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HIGH COURT.

1927.

Chief Justice

Hon'ble Sir Dawson Miller, Kt., K.C. *(On leave from 28th April, 1927, to 11th August, 1927).*

,, Sir Basanta Kumar Mullick, Kt., I.C.S. *(Acting from 28th April, 1927, to 11th August, 1927).*

Puisne Judges.

Hon'ble Sir Basanta Kumar Mullick, Kt., I.C.S. *(On deputation from 28th October, 1927, to December 1927.*

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,, P. K. Sen, Barrister-at-Law. *(Acting from 28th April 1927, to 11th August, 1927).*

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Tirath Ram *v.* Kahan Devi, (1920) I. L. R. 1 Lah. 583, followed 788

Tituram Mukerjee *v.* Cohen, (1906) I. L. R. 33 Cal. 203, reviewed 638

Tulsi Ram *v.* Bihari Lal, (1890) I. L. R. 12 All. 328, F. B., followed 507

Umed Ali *v.* Abdul Karim, (1908) I. L. R. 35 Cal. 1060, distinguished 277

Uzir Biswas *v.* Harndeb Das Agarwala, (1919-20) 24 C. W. N. 575, followed 254

Vaithialinga Mudaliar *v.* Srirangath Anni, (1925) I. L. R. 48 Mad. 883, P. C. followed 507

Venkata Reddy, *In re*, (1913) I. L. R. 36 Mad. 216, not followed 224

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Vol. VI.

ERRATA.

The following in Vol. VI, pages 274, 280 and 386 should be substituted in their respective places :—

1. At page 274, line 2 of the headnote [execution of a rent decree, dated the 31st May, 1924] :—

Substitute " 31st May, 1921 " *for* " 31st May, 1924 ".

2. At page 280, line 5 of the headnote [Article 192(5), Schedule I of the Limitation Act.....] :—

Substitute " Article 182(5) " *for* " Article 192(5) ".

3. At page 386, line 8 of the headnote [A decree was then preferred to the High Court] :—

Substitute " An appeal " *for* " A decree ".

Vol. VII.

In Vol. VII, at page 50, line 19—

Substitute " Rs. 590 " *for* " Rs. 950 ".

THE
INDIAN LAW REPORTS
PATNA SERIES.

REVISIONAL CRIMINAL.

Before Jwala Prasad, J.

BHUBANESHWAR KUER

v.

KING-EMPEROR.

1926

Feb., 2.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 110 " *by habit* ", " *habitually* ", *meaning of.*

The words " by habit " and " habitually " are used in section 110, Criminal Procedure Code, 1898, in the sense of depravity of character as evidenced by the frequent repetition or commission of the offences mentioned in the section.

Certain tenants, pending the preparation of a record-of-rights, agreed inter se that those amongst them whose names should be entered in the record-of-rights would divide the land allotted to them with certain other tenants who had contributed towards the expenses of litigation which had resulted in the settlement of the land by the landlord. Some of the parties to this agreement, in trying to enforce

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*Criminal Revision no. 689 of 1924, from an order of G. J. Monahan, Esq., Sessions Judge of Monghyr, dated the 3rd November, 1924, modifying an order of B. Raghunandan Pande, Deputy Magistrate, Monghyr, dated the 18th July, 1924.

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its terms, committed offences of loot and assault against recalcitrant parties and were called upon to execute bonds for good behaviour under section 110 on the ground of the above mentioned offences coupled with previous acts of aggression committed against the landlord prior to the settlement referred to above. *Held*, that the mere fact that some of the parties to the agreement resorted to improper means to enforce its terms did not prove them to be habitual offenders within the meaning of section 110 (*a*) to (*e*) but that the evidence of their conduct towards the recalcitrant parties to the agreement showed that they had become so desperate and dangerous as to render their being at large without security hazardous to the community in which they lived and, therefore, that they were liable to be bound down under section 110 (*f*) *Kali Prasanna Bose* v. *Emperor*(1), *Kasi Sundar Roy* v. *Emperor*(2) *and Sri Kanta Nath Shaha* v. *King-Emperor*(3), referred to.

As, however, some of the persons proceeded against had in the meantime been convicted on substantive charges and their sentences had not expired the High Court held that these latter were not " at large " within the meaning of section 110 (*f*), and, therefore, that there was no necessity for an order against them under that clause.

The facts of the case are stated in the judgment.

Sir Ali Imam, with him *S. A. Sami*, for the petitioners.

Manuk, with him *H. L. Nandkeolyar*, Assistant Government Advocate, and *N. C. Roy*, for the opposite party.

JWALA PRASAD, J.—This is an application against an order passed under section 110 read with section 118 of the Code of Criminal Procedure, directing the petitioners to furnish bonds and sureties of the amounts detailed in the order of the Magistrate, dated the 18th July, 1924, to be of good behaviour for two years. The order has been upheld in appeal by the Sessions Judge of Monghyr by his judgment, dated the 3rd November, 1924.

(1) (1911) I. L. R. 38 Cal. 156. (2) (1904) I. L. R. 31 Cal. 419.
(3) (1904-05) 9 Cal. W. N. 898.

