have a fresh index prepared with the objectionable material eliminated. *King-Emperor* v. *Mayadhar Pothal* ... 450

3——————*section* 30—*confession of a co-accused, when admissible—nature of corroboration required—rule of prudence. See* Sessions Trial, no. 2 82

5——————*section* 114—*murder and robbery—recovery of stolen property——nature of presumption to be drawn. See* no. 1, *supra* 450

4——————*section* 32(*1*)—*statement by deceased person—conditions governing admissibility. See* Evidence ... 234

EXECUTION.—

1——————*application for execution against surety—death of surety—heirs not brought on record—heirs entering appearance—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXI, rule* 22, *notice under, whether necessary.*

Execution proceeding started against a surety cannot be continued, after his death, against his estate without bringing on the record his legal representatives. While substituting the heirs the Court should issue notice under Order XXI, rule 22, Code of Civil Procedure, 1908, against them, and their objection, if any, should be heard before the execution proceeding can be further continued; the fact that the legal representatives have already entered appearance is immaterial.

Per ROWLAND, J.—The correct procedure for the initiation of proceedings against the surety is, first, to call on him to produce the judgment-debtor; next, on his failure to do so, to call on him to show cause against forfeiture and execution; next, on failure to show cause to the satisfaction of the Court, to obtain an order of the Court directing execution to proceed against the person and properties of the surety.

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EXECUTION—*contd.*

The correct procedure after the death of the surety is to substitute his heirs in the execution proceeding and obtain leave of the Court to continue the execution against them; thereafter, to serve them with notices under Order XXI, rule 22, and on their appearance the Court, after hearing and determining any objections that they might make, should permit or disallow the continuance of the execution. *Mazharul Haq* v. *Raghuber Singh* ... 761

2——————*security bond—hypothecation of properties for satisfaction of decree—bond in the name of the Judge—execution—decree-holder, seeking to sell hypothecated properties without assignment and attachment—legality. See* Security Bond 719

3——————*decree against a member of joint Hindu family—family property attached and ordered to be sold—death of judgment-debtor before sale—effect—judgment-debtor's share at the time of death, whether liable to be sold. See* Hindu Law no. 1 499

4——————*decree-holder, right of, to proceed in the first instance against either the person or property of judgment-debtor—Court, whether can impose restriction on his freedom of choice.*

A decree-holder has the right to decide whether he should execute the decree for money by arrest of the judgment-debtor or by attachment and sale of property, and, except as specifically provided in the Code, it is not for the Court to impose restrictions on this freedom of choice of the decree-holder. *Kamaldhari Lal* v. *Rai Bahadur Kamleshwari Sahay* 366

5——————*person appearing on the face of the decree as decree-holder or his transferee or successor, whether alone entitled to execute—plea as to decree-holder being benamidar, whether can be taken by judgment-debtor in execution proceeding—Code of Civil Procedure,* 1908 (*Act V of* 1908), *Order XXI, rule* 2—*entry of satisfaction, when can be claimed—payment must be to decree-holder or his agent.*

The person appearing on the face of the decree as the decree-holder is entitled to execute the decree, unless some other person can show that he has taken the decree-holder's place by an assignment of the decree or by operation of law, that is, by death or succession or in some similar manner.

In execution proceedings it is not open to the judgment-debtor to assert that the real holder of the decree is any person other than the person named as decree-holder in the decree unless there has been a valid assignment or devolution by process of law.

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EXECUTION—*contd.*

Under Order XXI, rule 2, Code of Civil Procedure, 1908, the judgment-debtor can only claim entry of satisfaction of the decree where payment has been made either to the decree-holder or to some other person definitely held out by the decree-holder as his agent for the purpose of payment.

Per ROWLAND, J.—An adjustment to which the decree-holder is not a party cannot be recognised by the executing court. *Rambahadur Singh Thakur* v. *Awadhbehari Prasad Singh* 318

6——————*sale by executing Court of property outside its territorial jurisdiction, whether is a nullity—no objection to confirmation of sale—judgment-debtor, whether estopped from impugning the sale—Code of Civil Procedure,* 1908 (*Act V of* 1908), *section* 21—*estoppel, whether extends to another execution creditor purchasing the same property.*

A sale by an executing Court of a property which is outside its territorial jurisdiction is a nullity.

Though a judgment-debtor, who does not object to the confirmation of sale by a Court having no territorial jurisdiction to sell a property, may be estopped (by reason of the principles underlying section 21 of the Code of Civil Procedure, 1908) from raising the question that the sale was a nullity, such estoppel does not operate to prevent another execution creditor, who purchases the same property in execution of his decree, from proving that as between himself and the previous purchaser his title ought to prevail. *Khirod Chandra Ghosh* v. *Panchu Gopal Sadhukhan* 670

7——————*minor—reference to arbitration in contravention of rule 7 of Order XXXII, Code of Civil Procedure,* 1908 (*Act V of* 1908)—*decree based on award, whether void or voidable—minor, whether can impeach the decree in execution proceeding—minor effectively represented by guardian—absence of formal appointment—effect—question of effective representation and prejudice, whether can be investigated in an execution proceeding. See* Code of Civil Procedure, 1908, no. 24 708

GOVERNMENT OF INDIA ACT, 1935.—

1——————*section* 100. *See* Bihar Money-Lenders Act, 1938, no. 1 13

2——————*section* 107. *See* Bihar Money-Lenders Act, 1938, no. 1 13

3——————*section* 107—*Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act,* 1938 (*Bihar Act IX of* 1938) *section* 15, *whether void. See* Bihar Restoration of Baskasht Lands and Reduction of Arrears of Rent Act, 1938 694

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HINDU LAW—

1——————*decree against a member of joint Hindu family —execution family property attached and ordered to be sold —death of judgment-debtor before sale—effect—judgment-debtor's share at the time of death, whether liable to be sold.*

Where in execution of a money decree against a member of a joint Hindu family, the property of the joint family had been attached and ordered to be sold, and thereafter the judgment-debtor died and the sale was objected to by the other co-parceners on the ground that the attachment of the property in the life-time of the judgment-debtor ceased to be of any effect on his death and that they took the whole of the property attached by survivorship:

Held, (*i*) that the execution proceedings had gone so far as to constitute in favour of the judgment-creditor a valid charge upon the property to the extent of the judgment-debtor's undivided share and interest therein which could not be defeated by his death before the actual sale.

(*ii*) that the decree-holder was entitled to proceed against what would have been the judgment-debtor's share at the time of his death, and that any subsequent happenings could not, in view of the attachment and the death, either increase or reduce that share. *Bhubneshwar Prasad Narain Singh* v. *Khemchandra* 499

2——————*dedication for the worship of dicty—succession to the office of shebait, whether governed by the law of inheritance—principles of inheritance—death of last shebait who succeeded as male owner—shebait's heirs, whether entitled to succeed—nature of interest inherited—shebaitship, when vests in the heirs of founder.*

According to Hindu Law, when the worship of a deity has been founded, the shebaitship is vested in the heirs of the founder in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some other circumstances to show a different mode of devolution.