The case of the prosecution has been succinctly and clearly set forth in the report of the Sub-Inspector in charge of Bihpur Thana, dated the 22nd November, 1923, on the basis of which the proceeding under section 110 of the Code of Criminal Procedure was drawn up by the Magistrate on the 24th November, 1923. The ground for the proceeding as stated therein is that the petitioners are by habit thieves and habitually commit or attempt to commit or abet the commission of theft, mischief and offences involving a breach of the peace and are so desperate and dangerous as to render their being at large without security hazardous to the community.

The learned Sessions Judge says that grounds for the order under section 110 of the Code against the petitioners are that they are

> "Leaders of a formidable gang which is in the habit of committing loot and mischief in furtherance of an unlawful common object and that they have on many occasions promoted breach of the peace and are dangerous people."

This observation of the Sessions Judge is taken from the finding of the Magistrate in his judgment of the 18th July 1924.

The petitioners are residents of village Sonebarsa which is merely inhabited by Bhuinhars. During the years 1322 and 1325 Fasli a large quantity of land in mauza Sonebarsa, Bishunpur Gopal and Takbazpore in the zamindari of one Mr. Grant, which had come out of the river Ganges, became cultivable. He made settlements of a portion of these lands with tenants on payment of salami and at Rs. 6 a bigha as rent. These tenants are described as Naramdal or moderate party. Certain other tenants applied for settlement of the lands at the old rate of Rs. 3 a bigha, which being refused they formed themselves into an organisation known as Garamdal or extremists party with a view to force the landlord to accept their terms. The petitioners belong to the Garamdal party. Many acts of loots and assaults

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took place, with the result that certain members of the Garamdal party were bound down on the 3rd of February 1920 for a year under section 107 of the Code of Criminal Procedure (Exhibits 61 and 62). Suffice it to say that the situation became so grave that Mr. Grant had to requisition the services of a band of Gurkhas which was followed by the tragic murder of about 20 of them in a riot said to have been committed by the Garamdal party. Twenty persons were put on their trial, but only one of them Dhally Kuar (who is not before us) was convicted under section 147, Penal Code, and sentenced to two years' rigorous imprisonment (judgment, Exhibit 63). Three of the present petitioners Hari Kuar, Bhutti Kuar and Ramrup Kuar were accused in that case but were acquitted. The gravity of the situation attracted the intervention of the authorities, with the result that Mr. Sen, Commissioner of Bhagalpur Division, held a conference at his house between the parties and had a settlement arrived at between Mr. Curtis as Manager of Mr. Grant and the tenants. It was agreed that a record-of-rights would be prepared and the tract of land which by the fluvial action of the river became the khudkasht lands of Mr. Grant would be settled with tenants, but that the tenants who would be able to identify any of the reformed lands as being part of their previous holding would have those lands settled with them. Consequently by orders of the Local Government survey and settlement was carried out by Babu N. L. Basu, Deputy Magistrate, who was appointed Assistant Settlement Officer. It is said that during the progress of this survey a number of armed lathials of the Garamdal party used to wander about the Diara driving out the tenants going before the Assistant Settlement Officer in support of their claims. The result was that 21 persons of the Garamdal party were bound down for a year on the 23rd September, 1921. Amongst those bound down were the petitioners Bhubaneshwar Kuar, Ramarup Kuar, Bhokar

Kuar, Puchha Rai, Hari Kuar and Dudhraj Kuar (judgment, Exhibit 64).

A few months after, in December 1922, the record-of-rights was finally published. As no one was able to identify any of the newly formed lands, they were divided up into three blocks. The larger block was assigned to the Garamdal party and the lesser area to the Naramdal party and the Gangoutas. The petitioner no. 1 Bhubaneshwar Kuar, leader of the Garamdal party, drew up a list of the tenants of his party to whom the lands were to be assigned within the area allotted to them. This list was accepted by Mr. Curtis and the record-of-rights was prepared accordingly.

In the meantime in June 1922, some 234 tenants of the Garamdal party executed an agreement. The agreement (Exhibit A) was registered from June 1922 to February 1923. The reason of this agreement is stated therein as well as in the petition before us, and it is that both the 1st and the 2nd parties to the agreement contributed towards the expenses of the litigation between the zamindar and themselves on the basis of ploughs, whereas according to the compromise between the zamindar and the tenants, some of them only would be recorded in respect of the lands which have come out and which are still under water and others who cultivate jointly with them would not be recorded. So that the interest of these persons might not suffer, and those whose names would be recorded might not acknowledge their rights and possession which might cause endless litigation, both the 1st and the 2nd parties executed the agreement whereby whatever land would be allotted in the names of the 1st and the 2nd parties by the zamindar would be divided amongst themselves according to ploughs at present possessed by them, and irrespective of the names of the tenants being recorded in the zamindar's sarishta each individual of the 1st and the 2nd parties would pay rent and have his name recorded in the

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landlord's sarishta in accordance with this arrangement, and so long as the landlord would not recognise this division the rent would be paid by the persons holding the lands in accordance with the agreement through the persons recorded in the survey record-of-rights and in the landlord's sarishta.

The agreement further provides that if any member of the 1st party refuses or puts off dividing the land to be recorded in his name according to the terms aforesaid he will get it done by suit or " any other means he thinks fit ". A committee of 13 persons including the petitioners Ramarup Kuar, Hari Kuar, Puchha Rai and Jagarup Kuar was nominated to carry out the arrangement.

The penultimate clause of the agreement makes provision for the maintenance of a Middle English School at Sonebarsa by means of subscription to be paid by the 1st and the 2nd parties at the rate of Rs. 3 per plough annually to the Secretary of the school. The Secretary has been authorized to recover subscription by suit or " any other means he thinks fit ".

The prosecution relies upon the terms of the agreement as showing a determination on the part of the parties to the agreement to enforce the terms thereof by whatever means they think fit, lawful or unlawful. It is said that the expression in the agreement " any other means he thinks fit " referred to above indicates that the parties were resolved to resort to force in order to give effect to the agreement in question.

The learned Sessions Judge says,

" As regards the alleged agreement (Exhibit A) it is possible that it may not itself be illegal. However as I have already pointed out there is one ominous clause therein to the effect that the person with whom the land is to be divided may enforce the agreement by suit or by any other means he thinks fit. Obviously the appellants are not justified in enforcing this agreement by illegal means."

The learned Sessions Judge is correct in his view that no party has a right to enforce the terms

of the agreement by illegal means, he however does not definitely find that the clause in question is illegal or unusual though he calls it ominous.

Now, the dispute with regard to the Diara lands was originally between the landlord and the tenants. The dispute was settled by certain arrangement which resulted in the preparation of the record-of-rights. There is no longer any dispute between the landlord and the tenants. The present dispute is beween the tenants inter se and the history prior to the preparation of the record-of-rights in December 1922 is not of much importance except as showing that the petitioners have by a course of conduct acquired a disposition to commit offences such as those mentioned in section 110 of the Code of Criminal Procedure.

The word "habit" implies a tendency or capacity resulting from the frequent repetition of the same acts. The words "by habit" and "habitually" imply frequent practice or use. The aforesaid words have been used in section 110 of the Code of Criminal Procedure in the sense of depravity of character as evidenced by the frequent repetition or commission of offences mentioned in the section.

We have not been taken back to a period prior to 1919 when the Diara lands appeared. We do not know the habits of the petitioners prior to that date and the first thing that brought them within the purview of the criminal law is their attempt to take possession of the lands thrown out by the river Ganges. Apart from this Diara land dispute, nothing has been brought upon the record to show that the petitioners bore any despicable character, that they were implicated in any theft, extortion, cheating or mischief or that they ever provoked a breach of the peace. To my mind, section 110, clauses (*a*) to (*e*), of the Code has no application to the present case. Rightly or wrongly they thought that they would get the lands in question and the result shows that they

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were right in their estimation, for accepting the case of the prosecution they were able to obtain from the zamindar a settlement whereby a large tract of land was made available for settlement with them. Their object was gained, and we find that since then they have not committed any offence so far as the zamindar is concerned. But the dispute has now arisen with respect to the division of the booty. The large tract of land referred to above was sought to be settled with them by means of a record-of-rights. The record-of-rights was prepared for these lands not with a view to exclusively record the rights and possession which existed at the time of its preparation. Its object was to settle the dispute between the landlord and the tenants whereby the lands were to be allotted to the tenants in a certain way irrespective of whether they had held the lands previously. This is at least true with respect to the block of lands in dispute allotted to the Garamdal party and in respect of which the agreement in question (Exhibit A) was executed. It is conceded by Mr. Manuk that so far as these lands are concerned the record-of-rights is not such as is required to be prepared under the Bengal Tenancy Act which acquires certain presumptions. While the record-of-rights was being prepared the Garamdal party entered into an agreement to divide the lands allotted to them by the landlord in a particular way. They do not ignore the record-of-rights altogether. It is said in the agreement that the persons whose names would be recorded would divide the lands allotted to them with other tenants whose names were not recorded on the ground that they had contributed towards the expenses of the litigation which ultimately resulted in the settlement of the lands by the landlord. This agreement, no doubt, is not binding upon the landlord as he is not a party to it, but it is an arguable question as to whether the agreement is not binding upon the executants thereof. The learned Sessions Judge very rightly says that the

agreement may be a lawful one. He is also right in pointing out that the parties to the agreement are not justified in enforcing this agreement by illegal means. The case of the prosecution is that in trying to enforce this agreement amongst themselves the tenants have committed loots and assaults against the recalcitrant members of their parties, which coupled with their previous acts of oppression committed against the landlord, bring them within the purview of section 110, clauses (*a*) to (*e*) of the Code of Criminal Procedure. This contention does not commend itself to me. Rightly or wrongly the petitioners believed that the agreement is a valid agreement and if in enforcing the same in an improper way they committed offences they cannot be said to have acquired the habit of committing those offences or that they were habitually offenders so as to bring them within the purview of the aforesaid clauses. The primary dispute with the landlord, which led them to commit offences, was settled by the lands being allotted to them. The moment this was done they ceased to commit any offence as against the landlord. The present dispute amongst themselves has arisen on account of the division of the booty and the moment this will be settled they would probably cease to commit the offences complained of. Therefore they cannot be said to be habitual offenders so as to bring them within the purview of clauses (*a*) to (*e*) of section 110. To bring them within those clauses where there is a land dispute is calculated to seriously prejudice them. They rely upon a registered agreement settling their rights. It is not possible to decide in a criminal court the validity or otherwise of this agreement, but surely no tenant, whether he is a party to the agreement or not, has a right to take the law into his own hands. After the execution of the agreement the tenants committed offences of loot and assaults which led to an inquiry being instituted, resulting in the present proceedings under section 110 against them. After the proceeding