The management and control of the endowed property besides the right of acting ministrant to the deities—the two together constituting the shebaiti right—therefore follow the line of inheritance from the founder.

The Hindu law of inheritance makes a distinction between the sexes in that a male heir becomes full owner of the property inherited by him and transmits it on death to his own heirs, while a female heir (barring such Bombay exceptions as *gotraja* females) only takes as a limited owner, the property passing on her death not to her heirs but to the next heir of the last full owner.

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HINDU LAW—*contd.*

This principle applies to the inheritance of the shebaiti interest also.

No shebait can alter the line of succession laid down by the founder but this again is far from inconsistent with a male who inherits a shebaiti interest taking as full owner as in the inheritance of immovable property of a secular character. The entire estate is vested in him, though his powers of alienation are qualified and restricted.

Therefore, on the death of the last shebait, who succeeded as a male owner, the shebaiti right devolves on *his* heirs.

Musammat Anuragi Kuer v. *Parmanand Pathak* ... 171

3——————*legal necessity—powers of karta to charge ancestral property—expression "benefit of the estate", whether limited to transaction of a purely defensive nature.*

A manager of a joint Hindu family has power to charge ancestral property by loan or mortgage in case of need or for the benefit of the estate. The test in each case is whether the transaction was one into which a prudent owner would enter in the ordinary course of management in order to benefit the estate.

The expression "benefit of the estate" has a wider meaning than mere compelling necessity, and is not limited to transaction of a purely defensive nature. *Sital Prasad Singh* v. *Ajablal Mander* 806

4——————*Mitakshara—stridhan of a maiden—rule of succession—heirs entitled to succeed—step-mother, whether an heir—failure of father—father's remote agnates, whether preferred to less remote cognates.*

The stridhan of a maiden, governed by the Mitakshara school of Hindu Law, devolves, in the absence of uterine brothers, on the mother, and after her death and in the absence of the father the property goes to the father's heirs in the order laid down in the Mitakshara for succession to a male dying without issue.

Therefore, after the mother, and in the absence of the father, the step-mother being the nearest heir of the father inherits the stridhan in the first instance, and after her a remote agnate of the father (great-great-great-grandson of the common ancestor) succeeds in preference to a less remote cognate (maternal great-grandson of the father's paternal grandfather).

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HINDU LAW—*concld.*

The Mitakshara, while holding that the right to inherit does not spring from the right to offer oblations, does not exclude from consideration the test of propinquity or nearness of blood, but this test is applied only in competitions between persons of the same class. *Kumar Raghava Surendra Sahi* v. *Babui Lachmi Kuer* 590

5——————*sons' pious obligation to pay father's debt—suit against father and sons—decree against father only—creditor, whether entitled to execute the decree against sons.*

Where a creditor of a Hindu debtor wants to enforce the pious obligation of his sons to pay his debts, the debt not being illegal or immoral, and impleads the sons also in the suit, but the Court, rightly or wrongly, refuses to pass a decree against the sons and passes a decree against the father only, the decree cannot be said to have been obtained against the father both in his individual capacity and also as representing the sons and such a decree against the father, not being a decree against the sons, cannot be executed against them, not because they were not under a pious obligation to pay the debt of their father but because the procedure of enforcing their liability having been adopted the Court had refused to enforce it.

In order to enforce the pious obligation of a son to pay his father's debt there must be a decree against him obtained in a suit in which he was a party or can be deemed to have been a party through his father. *Prahlad Das* v. *Dasrathi Satpathi* 783

INCOME-TAX ACT, 1922—*sections* 2(*1*)(*a*) *and* 4—salami *for settlement of land, whether taxable—section* 66(*4*)—*High Court's jurisdiction to remit case to Commissioner for restatement—Commissioner's duty—Transfer of Property Act,* 1882 (*Act IV of* 1882) *section* 105—bemeadi *settlement of land for building permanent structure*—salami *paid*—kabuliyat *putting restraint upon alienation—rights descendible to heirs—lease, whether permanent*— salami, *whether premium or advance rent.*

Where the premium or *salami* represents the whole or part of the price of the land it cannot be income. Income connotes a periodical monetary return coming in with some sort of regularity, or expected regularity, from definite sources. The premium, or *salami,* which is paid once for all, and is not a recurring payment, hardly satisfies this test.

Where the assessee gave a *bemeadi* lease of certain lands for building a *gola* house and a platform for rice mill and received a certain sum of money as *salami*, and the

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kabuliyat further provided that the lessee or his representatives were not to put forward any objection as to the payment of rent, that the assessee or his heirs had the rights of realisation and enhancement of rent, that the lessee could not sell the residential rights to any one without obtaining the permission of the assessee or his heirs, and the assessee's own *challans* described the lease as a *mukarrari* settlement:

Held, that the lease was intended to be a permanent one; no term had been fixed in the lease and provision had been made for the exercise of certain rights by the heirs of the lessor and the lessee.

Per MANOHAR LAL, J.—It would be impossible to lay down a hard and fast rule that a *salami* can in no case be taxable, the question would depend on the facts and circumstances of each case.

It is within the jurisdiction of the High Court to require the Commissioner to re-state a case which is not found satisfactory, and so long that order stands, the High Court expects that it should be carried out to the very letter and in the spirit in which the order is worded. *Commissioner of Income-tax* v. *Maharajadhiraj Kumar Visheshwar Singh* 805

INDIAN (FOREIGN JURISDICTION) ORDER-IN-COUNCIL, 1902—*notifications, dated March*, 1912, *and January*, 1937, *effect of—arrest and detention in terms of later notification, whether legal—notifications, whether ultra vires. See* Code of Criminal Procedure, 1898, no. 1 121

KAZI.—*District Judge as Kazi, limits to the powers of. See* Muhammadan Law 417

LANDLORD AND TENANT—

1——————*landlord purchasing under a rent decree, whether bound to annul incumbrance. See* Bengal Tenancy Act, 1885, no. 1 184

2——————*lease—tenancy of unknown origin—permanency, onus of proving, on whom lies—inference from proved facts, whether question of law—land in possession for over a hundred years—substantial kucha structure—occupation without payment of rent—tenancy, whether permanent.*

Where a tenant alleges that his interest is a permanent one, the onus of establishing such an interest lies on him.

An inference as to the nature of a tenancy from proved facts is a question of law.

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LANDLORD AND TENANT—*contd.*

The inference of permanency of a tenancy can only be drawn where the facts point irresistibly to such a conclusion. Where the facts are equally consistent with permanency or a tenancy at will, then permanency cannot be inferred; but where the facts are inconsistent with a tenancy at will and consistent only with a permanent tenancy, the permanency of the tenancy must legally be inferred.