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was initiated they are said to have committed certain riots which have since been tried. Evidence with respect to these cases has been given in the present case. One of them has ended in acquittal; in two of them tried separately all the petitioners except petitioner no. 1 Bhubaneshwari Kuar were accused and convicted. The investigation into the present case by the police officer was occasioned by certain complaints with respect to several occurrences said to have taken place about the 9th of November 1923. The kolai crops of Lachmi, Dhaneshwar, Chandi and Rajeshwar were grazed and a plough of one Panchu Hazari and Dhaneshwar was broken. In most of these cases all the petitioners including petitioner no. 1 Bhubaneshwar Kuar were concerned. Previous to the publication of the record-of-rights the petitioners were concerned in many cases of loot and assault culminating in the murder of twenty Gurkhas mentioned above. Both in the old dispute with the landlord and in the present dispute with the members of their own parties, the petitioners have shewn desperation and disregard of life and properties of others. Formerly their acts of *zulum* were directed against the landlord and his adherents, the members of the Naramdal party. Their present desperate action is directed against the members of their community who have either not accepted or resiled from the terms of the agreement. The course of their conduct shows that they have become desperate and dangerous and therefore it is not safe to let them wander about at large. This would bring them within the purview of clause (*f*) of section 110 of the Code under which if the course of conduct exhibited by a person shows that he has become so dangerous and desperate that it is not safe to let him remain at large he should be bound down to be of good behaviour. The learned Counsel on behalf of the petitioners contends that this clause does not apply, inasmuch as the recalcitrant tenants, who do not accept the terms

of the agreement, cannot be said to form a community. The petitioners along with other persons formed into a party called the Garamdal party. They claimed to have common interest and professed to have common rights and privileges. They thus formed themselves into a society of people having common rights, privileges and interests. In other words, they became members of a community. Those who have fallen out are also members of that community and may besides be regarded as forming a separate community. All of them are residing at Sonebarsa within the local limits of the jurisdiction of the Magistrate who has passed orders under section 110 against the petitioners. The petitioners have by their conduct made themselves dangerous to their fellow brothers living in Sonebarsa, who are members of a community. I therefore overrule this contention. In coming to this conclusion I have considered the following authorities cited at the Bar:

Kali Prasanna Bose v. *Emperor*(1), *Kasi Sundar Roy* v. *Emperor*(2) *and Sri Kanta Nath Saha* v. *King-Emperor*(3).

The concurrent finding of the Courts below is that by their behaviour for a number of years the petitioners have made themselves so desperate and dangerous that it is not safe to let them remain at large. The finding is in accordance with the evidence in the case and is not open to challenge in revision. In this veiw the order passed under section 110 of the Code of Criminal Procedure is not fit to be disturbed.

It appears, however, that the necessity of the order does not exist in the case of eight of the petitioners, for we find that all the petitioners except Bhubaneshwar Kuar have already been punished for the riot committed on the 7th and 8th February 1924.

(1) (1911) I. L. R. 38 Cal. 156. (2) (1904) I. L. R. 3 Cal. 419.
(3) (1904-05) 9 Cal. W. N. 898.

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In those riots the petitioners Ajab Lal Issar, Hari Kuar, Puchha Rai, Jagarup Kuar, Ramarup Kuar and Bhutti Kuar have received punishments of rigorous imprisonment of one year each in one case and nine months in the other case. Thus, these petitioners have to undergo imprisonment for a period of one year and nine months. Similarly, the petitioners Bhokar Kuar and Bilachhan Kuar have got six months' imprisonment in one of these cases and nine months' imprisonment in the other. The convictions and sentences in those two riot cases have now been finally confirmed by this Court on the 28th January, 1925(1). I am told that the accused have not served yet more than a few days of the period of imprisonment imposed upon them. So they will have to undergo almost the entire term of imprisonment from now. Therefore the petitioners are not " at large " to quote the words of the section and hence there is no necessity of taking any bonds from them. As to what will happen after they come out of jail will depend upon the circumstances existing at that time. Certainly, if they do not reform themselves and have recourse to illegal ways of enforcing their rights the authorities will take such action against them as will be applicable under the criminal law. So far as Bhubaneshwar Kuar is concerned, he is not undergoing any term of imprisonment and he is said to be the ring-leader of the accused persons in the sense that they are guided entirely by his counsel and advice, besides active part taken by him in many cases. I would, therefore, uphold the order of the Magistrate so far as he is concerned.

I would commend the action taken by the authorities in this case and the careful inquiry made by the investigating officer and the judgments of the Court below.

(1) Cr. Rs. 686 and 687 of 1924.

APPELLATE CIVIL.

Before Das and Adami, JJ.

SHAIKH ABDUL HASAN

v.

SHAIKH TAJ ALI.*

1926.

June, 4.

Cess Act, 1880 (*Ben. Act IX of* 1880) *sections* 4 *and* 41 (3)——*"cultivating raiyat" definition of——person cultivating land and paying rent not exceeding Rs.* 100 *per annum, whether " cultivating raiyat "——rate at which cess is payable.*

Where a person cultivates land and pays rent not exceeding Rs. 100 per annum, such a person is a " cultivating raiyat " within the meaning of section 4, Cess Act, irrespective of the character of his holding under the Bengal Tenancy Act; and he is liable to pay cess at half the rate paid by a tenure-holder.

Appeal by the defendants.

These three second appeals arose from three suits in which the plaintiffs as landlords sought to recover from the defendants as tenure-holders arrears of cess for the years 1326 to 1329 at the rate of one anna in the rupee. The defendants contested the suit on the ground that they were not tenure-holders but cultivating raiyats and were liable only to pay at the rate of half-anna in the rupee.

It appeared that there was a tenure of 300 bighas on an annual jama of Rs. 560. This tenure came to be held by a number of co-sharer tenure-holders who subsequently agreed with the landlord that each should pay his share of the jama according to the amount of land he held in the tenure. The defendants in the three suits were co-sharer tenure-holders, the amount of whose annual jama did not amount to as much as Rs. 100.

*Appeals from Appellate Decrees nos. 752, 819 and 820 of 1924, from a decision of Babu Krishna Sahay, Additional Subordinate Judge of Bhagalpur, dated the 19th March, 1924, reversing a decision of Babu Charu Chandra Coari, Munsif, 2nd Court, Bhagalpur, dated the 10th March, 1923.

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The trial Court found that as a matter of fact the defendants were cultivating raiyats within the meaning of the Cess Act, and, therefore, they were liable to pay at the rate of half-anna in the rupee only.

On appeal the Subordinate Judge came to a different finding. He stated that though he agreed with the Munsif that the liability to pay cess was based upon the provisions of the Cess Act and not upon the Bengal Tenancy Act, he still found it difficult to agree with the Munsif that, having regard to the definition given in section 4 of the Cess Act, the respondents must be taken to be cultivating raiyats. He referred to the fact that the defendants were entered in the record-of-rights as tenure-holders, and he also refered to and relied on the fact that the defendants were co-sharer tenure-holders within the meaning of the Bengal Tenancy Act. He held that a division of a tenure could not change its character, nor would the distribution of its rental convert it into a different species of holding. He noticed that in the record-of-rights, though the defendants were entered as tenure-holders, the cess to which they were liable was stated to be at the rate of half-anna per rupee, but he held that this was due to a mistake.

Manohar Lal, with him, *Jagannath Prasad*, for the appellants.

S. M. Naim, with him *A. H. Fakhruddin*, for the respondents.

ADAMI, J., (after stating the facts set out above, proceeded as follows:)

It is clear that the learned Subordinate Judge has taken a wrong view. The Cess Act in section 41, sub-section (*3*), states that every cultivating raiyat shall pay to the person to whom his rent is payable one half of the local cess calculated at the prescribed rate upon the rent payable by him. The rate which is payable under the notification of the Government is one anna and, therefore, a cultivating raiyat

would have to pay half-anna in the rupee. The term "cultivating raiyat" is defined in section 4 as meaning a person cultivating land and paying rent therefor not exceeding Rs. 100 per annum; and a "tenure" is defined as including every interest in land, whether rent paying or not save and except an estate as defined in the Act and save and except the interest of a cultivating raiyat. The Act thus clearly states that where a person cultivates land and pays rent not exceeding Rs. 100 per annum such a person is liable to pay at the rate of half the rate paid by a tenure-holder. The denomination "cultivating raiyat" has nothing to do with the Bengal Tenancy Act, nor has the Bengal Tenancy Act anything to do with the realisation of the cess. In deciding whether the defendants are liable to pay as tenure-holders or not, we have to consider the definitions given in the Cess Act and find out who is liable, and if a person cultivates the land himself and pays rent not exceeding Rs. 100 he is a cultivating raiyat whatever may be the character of his holding under the Bengal Tenancy Act. The defendants in this case pay a rent under Rs. 100 and, if they cultivate the land themselves, they will be liable only to pay cess at the rate of half an anna per rupee. There is nothing in the judgment of the lower appellate Court to show us whether these defendants do actually cultivate the lands themselves, and the case must go back to the lower appellate Court for a consideration of the evidence and decision whether these defendants do cultivate the lands themselves. If they do, since they fall under section 41, they are cultivating raiyats and can only be liable to pay cesses at the rate of half-anna in the rupee.

The decree of the lower appellate Court must be set aside and the case must go back to it for decision according to the directions given above. Costs will abide the result.

DASS, J. I agree.

Case remanded.

REVISIONAL CRIMINAL.

Before Jwala Prasad and Macpherson, JJ.

1926.

June, 4.

KULDIP SINGH

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 423——*appeal, whether can be dismissed for default.*

Under section 423, Code of Criminal Procedure, 1898, the court is bound to peruse the record, and to hear the appellant or his pleader if he appears, before disposing of the appeal.

Where, therefore, on the date fixed for hearing, the appellant was not present and the court recorded the following order: —

" Appellant not present. Appeal dismissed ".

Held, that the order contravened the requirements of section 423, and that the court was bound, even when the appellant was not present, to go through the record itself and to decide the appeal on its merits.