Where, therefore, it was found that the origin of the tenancy was unknown, the tenants and their predecessors had been in possession of the land for over a hundred years and had built upon it a substantial structure consisting of mud walls and tiled roofs which had been in existence for very many years, the landlord at no time objecting to the construction of this building, the land together with structure had been held by the tenant's family generation after generation without let or hindrance and no rent had ever been paid to the landlord:

Held, that the tenancy was permanent. *Hafiz Muhammad Zeyauddin* v. *Shaikh Dargahan* 571

3——————*Occupancy holding—mafi on condition of rendering service as jeth raiyat—landlord, whether entitled to dispense with the services—tenant's holding, whether a service tenure and a grant burdened with services—tenant's claim to remission on dispensation with services, whether tenable—decision as to annual rent payable or dispute regarding tenant's status—second appeal, maintainability of—Bihar Tenancy Act,* 1885 *(Act VIII of* 1885*), section* 153.

In the record-of-rights the tenant was recorded as a settled raiyat of the village liable to pay a certain rent. There was an entry to the effect that at the end of the year the raiyat received Rs. 12 as *haqajri* on condition of rendering services as a *jeth* raiyat, assisting the landlord in the collection of rent. The holding was subsequently partitioned into three holdings, one occupier having taken half of the original holding and two others a quarter each. The landlord instituted three suits for rent claiming a proportionate amount from each of the tenants who, however, contended that the right to deduct Rs. 12 was an incident of the tenancy, so that each of them was entitled to a proportionate remission in the rent. The landlord, who had in the meantime dispensed with the services of the *jeth* raiyat, claimed that he was entitled to the full rent of the holding. The lower Courts upheld the contention of the defendants and the landlord having preferred a second appeal a preliminary objection was taken that the appeal was barred by the provisions of section 153 of the Bihar Tenancy Act, 1885?

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LANDLORD AND TENANT—*concld.*

Held, (*i*) that the *jeth* raiyat having been relieved of his duties by the landlord, the question of whether the defendants were liable to pay the full amount of rent or a reduced sum, must be treated as "a dispute regarding the amount of rent annually payable by the tenants", and that the lower Courts having found that the tenants held under a grant burdened with service, the dispute regarding the status of the tenants raised a question relating to an interest in land which had been decided by the decrees under appeal;

(*ii*) that, therefore, the second appeal was not barred by the provisions of section 153 of the Bihar Tenancy Act, 1885;

(*iii*) that the facts of the case did not warrant the inference that the occupancy holdings were of the nature of service tenures, or that the settlement of the original holding was a grant of land burdened with services;

(*iv*) that the landlord was entitled to dispense with the services of the *jeth* raiyats, and having done so, he was entitled to recover the rent of the subdivided holding at the rate which was shown as payable in the record-of-rights and the tenants were no longer entitled to claim remission which they enjoyed on condition of rendering service to the landlord. *Mahanth Dwarka Dass* v. *Bhekhu Mahton*, ... 502

LEASE—

1——————bemeadi *settlement of land for building permanent structure*—salami—kabuliyat *putting restraint upon alienation—rights descendible to heirs—lease, whether permanent. See Income-tax Act*, 1922 805

2——————*tenancy of unknown origin—permanency, onus of proving, on whom lies—inference from proved facts, whether question of law—land in possession for over a hundred years—substantial kucha structure—occupation without payment of rent—tenancy, whether permanent. See* Landlord and Tenant no. 2 571

LEGAL PRACTITIONERS ACT, 1879—*sections* 13 *and* 14—*inquiry against legal practitioner—standard of proof required—failure to formulate charges, whether vitiates the proceeding—lawyer, whether should accept loan from client.*

Lawyers should not, except in very special circumstances, accept loans from their clients.

Where a lawyer has withdrawn money for a client and has been permitted to retain it, a document evidencing that transaction should in every case be drawn up. It is essential, in cases where the relationship of lawyer and

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LEGAL PRACTITIONERS ACT, 1879—*concld.*
client has been changed into one of debtor and creditor, that the clearest evidence of such a change should be obtainable.

No lawyer should ever borrow money from a client unless he is sure that he can repay it when the client demands repayment.

Charges of professional misconduct must be clearly proved and should not be inferred from mere ground for suspicion, however, reasonable, or what may be mere error of judgment or indiscretion.

An inquiry in a serious case, such as professional misconduct on the part of a legal practitioner, should proceed on formulated charges, but failure to formulate precise charges, where it has led to no injustice, does not vitiate a proceeding under section 14 of the Legal Practitioners Act, 1879. *U. C. Patnaik, In the matter of* 580

LEGAL PRACTITIONERS' (FEES) ACT, 1926—*section 4—several pleaders engaged in a case—absence of specific agreement as to amount of fees—each pleader, whether entitled to full fee assessed at the hearing.*

Where several pleaders have been engaged in a case and no agreement is specifically entered into as to the amount of their fees, each pleader is entitled to his fees up to the full fee assessed at the hearing. *Manmatha Nath Mullick* v. *Jitendra Nath Mukharji* 213

LIMITATION—*suit for produce rent instituted after Bihar Tenancy (Amendment) Act,* 1934 *(Bihar and Orissa Act VIII of* 1934) *came into force, whether would be governed by shorter period of limitation. See* Bihar Tenancy Act, 1885, nos. 8 and 9 ... ... 1, 355

LIMITATION ACT, 1908.—
1——————*sections* 19 *and* 21—*acknowledgment of liability by a co-mortgagor not acting as agent of other mortgagors —effect. See* Chota Nagpur Encumbered Estates Act, 1876 434

2——————*section* 19—" *signed* ", *meaning and significance of—name of debtor appearing in acknowledgment of liability —name introduced under authority of debtor—acknowledgment, effect of.*

Where upon a document, which purports to be an acknowledgment of liability, appears the name of the debtor, and this name is introduced under his authority with a view to authenticate the document, such a document is a valid acknowledgment of his liability within the

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LIMITATION ACT, 1908—*contd.*

meaning of section 19 of the Limitation Act, 1908. It is not necessary that the name should be written by the debtor himself. It is sufficient if it is written by a person with authority to write his name.

Section 19, Limitation Act, 1908, does not draw a distinction between a person who is literate and one who is not literate. In either case an acknowledgment signed by an agent with his authority would be enough.

The aection also does not say as to what should be the form of the signature. If the name of the debtor is introduced into the document of acknowledgment in such a way as to show that the acknowledgment was intended to be his own, such a name, whether written or printed, would constitute his signature within the meaning of the expression as used in section 19. *Ramjan Ali* v. *Khawja Meer Ahmed Sethi* 715

3——————*section* 20(*1*)—*payment made by debtor without specification—appropriation by creditor towards interest as such—the words " as such " in the amended section* 20(*1*), *whether are redundant.*

Where a payment is made by the debtor to his creditor within the period of limitation, and the debtor does not specify whether the payment is towards interest or principal but the creditor appropriates the payment towards interest, the payment is a payment of interest as such within the meaning of section 20(*1*) of the Limitation Act, 1908.

The words " as such " in section 20(*1*) of the Act, as amended in 1927, are now redundant. *Santa Prasad Singh* v. *Thakur Harkishore Prasad Singh* 253

4——————*schedule* 1, *article* 11*A*—*suit governed by rule* 103 *of Order XXI, Code of Civil Procedure,* 1908 (*Act V of* 1908)—*limitation. See* Mortgage, no. 3 155

5——————*article* 75—*simple instalment bond—whole amount to become payable on any single default—suit to recover unpaid instalments—article* 75, *whether applicable—time, whether runs from the date of first default—waiver, what amounts to—abstention from suing or acceptance of a portion of overdue instalment, whether amounts to waiver.*

Where a simple instalment bond provides that on default of any single instalment the whole amount under the bond shall become payable, a suit to recover the unpaid instalments is governed by Article 75 (or article 116 in the case of a registered bond) of the Limitation Act, 1908, and, in the absence of a waiver of the default clause, time begins to run from the date of the first default.

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LIMITATION ACT, 1908—*contd.*

Mere abstention from suing in the case of an instalment bond or an acceptance of a portion of an overdue instalment does not amount to a waiver.

When the plaintiff alleges that all the previous instalments have been paid, he proceeds on the footing that there has been no default and no waiver, and if his allegations are, in the course of the trial, found to be false, he cannot turn round and ask the court to infer any waiver. *Gokhul Mahton* v. *Sheo Prasad Lal Seth* ... 459

6——————*schedule* 1, *Articles* 97 *and* 116—*lessee taking possession under a registered lease—lessor's title found defective—dispossession of lessee—suit for damages and return of premium—limitation—proper article applicable—terminus a quo.*

A suit for the refund of premium paid for a lease under a registered instrument, on the ground that the lessor had no title, is governed by Article 116, Limitation Act, 1908, even though the suit may apparently fall within Article 97 of the Act.

As between parties to the transaction, a lease cannot be regarded as void ab initio when both the parties considered that the lessor had a good title to convey.

Under a registered permanent mukarrari lease the lessee *S* got possession of the leasehold property after payment of a certain premium to the lessor. Subsequently *D* brought a suit for specific performance of a prior contract for lease of the same property impleading both the lessor and the lessee in possession as parties to the suit. *D* alleged that after having executed the contract for lease in his favour, the lessor had no good title to convey to *S*. The suit was decreed and it was ordered that upon *D*'s depositing the balance of the consideration money which he had not paid to the lessor, a formal deed would be executed and registered in his favour and then possession would be delivered to him after ousting *S*. In pursuance of the decree *D* deposited the money and got delivery of possession on the 6th February, 1928. Thereupon *S* brought the present suit on the 3rd of July, 1933, claiming damages and return of the premium paid to the lessor:

Held, that the suit was governed by Article 116 of the Limitation Act, 1908, and that, as the cause of action arose on the date when the plaintiff was dispossessed, the suit was within time. *Debi Prasad Agarwala* v. *Haji Syed Mehdi Hasan* 654

7——————*article* 116. *See* no. 6, *supra* 654

8——————*article* 116—*mortgage bond—fraud on registration—suit on personal covenant—document, whether can be treated as a registered instrument for purposes of limitation—article, whether applicable. See* Registration Act, 1908 429

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LIMITATION ACT, 1908—*concld.*

9——————*article* 182(*4*)—*Code of Civil Procedure*, 1908 (*Act V of* 1908), *section* 48, *whether controlled by article* 182(*4*)—*amendment of decree—period of twelve years under section* 48, *whether is to be calculated from the date of amended decree. See* Code of Civil Procedure, 1908, no. 3 395

MINERALS—*owner of unworked minerals, when can be deemed to be in actual physical possession—trespasser wrongfully working minerals, whether can be said to be in possession of any of the unworked minerals—permanent tenure-holders, whether can claim subsoil rights in the absence of express grant. See* Code of Criminal Procedure, 1898 no. 5 215

MINOR—

1——————*defendant attaining majority during pendency of suit—no steps taken to proceed against defendant as major —decree, whether is a nullity. See* Code of Civil Procedure, 1908, no. 23 539

2——————*reference to arbitration in contravention of rule* 7 *of Order XXXII, Code of Civil Procedure*, 1908 (*Act V of* 1908)—*decree based on award, whether void or voidable—minor, whether can impeach the decree in execution—minor effectively represented by a guardian—absence of formal appointment—effect—questions of effective representation and prejudice, whether can be investigated in execution proceeding. See* Code of Civil Procedure, 1908, no. 24 ... 708

MORTGAGE—

1——————*mortgage decree—administration suit between mortgagors—appointment of Receiver—debt incurred by Receiver for purposes other than preservation of estate—priority—salvage lien, rule of—application by mortgagee decree-holder for leave to execute the mortgage decree—question of priority, whether should be investigated in a summary proceeding—Court, power of, to make an order altering mortgagee's priority—leave to execute mortgage decree, whether at all necessary. See* Receiver ... 279

2——————*mortgagee under an obligation to pay rent—default by mortgagee resulting in rent decree—property sold in execution to third party—subsequent purchase by mortgagee—absence of fraud—equity of redemption, whether extinguished.*

Where a property subject to a mortgage is sold in execution of a rent decree and at some period later purchased by the mortgagee, whose failure to pay rent had resulted in the rent decree, such purchase by the mortgagee does not, in the absence of fraud, revive the equity of redemption which is extinguished by the sale. *Fakua Mahto* v. *Babu Lal Sahu* 133

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MORTGAGE—*contd.*

3——————*mortgagor's interest attached—attachment, whether creates any interest in or charge upon attached property—attaching creditor, whether is necessary party to mortgage suit—attachment followed by sale during pendency of mortgage suit*—lis pendens, *applicability of—Transfer of Property Act*, 1882 (*Act IV of* 1882), *section* 52 —*Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXI, rules* 54, 100, 103 *and Order XXXIV, rule* 1—*suit governed by rule* 103—*limitation—Limitation Act*, 1908 (*Act IX of* 1908), *Schedule* 1, *article* 11*A*.

An attachment does not create any title in or charge upon the attached property.

An attaching creditor coming under clause (*f*) of section 91 of the Transfer of Property Act, 1882, as it stood before the amending Act of 1929 does not stand in the same position as a person coming within clause (*b*) of that section.

A fortiori an attaching decree-holder does not fall within the class of persons contemplated by Order XXXIV, rule 1, Code of Civil Procedure, 1908.

In March, 1917, certain creditors of the mortgagor attached certain shares in the mortgaged property in execution of their money decree, and purchased the same in execution on the 9th of September, 1918. In the meantime, on the 1st of February, 1918, the mortgagees brought the mortgage suits without impleading the attaching decree-holders as defendants. The mortgagees obtained decrees on the 18th of December, 1918, and having purchased the properties in execution on the 28th of May, 1923, obtained delivery of possession in December, 1923. The attaching decree-holders who had already purchased the mortgaged property, being thus dispossessed by the mortgagee-purchasers filed an application under Order XXI, rule 100, Code of Civil Procedure, 1908. The application was dismissed on the 4th of August, 1927, and on the 30th of July, 1930, the attaching decree-holders filed the present suit claiming, among other reliefs, possession of the mortgaged property upon redemption of the mortgages on the ground that they as attaching decree-holders were necessary parties to the mortgage suits, and not having been made parties their rights were not affected by the mortgage decree and sale.