The facts of the case are stated in the judgment.

C. M. Agarwala, for the appellant.

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

JWALA PRASAD AND MACPHERSON, JJ.—This is an application against the order of the Sessions Judge of Patna, dated the 28th of April, 1926, dismissing a criminal appeal of the petitioner.

The appeal was admitted on the 18th of February 1926 and after certain adjournments was fixed for hearing for the 28th of April. On the last date the

*Criminal Revision no. 341 of 1926, from the order of A. C. Davies, Esq., I.C.S., Sessions Judge of Patna, dated the 28th April, 1926, upholding an order of Babu Ranjit Prasad, Magistrate of Patna City, dated the 18th February, 1926.

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learned Sessions Judge dismissed the appeal recording the following order:—

"Appellant not present. Appeal dismissed."

The order in question has contravened the requirements of section 423 of the Code of Criminal Procedure under which a criminal appeal has to be dealt with. That section requires that the Court is bound to peruse the record and to hear the appellant or his pleader if he appears before disposing of the appeal. Even if the appellant was not present, the learned Sessions Judge was bound to go through the record himself and to decide the appeal upon merits. Therefore, the appeal has not been legally disposed of.

The order of the learned Sessions Judge, dated the 28th of April, 1926, is illegal and is set aside. and the appeal is restored to its original file. The learned Sessions Judge will now dispose of it in accordance with law.

Appeal restored.

REFERENCE UNDER THE COURT-FEES ACT, 1870.

Before Jwala Prasad J.

PANDIT DHANUKDHARI TEWARI

v.

MANI SONAR.

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June, 9.

Court-fees Act 1870 (*Act VII of* 1870), *section 7(2), 7(4) (c) and Article* 17, *Schedule II—assessment of fair and equitable rent, suit for—prayer not in the nature of declaratory relief—ad valorem court-fee payable.*

A suit for recovery of possession with mesne profits and in the alternative for assessment of fair and equitable rent upon adjudication of plaintiff's title is a suit for a declaration of title and for consequential relief, and court-fee is payable under section 7(4) (c), Court-fees Act, 1870.

The words "other sums payable periodically" in section 7(2) must be construed as implying sums payable in the nature

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of maintenance and annuities upon the rule of ejusdem generis and do not, therefore, cover a suit for assessment of fair rent.

Kali Charan Rai v. *Maharaja Kesho Prashad Singh* (1) and *Hemnalini Debi* v. *Maharaja Chandra Mouleshar Prasad Singh Bahadur* (2), followed.

Held, further, (*i*) that a prayer for assessment of rent is not in the nature of a declaratory relief and does not come under Article 17, Schedule II, Court-fees Act, (*ii*) that there being no provision in the Court-fets Act applicable to a suit for assessment of fair and equitable rent, ad valorem court-fee is payable under Schedule I of the Act, which provides for fees payable on plaints or written statements, etc., " not otherwise provided for in the Act ".

Where the plaintiff's claim was for assessment of rent at Rs. 10 per katha and the lower appellate court allowed him Rs. 3 per katha, thereby reducing the value of the plaintiff's claim in second appeal, *held*, that the court-fee on the memo. of appeal was payable on the reduced claim.

Lukhun Chunder Ash v. *Khodabuksh Mondal* (3), followed.

The facts are stated in the Order of the Court.

Sambhu Saran, for the appellant.

Sultan Ahmed, Government Advocate, for the Crown.

JWALA PRASAD, J.—This is a reference by the Taxing Officer under section 5 of the Court-fees Act, and it arises in connection with the second appeals filed by the plaintiffs in this Court.

The plaintiffs are proprietors of mauza Amehta. The defendants hold a house in khata no. 196, khasra no. 47, on land measuring 2 acre in the said village. The land has been entered in the survey record-of-rights as gair majruha of the maliks.

The plaintiffs' case is that the land was given to the defendants in lieu of services to be rendered by the defendants on condition that the plaintiffs would be entitled to take khas possession of the land either

(1) (1919) 4 Pat. L. J. 561. (2) (S. A.) 288 of 1924.
(3) (1892) I. L. R. 19 Cal. 272.

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when the services were no longer required or when the defendants ceased to render those services; and that the defendants refused to render services from Srawan 1328 Fasli and are not inclined to do so and that they refused to quit the land or to pay rent. The plaintiffs, therefore, seek the following reliefs:

(1) That it may be adjudicated that the land or house is the gair majruha of the proprietors and was given as jagir to the ancestor of the defendants in lieu of rendering services on the condition that they would have no right to hold possession of the land in the event of not rendering services to the plaintiffs or of not paying ground rent; that the possession of the defendants is a trespass and the plaintiffs are entitled to recover possession;

(2) That on a declaration of the plaintiffs' title and want of title of the defendants, possession may be awarded to the plaintiffs by ousting the defendants, or in the alternative an order may be passed for recovery of ground rent at the rate of Rs. 10 per katha annually as per account given in the plaint, or any amount that may be considered proper by the court from the defendants.