Held, (*i*) that the attaching decree-holders were not necessary parties to the mortgage suits;

(*ii*) that whatever rights the plaintiffs had as attaching decree-holders came to an end after they became purchasers in September, 1918;

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MORTGAGE—*contd.*

(*iii*) that the rights of the plaintiffs as purchasers were affected by *lis pendens;*

(*iv*) that the suit was essentially one under Order XXI, rule 100, and was therefore barred by limitation under article 11A of the Limitation Act, 1908. *Baiju Lal Marwari* v. *Thakur Prasad Marwari* 155

4——————*suit—absence of some persons having equity of redemption from the record—effect—suit, whether should be dismissed—decree, whether should be passed for the entire amount—Transfer of Property Act*, 1882 (*Act IV of* 1882), *section* 60, *effect of—Transfer of Property* (*Amendment*) *Act*, 1929 (*Act XX of* 1929),—*transfer* pendente lite—*assignee not made party—effect—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXII, rule* 10—*Bihar Money-Lenders Act*, 1938 (*Bihar Act III of* 1938), *section* 11, *whether controls the powers of Courts with respect to final decrees.*

In the event of transfer or assignment of an interest by a plaintiff (or decree-holder), the assignee has the right to apply to the court to be added or substituted as a plaintiff. If this is not done the suit will proceed at the instance of the original plaintiff and any decision arrived at, whether favourable or unfavourable, will be effective for or against the interest of the assignee.

It is not, moreover, open to a defendant-mortgagor to raise any objection against the plaintiff when the interest of the mortgagee in the litigation is throughout fully represented.

Whereas the general rule is that all persons having the equity of redemption ought to be brought on the record, the failure to bring any one of them on the record does not necessitate the dismissal of the suit if the court in his absence can deal with the matters in controversy so far as regards the rights and interest of the parties actually before it.

The intention of the legislature in amending section 60 of the Transfer of Property Act, 1882, by the Amending Act of 1929, was not to alter but to declare the law.

Therefore, notwithstanding that the decree in a mortgage suit in which the interest of certain persons having the equity of redemption is not represented may be ineffective against such persons, the amount of the mortgage debt to be entered in the decree as payable for the redemption of the mortgaged properties will not be affected by the absence of those persons from the record.

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MORTGAGE—*concld.*

The expression "no court shall pass a decree" in section 11 of the Bihar Money-Lenders Act, 1938, is not intended to control the powers of the courts with respect to final decrees and, therefore, where a preliminary mortgage decree has been passed, it is open to the court to pass a final decree, or on appeal to affirm a final decree, which would award interest beyond the limits laid down in section 11.

It is a recognised principle that where one construction of an enactment will be in accordance with the existing enactments and another construction will be repugnant to them, the courts will, where possible, adopt that reading which avoids repugnancy. *Maulavi Muhammad Yunus* v. *Champamani Bibi* 141

5——————*subrogation, suit to enforce—cause of action when arises—limitation—redemption of prior mortgage by more than one person—right of subrogation, whether can be claimed by all proportionately. See* Transfer of Property Act, 1882, no. 5 342

MUHAMMADAN LAW—*Wakf—Kazi—District Judge as Kazi, limits to the powers of—appointment of mutawalli, when can be made.*

Under the Muhammadan Law the kazi has power to appoint a Mutawalli when a vacancy occurs and there is none to take office under the terms of a wakf or when the mutawalliship devolves under the deed of a wakf upon a minor.

The District Judge as a principal Court of Original Civil Jurisdiction has, by virtue of his power as a kazi, a general power of appointing Mutawallis in a summary proceeding, but he has no power in such a proceeding to appoint another Mutawalli in place of one who is in office. This can only be done in a suit instituted either under the Religious Endowments Act of 1863 or under section 92 of the Code of Civil Procedure, 1908.

The appointment of a Mutawalli by a District Judge in a summary proceeding not being appealable, such appointment should be made in cases of emergency and, by the very nature of it, must be subject to the result of any suit which may be instituted by any of the parties who claim adversely to one another, or any suit which may be instituted under section 92 of the Code of Civil Procedure or under the provisions of the Religious Endowments Act, 1863.

The District Judge has no jurisdiction in a summary proceeding to decide that under a wakf deed a certain person is to be the mutawalli on the death of the last incumbent.

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MUHAMMADAN LAW—*concld.*

The provisions of the Religious Endowments Act, 1863, apply not only to those endowments which were in existence at the time the Act was passed and had been taken under its control by the Board of Revenue under Regulation XIX of 1810, but also to later institutions which come within its purview. *Bibi Zohra* v. *Bibi Habibunnessa* 417

ONUS—*tenancy of unknown origin—permanency, onus of proving, on whom lies. See* Landlord and Tenant, no. 2 571

ORDER-IN-COUNCIL. *See* Indian (Foreign Jurisdiction) Order-in-Council, 1902 121

ORISSA TENANCY ACT, 1913—*sections* 126 *and* 127—*entry in the record-of-rights as to rent, whether final—suit—declaration as to nature of tenancy, whether can displace the irrebuttable presumption as to correctness of rent—tanki bahaldar, whether is a tenant for purposes of part I of Chapter XI—revenue officer, whether has jurisdiction to settle and record his rent—second appeal—question as to finality of entry in the rent roll, whether is a point of law—practice to clothe a decision on a question of law with the appearance of a finding of fact deprecated.*

Failing a suit under section 126 of the Orissa Tenancy Act, 1913 (corresponding to section 104H of the Bengal Tenancy Act), the entry in the record-of-rights as to the rent settled under part I of Chapter XI of the Act is final.

A declaratory suit (such as is contemplated by the proviso to section 141 of the Orissa Tenancy Act) can no doubt be entertained and a declaration can be had that the tenancy is of a different class from that shown in the record-of-rights; but such a declaration does not displace the irrebuttable presumption of correctness of the rent entered in the rent roll.

The only ground on which an entry of rent can be challenged is that of want of jurisdiction.

Although a holder of a *tanki bahal* land is a sub-proprietor within the meaning of section 3, clause (*21*), of the Act, he is a tenant for purposes of part I of Chapter XI and what he pays kist by kist to the proprietor is for those purposes rent. Therefore, the revenue officer has jurisdiction to settle and record the rent of a *tanki bahaldar.*

The question whether an entry of rent in the settlement rent roll is conclusive or whether a party can prove by evidence that it is incorrect is a point of law which can be raised in second appeal.

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ORISSA TENANCY ACT, 1913—*concld.*

Observations deprecating the practice which has been observed in the judgments of some of the lower appellate courts of attempting to shut out a second appeal by the use of language designed to clothe a decision on a question of law with the appearance of a finding of fact. *Mahant Sidhakamal Ramanuj Das* v. *Betakrishna Mahapatra* ... 204

PARTITION SUIT—*suit partaking of the nature of title suit—plaintiff out of possession of a portion of the subject-matter—ad valorem court-fee payable on the amount by which plaintiff's share in possession is of less value than the share claimed. See* Court-Fees Act, 1870, no. 2 267

PARTNERSHIP ACT, 1932—*section 69(2)—unregistered firm, suit by—registration after the institution of the suit, whether can cure the initial defect and make the suit maintainable.*

A suit by an unregistered firm is not maintainable by reason of section 69(2) of the Partnership Act, 1932. Registration of the firm at a later stage, after the institution of the suit, cannot cure the initial defect so as to make the suit maintainable.

A plaint filed by an unregistered firm is in effect no plaint at all, because section 69 makes claims arising out of a contract unenforceable if the firm is unregistered at the date of the institution of the suit.

If the plaintiff has no cause of action when the suit is instituted, such a suit is bound to fail though a cause of action might come into existence within a very short time after the institution of the suit. *Firm Laduram Sagarmal* v. *Jamuna Prasad Chaudhuri* 114

PENAL CODE, 1860.—

1——————*section* 12—"*public*", *meaning of. See* Code of Criminal Procedure, 1898, no. 3 76

2——————*sections* 33 *and* 302—*murder—assault with the intention of causing death—body subsequently placed on railway line—death due to decapitation—accused, whether guilty of murder—test.*

Where an accused person commits two (or more) acts, closely following upon and intimately connected with each other, they cannot be separated and assigned, the one to one intention and the other to another, but both must be ascribed to the original intention which prompted the commission of those acts and without which neither could have been done.

Where, therefore, the accused assaulted a woman with the intention of causing death, and thereafter placed her

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PENAL CODE, 1860—*concld.*

body on the railway line where she was run over by a train and the medical opinion favoured the view that the actual cause of death had been decapitation but there was no evidence that the accused, when he carried the body to the railway line, was under the belief that the woman was dead and that he was handling a dead body, *held*, that the accused was guilty of murder. *King-Emperor* v. *Nehal Mahto* 485

3——————*sections* 34 *and* 300—*murder—accused killing paramour of a woman with whom he carried on intrigue—both found sleeping together—grave provocation, whether can be pleaded—nature of provocation contemplated by first exception—direct evidence of acts of the accused sufficient to disclose his intention—question of motive, whether material—section* 34, *application of.*

The provocation which is mentioned in the first exception to section 300 of the Penal Code, 1860, is something which is recognized as provocation in law and not merely something which arouses the uncontrollable anger of a particular individual.

A man in love with a woman who has repulsed his suit might be so angry as to lose control of himself at the sight of her engaged in sexual intercourse with another, but if he kills one or both of them, he cannot plead grave provocation in mitigation of his offence. The law that when a husband discovers his wife in the act of adultery and thereupon kills her, he is guilty of manslaughter and not of murder, has no application where the woman concerned is not the wife of the accused but a woman with whom the accused has been carrying on an intrigue sanctioned by the custom of the community.

For the application of section 34 of the Penal Code, 1860, the question of motive is not material where there is direct evidence of the acts of the accused and the acts themselves are sufficient to disclose the intention of the actor. *Murgi Munda* v. *King-Emperor* 101

4——————*section* 300—*murder—accused killing paramour of a woman with whom he carried on intrigue—both found sleeping together—grave provocation, whether can be pleaded—nature of provocation contemplated by first exception. See* no. 3, *supra* 101

5——————*section* 302—*murder—assault with the intention of causing death—body subsequently placed on railway line—death due to decapitation—accused, whether guilty of murder—test. See* no. 2, *supra* 485

6——————*sections* 366, 366*A* *and* 376—*Judge, how should direct the jury in cases dealing with sexual offences See* Trial by Jury 698

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PRACTICE—

1——————*index to map containing objectionable material, whether should be put to the Jury—proper course to be adopted. See* Evidence Act, 1872, no. 1 450

2——————*appellate Court, whether entitled to call for a private report from lower Court—procedure, whether irregular. See* Chota Nagpur Tenancy Act, 1908, no. 2 ... 649

RECEIVER—*mortgage decree—administration suit between mortgagors—appointment of Receiver—debt incurred by Receiver for purposes other than protection of estate—priority—salvage lien, rule of—application by mortgagee decree-holder for leave to execute the mortgage decree—question of priority, whether should be investigated in a summary proceeding—Court, power of, to make an order altering mortgagee's priority—leave to execute mortgage decree, whether at all necessary.*

Subject to the rule of salvage lien, which is applied in India as a rule of justice, equity and good conscience, the Court, when administering the estate of the mortgagors in a suit between them inter se, has no power to destroy or curtail the rights of the mortgagees in exercise of its discretion to grant them leave to execute their mortgage decree obtained before the estate came in custodia legis.

Likewise it has no power, while administering the estate through a Receiver, to order that the priority of a mortgage already created on the estate should be altered in favour of a debt subsequently incurred, under its orders, by the Receiver for purposes other than the preservation of the estate itself.

Where a mortgagee decree-holder applied for leave to execute his decree against the properties of his mortgagors in the hands of a Receiver (appointed by the Court in an administration suit between the mortgagors inter se) and a dispute having arisen as to whether the mortgage, which had been created on the estate before it came in custodia legis, had priority over a certain debt subsequently incurred by the Receiver, under the orders of the Court, for purposes other than the preservation of the estate, the Court granted conditional leave to execute the decree and, holding that the debt incurred by the Receiver was a first charge on the estate, directed that the mortgagee should either pay up the debt or proceed against the mortgaged property subject to the liability created by the Receiver.

Held, in revision, (*i*) that the order granting conditional leave was improper;

(*ii*) that the dispute as to priority could not be decided in a summary proceeding for leave to execute the decree

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RECEIVER—*concld.*

and that the proper course was to allow the creditor, who had advanced the loan to the Receiver, to proceed with his execution and face proceedings in which the question of priority could in the ordinary course be decided by an order having the force of a decree and thus subject to appeal.

Query: Whether in the circumstances of the case leave to execute the decree was at all necessary? *Sourendra Mohan Sinha* v. *Kumar Jogendra Narain Sinha* ... 279

REGISTRATION ACT, 1908—*sections* 17, 28 *and* 29—*mortgage bond—fraud on registration—effect—suit on personal covenant—document, whether can be treated as a registered instrument for purposes of limitation—Limitation Act,* 1908 (*Act IX of* 1908), *Article* 116, *applicability of.*

If the registration of a mortgage bond has been obtained by a fraud on the law of registration, the document cannot be treated as a registered instrument for the purpose of applying the provisions of Article 116 of the Limitation Act, 1908, to a suit on the personal covenant. *Inderdeo Singh* v. *Ramlal Singh* 429

RES JUDICATA—*matter agitated and decided in earlier execution—same matter, whether can be raised in subsequent execution. See* Chota Nagpur Tenancy Act, 1908, no. 1 878

ROADWAY—*owner of land abutting on a roadway, whether entitled to access at all points on his boundary. See* Bihar and Orissa Municipal Act, 1922 735

SALVAGE LIEN—*rule of priority. See* Receiver 279

SECOND APPEAL—*question as to finality of entry in rent roll, whether is a point of law—practice to clothe a decision on a question of law with the appearance of a finding of fact deprecated. See* Orissa Tenancy Act, 1913 204

SECURITY BOND—*hypothecation of properties for satisfaction of decree—bond in the name of the Judge—execution—decree-holder seeking to sell hypothecated properties without assignment and attachment—legality—Code of Civil Procedure,* 1908 (*Act V of* 1908), *Order XX, rule* 11—*instalment decree passed under rule* 11(*1*)—*Court, power of, to amend the decree under rule* 11(*2*).