The plaintiffs valued the suit at Rs. 6-8-0 in the case of Mani Sonar and another, at Rs. 19-8-0 in the case of Dahin Sonar and oth rs and at Rs. 16-4-0 in the case of Baijnath Sonar and another, and paid court-fee thereon. The Munsif disallowed the prayer for khas possession, and allowed the prayer for assessment of rent fixing Rs. 10 per katha annually to be paid from Sawan 1328 Fasli up to the date of the suit.

On appeal the Subordinate Judge fixed the rate of rent at Rs. 3 per katha as a fair and equitable rent. The cross-appeal of the defendants was dismissed.

The plaintiffs have come to this Court in second appeal and seek to have the decrees of the Munsif restored, assessing the rent at Rs. 10 per katha, and have va..ed the memorandum of appeal at one year's rent under sub-section 11 of section 7 of the Court-fees Act, deducting therefrom the amount of rent decreed by the lower appellate Court.

The Stamp Reporter objected to the court-fee paid by the plaintiffs on the plaint and the memoranda of appeal in this as well as in the lower

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appellate Court. He contended that the suit of the plaintiffs being for recovery of khas possession, or in the alternative for assessment of rent, the court-fee payable is on the higher of these alternative reliefs claimed by them. The alternative relief for assessment is assessable with a court-fee of Rs. 15 under Article 17 to Schedule II of the Court-fees Act. This fee being higher than the court-fee payable for the relief for khas possession should be levied in view of the decisions in *Kasinath Narayan* v. *Govinda* (1), *Mahanth Mukhlal Gir* v. *Ramdheyan Rai* (2) and *Dasrati Meshy* v. *Jay Chand Sutradhar* (3).

Accordingly, the plaint and the memorandum of appeal were not properly stamped and the plaintiffs must make the deficiency good with respect to the fee paid by them on the plaint in the trial Court and on the memorandum of appeal filed in this Court as well as in the lower appellate Court. The defendants respondents similarly should have paid Rs. 15 with respect to the cross-appeal filed by them in the lower appellate Court and should be called upon to make up the deficiency in the court-fee paid by them.

The Taxing Officer has accepted the report of the Stamp Reporter. The appellants dispute the view taken by the Taxing Officer, and the dispute thus raised between the Taxing Officer and the appellants has been referred to me for determination as a Taxing Judge, inasmuch as the dispute raised involves a question of principle.

The plaintiffs valued the relief upon one year's rent claimed by them on the principle of section 7. clause (v) of the Court-fees Act. Under that clause court-fee is to be paid according to the amount of rent of the immovable property to which the suit refers payable for the year next before the date of presenting the plaint. The clause relates to suits of

(1) (1891) I. L. R. 15 Bom. 82. (2) (1918) 44 Ind. Cas. 143.
(3) (1924) 78 Ind. Cas. 530.

various kinds between landlord and tenant, such as, a suit for delivery by a tenant of a counter part of the lease, to enhance the rent of a tenant having right of occupancy, for the delivery by a landlord of a lease, for the recovery of immovable property from a tenant holding over after the termination of tenancy, to contest a notice of ejectment, to recover occupancy of immovable property from which a tenant has been illegally ejected by the landlord and for abatement of rent. The clause does not provide for a suit for assessment of rent which implies that no rent was paid previously by the defendant. The court-fee payable under this clause is upon the rent

"payable for the year next before the date for presenting the plaint."

In a suit for assessment of rent there being no rent payable previously the clause does not apply. So far the Taxing Officer seems to be correct.

He, however, thinks that the prayer for assessment of rent amounts to a declaration, but this is not so. It is obvious from the reliefs quoted above that the plaintiffs firstly, seek a declaration of their right to recover possession of the property and of the absence of any right in the defendants to hold possession thereof and then upon such declaration they want to eject the defendants or to have rent assessed in the alternative. The terms of the second relief make it quite clear. It is in two parts, namely (*1*) to eject the defendants and (*2*) to have ground rent fixed in the alternative. Both these prayers in the alternative follow from the adjudication of the plaintiffs' title. Therefore, both these prayers are consequential reliefs sought by the plaintiffs upon a declaration of their title and of want of the defendants' title to the land in question. Therefore, it would be wrong to say that the prayer for ejectment is a consequential relief after adjudication of the plaintiffs' title, whereas the prayer for assessment of rent in the alternative is not a prayer for consequential relief but is only in the nature of a declaration. No rent

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was payable previous to the institution of the suit and the assessment of rent implies that the rent payable is uncertain and depends upon a determination by the Court. The rent of Rs. 10 per katha stated by the plaintiffs is only a suggestion of what they consider to be a fair and equitable rent.

JWALA PRASAD, J.

Therefore, a suit for recovery of possession with mesne profits, and in the alternative for assessment of fair and equitable rent, is a suit for a declaration of the plaintiffs' title to the land and for consequential relief. In the case of *Kali Charan Rai* v. *Maharaja Kesho Prasad Singh* (1) the landlord sued for assessment of rent and for recovery of specific sums as damages for use and occupation of the land. It was held that the suit was to obtain a declaratory decree where consequential relief was prayed and that it came within section 7, clause (*4*)(*c*), and not under section 7, clause (*2*) of the Court-fees Act. The latter clause applies to suits for

> " maintenance or annuities or other sums payable periodically "

and the court-fee payable is according to the value of the subject-matter of the suit which is deemed to be ten times the amount claimed to be payable for one year. It was held that " other sums payable periodically " in the section must be construed as implying sums payable of the nature of maintenance and annuities upon the rule of ejusdem generis. This ruling indicates that a suit for assessment of rent comes under section 7, clause (*4*)(*c*).