Where the decree in a money suit provided for instalments and thereafter the Court amended the decree with the consent of both parties, making it an instalment decree coupled with a hypothecation of properties, and the security bond was expressed in favour of the Judge, and the decree-holder without taking assignment of it and without taking out attachment proceeded to sell the hypothecated properties in execution:

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SECURITY BOND—*concld.*

Held, (*i*) that rule 11(*2*) of Order XX, Code of Civil Procedure, 1908, is wide enough in its terms to apply to the fixing of instalments and the taking of security after the passing of any decree for the payment of money whether the form of the original decree was for instalments or for a lump sum, and, therefore, that the Court had jurisdiction, under rule 11(*2*), to pass a further and different kind of decree coupled with a hypothecation of property;

(*ii*) that the decree-holder could proceed to sell the hypothecated properties without attachment since they were the subject-matter of a security bond executed by the judgment-debtor for the satisfaction of the decree in the suit;

(*iii*) that the Judge was not a juridical person and the decree-holder could enforce the bond without assignment. *Lalita Prasad Chaudhury* v. *Syed Muhammad Mansoor* ... 719

SERVICE TENURE—*occupancy holding—mafi on condition of rendering services as jeth raiyat—landlord, whether entitled to dispense with the services—tenant's holding, whether a service tenure and a grant burdened with services—tenant's claim to remission on dispensation with services, whether tenable. See* Landlord and Tenant, no. 3 ... 502

SESSIONS TRIAL.—

1——————*index to map containing objectionable material, whether should be put to the Jury—proper course to be adopted. See* Evidence Act, 1872, no. 1 450

2——————*procedure—commitment, whether can be quashed—all charges to be disposed of—Code of Criminal Procedure*, 1898 (*Act V of* 1898), *sections* 215 *and* 240—*confession of a co-accused, when admissible—nature of corroboration required—rule of prudence—Evidence Act*, 1872 (*Act I of* 1872), *section* 30.

A Sessions Judge must pass orders disposing of every charge framed: he cannot quash a commitment though he has power to take action under section 240 of the Code of Criminal Procedure, 1898.

Once a charge has been framed it should not be dropped until the conclusion of the trial unless, on the face of it, it is wholly inappropriate or the trial is open to attack on the ground of misjoinder or multifariousness of charges.

Section 30 of the Evidence Act, 1872, requires that the confession to be used against a co-accused must incriminate its maker. The law does not require that the confession should claim for its maker the leading part in the crime.

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SESSIONS TRIAL—*concld.*

The confession of a co-accused uncorroborated by other evidence is not alone sufficient to support a conviction, and can carry no weight unless it is substantially corroborated by good evidence from other sources.

It is not a rule that corroboration by circumstantial evidence is not sufficient unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction. The criterion is whether the matters before the court taken as a whole carry conviction.

Per KHAJA MOHAMAD NOOR, J.—The confession of a co-accused cannot be placed on the same footing as that of an accomplice. Section 30 of the Act gives it a position inferior to the evidence of an accomplice. The law does not require, apart from the confession of a co-accused, independent evidence by itself sufficient for conviction. This will be making section 30 of the Evidence Act practically useless.

The broad proposition that a conviction can legally be had on an uncorroborated confession of a co-accused is too wide. There must be some evidence, which when weighed after considering the confession of the accused, should bring the charge home to the accused. *King-Emperor* v. *Sadasibo Manjhi* 82

SUCCESSION ACT, 1925—*sections* 332 *and* 335—*Will—residuary legatee appointed executor—mortgage by executor in his capacity as residuary legatee—assent of executor, whether implied—renunciation of executorship without taking out probate—mortgage, whether valid—assent, whether inoperative—letters of administration granted to a legatee—such legatee, whether entitled to recover possession of mortgaged property—grant of letters of administration, whether raises a presumption that the estate remains unadministered—residuary legatees and their transferees, whether liable to have the property in their possession reduced in order to repay specific legatees.*

A legatee, to whom letters of administration with copy of the Will annexed have been granted, is not entitled to institute a suit for the recovery of possession of an estate which has passed out of the possession of the executor as a result of a transaction, entered into by the executor in his character as the residuary legatee before he renounced his executorship without taking out probate.

The mere fact that a legatee has obtained letters of administration with Will annexed cannot raise a presumption that the estate remains unadministered or that, all the legacies, or at least the legacy in favour of the particular legatee who obtains letters of administration, has not been paid in accordance with the tenor of the Will.

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SUCCESSION ACT, 1925—*concld.*

A mortgage, by a legatee under a Will, of immovable property left to him by the testator, before the assent of the executor to the legacy is obtained, is valid and the mortgagee is entitled to cut off the equity of redemption. The reason for this rule is that although the legatee has no property in the legacy by the devise until the assent of the executor is obtained, he has an interest therein which is capable of being transferred; in other words, though on the assent of the executor the full title passes to the legatee, the assent creates no new title but merely perfects the title acquired under the Will.

Where an executor, in his capacity as a legatee, mortgages the property bequeathed to him and applies the money to his own use, and not for the purpose of administering the estate of the testator, the executor will be deemed to have assented to the legacy in his own favour on the date when he gave the property in mortgage. An assent given to a legacy by the executor is not rendered inoperative by reason of the fact that the executor renounces the executorship without taking out any probate.

The residuary legatees and their transferees are always liable to have the property in their possession reduced to a proper extent in order to repay the specific legatees. *Sreemati Indu Prova Debi* v. *Durga Charan Mitra* ... 828

TENURE—*grant of jagir by Government—stipulation as to restraint against alienation—tenure, whether can be sold in execution of money decree. See* Crown Grants Act, 1895 370

TRANSFER OF PROPERTY ACT, 1882—

1——————*sections* 6 *and* 130—*assignment of a part of a debt, whether valid—enforcibility—Code of Civil Procedure,* 1908 (*Act V of* 1908), *Order II, rule* 2—*one sum representing two distinct debts—assignment of a portion representing one item, whether amounts to assignment of a portion of a debt—deed, construction of.*

A executed a zerpeshgi lease in favour of *B* and subsequently mortgaged the same property to *C*. Later *A* borrowed a certain sum from the mortgagee *C* on a handnote. Thereafter the mortgagor sold to *B* the mortgaged property for a sum of Rs. 5,000. It was recited in the sale deed that out of the consideration money a sum of Rs. 2,125 had been set off against the mortgage debt due to the vendee, and a sum of Rs. 2,227 had been left in deposit with him for the purpose of paying off *C*, the balance having been paid to the vendor in cash. It appeared that the sum of Rs. 2,227 left in deposit with *B* represented the entire debt due to *C*, both on the mortgage and the handnote. As the debt due to *C* on the handnote was not paid by the vendee, the vendor borrowed a sum of Rs. 450 from the plaintiff for the purpose of paying off *C* and in consideration of the advance made by the

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TRANSFER OF PROPERTY ACT, 1882—*contd.*

plaintiff, the vendor executed a registered deed whereby he assigned to the plaintiff his right to realize from *B* ' a portion of Rs. 2,227 ', besides interest, which was, under the terms of the sale deed, payable to *C* on the handnote. After the assignment the plaintiff brought a suit to recover the sum from *B*. The defence was that a part of the debt could not be assigned, and, therefore, that the plaintiff had no right to sue:

Held, (*i*) that the sum left in deposit with *B* represented two distinct sums payable to *C*, one on the basis of the mortgage deed and another on the basis of the handnote;

(*ii*) that the two items being quite separate, what was assigned to the plaintiff was a distinct and separate debt and not merely a part of a debt.

Per FAZL ALI, J.—The answer to the question whether a part of a debt can be validly assigned under the Transfer of Property Act, 1882, depends on whether a part of a debt is " property " within the meaning of section 6 of the Act.

A claim to a debt which cannot be enforced by action, as for example, when the debt is barred by limitation, is not property. The same limitation must apply to a part of a debt. Thus, if a claim to a part of a debt cannot be enforced under Order II, rule 2, Code of Civil Procedure, 1908, it is not an actionable claim and section 130 of the Transfer of Property Act has no application to it.

The Transfer of Property Act, 1882, does not recognise any distinction between a whole debt and a part of a debt. Both may be transferred under that Act if they come under the category of actionable claims, as an actionable claim is " property ". The transferee of a part of a debt may, however, find that what is transferred to him is not an actionable claim, as under Order II, rule 2, a single cause of action cannot be split up into several causes of action. Order II, rule 2, being a rule of procedure, it does not affect the right of transfer, that is to say, it cannot make what is transferable non-transferable. It does, however, bar the right of suit in certain cases and it may prevent the transferee of a part of a debt from enforcing his claim and thereby make the transfer nugatory. *Durga Singh* v. *Kesho Lal* 839

2——————*section* 105—*bemeadi settlement of land for building permanent structure—salami—kabuliyat putting restraint upon alienation—rights descendible to heirs—lease, whether permanent—salami, whether premium or advance rent. See* Income-Tax Act, 1922 805

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TRANSFER OF PROPERTY ACT, 1882—*concld.*

3——————*section 52—attachment followed by sale during pendency of mortgage suit—lis pendens, applicability of. See* Mortgage no. 3 155

4——————*section 60—mortgage suit—absence of some persons having equity of redemption from the record—effect —decree, whether should be passed for the entire amount —section 60, effect of. See* Mortgage, no. 4 141

5——————*section 92—Transfer of Property (Amendment) Act,* 1929 (*Act XX of* 1929)*—subrogation, suit to enforce—cause of action, when arises—limitation—redemption of prior mortgage by more than one person—right of subrogation, whether can be claimed by all proportionately.*

Although a subrogee acquires the rights and powers of the incumbrancer whom he has paid off, yet it does not follow that the remedies for enforcing those rights are the same as those that were available to the prior incumbrancer.

Where, under a new contract of mortgage, a person advances money to the mortgagor for the express purpose of paying off a prior mortgage decree, he acquires a right of subrogation under a contract, and the cause of action for a suit to enforce this right of subrogation arises (even under the old law as it stood before he Amending Act XX of 1929) from the date when the mortgage decree is paid off. Limitation does not run from the accrual of the cause of action on the original mortgage.

In order to give rise to a right of subrogation it is not necessary that the redemption must be effected entirely by the particular person who claims subrogation: all that is necessary is that the mortgage dues must have been fully satisfied.

Where, therefore, more than one person advance money with which a prior mortgage is redeemed in full, they are entitled to claim subrogation in proportion to the amounts they have respectively paid. *Dulhin Kamlapati Devi* v. *Jageshar Dayal* 342

TRANSFER OF PROPERTY (AMENDMENT) ACT, 1929—*subrogation, suit to enforce claim of—cause of action, when arises—state of law as it stood before amendment. See* Transfer of Property Act, 1882, no. 5 342

TRIAL BY JURY—*charges under sections* 366, 366*A and* 376, *Penal Code,* 1860 (*Act XLV of* 1860)*—duty of Judge to warn the jury of the danger of convicting on the uncorroborated testimony of the girl—failure to give such warning, whether amounts to non-direction—statement by Judge*

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TRIAL BY JURY—*concld.*

that the general moral character of the girl was of no consequence, whether amounts to misdirection—Judge, how should direct the jury in cases dealing with sexual offences —charge to the jury must show how complicated law has been explained.

It is extremely dangerous, and permissible only in exceptional cases, to convict a man of a sexual offence on the uncorroborated testimony of the complainant. The corroboration must be by independent evidence, and the rule must be properly emphasised in the charge to the jury. Failure to warn the jury of the danger of convicting the accused on the girl's evidence alone amounts to a non-direction which vitiates the conviction.

In a trial for offences under section 366, 366A and 376, Penal Code, 1860, a direction to the jury to the effect that the general moral character of the girl is of no consequence amounts to a misdirection.

It is the duty of the Judge to direct the jury that if they are not completely satisfied that it has been established that the girl is under eighteen, they are bound to acquit the accused upon a charge under section 366A of the Penal Code.

Where the law is somewhat complicated and liable to be misunderstood by the jury, it is essential for the Judge to say exactly how he has explained it to the jury, so that the appellate court may be in a position to judge whether he has done so correctly and fully.

Per HARRIES, C. J.—In cases dealing with sexual offences it is essential that the Judge should specially warn the jury of the danger of convicting upon the uncorroborated testimony of the woman concerned. It is true that there is no rule of law in India requiring corroboration; but experience has shown both in England and in India that it is extremely dangerous in this class of cases to act solely upon the woman's evidence. The rule is a rule of practice, but it has been followed for such a length of time that it has virtually become a rule of law.

After warning the jury of the danger of acting upon the uncorroborated testimony of the girl, the Judge should explain to the jury what amounts to corroboration. He should then point out to the jury what evidence can legally amount to corroboration and he should ask them to consider whether or not they accept such evidence. Finally, he should tell the jury that they should only convict if they are satisfied that the evidence tendered as corroboration is true and worthy of credence. *Sachinder Rai* v. *King-Emperor* 698

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WAIVER—*what amounts to—instalment bond—abstention from suing or acceptance of a portion of overdue instalment, whether amounts to waiver. See* Limitation Act, 1908, no. 5 459

WAKF—*Kazi—District Judge as Kazi, limits to the powers of —appointment of mutawalli, when can be made. See* Muhammadan Law 417

WILL—*residuary legatee appointed executor—mortgage by executor in his capacity as residuary legatee—assent of executor, whether implied—renunciation of executorship without taking out probate—mortgage, whether valid—assent, whether inoperative—letters of administration granted to a legatee—such legatee, whether entitled to recover possession of mortgaged property—grant of letters of administration, whether raises a presumption that the estate remains unadministered—residuary legatee and their transferees, whether liable to have the property in their possession reduced in order to repay specific legatees. See* Succession Act, 1925 828

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