The case of *Hemnalini Debi* v. *Maharaja Chandra Mouleshwar Prasad Singh Bahadur* (2) seems to be on all fours with the present one. In that case the suit was for khas possession and mesne profits and in the alternative for assessment of a fair and equitable rent. The question of court-fee came before a Bench of this Court presided over by Das and Ross, JJ., the Stamp Reporter having taken the same

(1) (1919) 4 Pat. L. J. 561. (2) S. A. 288 of 1924.

view as in the present case. The order of the Bench was as follows:—

"We regret that in this case we are unable to agree with the Stamp Reporter. We have carefully read the plaint and in our opinion the suit is for khas possession and mesne profits, and in the alternative for assessment of fair and equitable rent. If the plaintiff succeeds in his appeal and if this Court refuses to give him khas possession, he would be entitled to a decree assessing fair and equitable rent payable by the defendant to him. We do not treat the alternative relief claimed by the plaintiff as a prayer for a declaration of title. It is clearly a prayer asking the Court to determine the fair and equitable rent payable by the defendant to the plaintiff."

In the present case the plaintiffs have been refused khas possession. Their claim is now confined to a decree assessing fair and equitable rent payable to them by the defendants. They also claim a decree at that rate from the date the cause of action arose up to the date of the suit. The prayer for determining a fair and equitable rent was treated in the aforesaid suit to be in the nature of a consequential relief in the same way as the prayer for obtaining khas possession. Both the prayers are consequential reliefs.

Therefore, following this decision the prayer for assessment of rent is not in the nature of a declaratory relief and it does not come under Article 17, Schedule II of the Court-fees Act.

The plaintiffs' prayer is now for assessment of rent at Rs. 7, he having already received Rs. 3 out of his claim for Rs. 10 per katha. This reduces the value of the plaintiffs' claim in the second appeal and the court-fee is payable upon the reduced claim: vide *Lakhan Chunder Ash* v. *Khoda Buksh Mondal* (1).

(1) (1892) I. L. R. 19 Cal. 272.

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The assessment of court-fee should be in accordance with section 7, clause (*4*)(*c*), as observed above. The same result is arrived at by looking at the provisions of the Court-fees Act. There is no particular provision in the Court-fees Act applicable to a suit for assessment of fair and equitable rent and therefore ad valorem court-fee is to be paid under Schedule I of the Act which, as the heading shows, provides for fee payable on a plaint or written statement, etc., in cases

"not otherwise provided for in the Act."

I, therefore, hold that the fee payable upon the plaint and the memorandum of appeal in this Court as well as in the lower appellate Court should be assessed in accordance with section 7, clause (*4*) (*c*), treating the relief for assessment of fair and equitable rent as a consequential relief. Article 17 of Schedule II of the Court-fees Act, which applies to purely declaratory suits, does not apply to the present case.

PRIVY COUNCIL.

J. C. 1926.

June, 15.

JOWAD HUSSAIN

v.

GENDAN SINGH.*

Mortgage Decree—Final Decree—Limitation for Application—Time from which Period runs—Appeal from preliminary Decree—Code of Civil Procedure 1908 (*V. of* 1908), *Order XXXIV, rules* 4, 5—*Limitation Act*, 1908 (*IX of* 1908), *Schedule I, Article* 181.

Where there has been an appeal from a preliminary mortgage decree under Order XXXIV, rule 4, sub-rule 1, and the appellate Court has not extended the time for payment, the period of three years within which, under the Indian Limitation Act, 1908, Schedule I, article 181, an application for a final decree under Order XXXIV, rule 5, sub-rule 2, must be made, runs from the date of the decree of the appellate Court, not from the expiry of the time for payment fixed by the preliminary decree. The above is the case, although the

* PRESENT: Viscount Dunedin, Lord Atkinson, and Mr. Ameer Ali.

appeal is by the mortgagee, and questions merely the amount for which the preliminary decree is made, and although the appeal is dismissed.

Gajadhar v. *Kishan Jiwan Lal* (1), approved.

Judgment of the High Court (2), affirmed.

APPEAL (No. 28 of 1924) from a decree of the High Court (March 22, 1922) affirming a decree of the Subordinate Judge of Gaya.

On February 23, 1915, the respondents obtained a preliminary mortgage decree under Order XXXIV, rule 4, sub-rule 1. In May, 1915, they appealed from that decree to the High Court, contending that two items had been erroneously excluded from the amount of the decree. On August 22, 1915, the time fixed for payment by the preliminary decree expired without any payment having been made. On May 21, 1917, the High Court dismissed the appeal from the preliminary decree without extending the time for payment. On February 21, 1919, the respondents applied for a final mortgage decree under order XXXIV, rule 5, sub-rule 2. The appellant filed an objection that the application was barred by limitation.

The trial judge held that the application was not barred by the Indian Limitation Act, 1908, Schedule I., Article 181, as it was made within three years of the date of the decree of the High Court upon appeal. The High Court (Das and Adami JJ.) affirmed the decision.

1926. May, 11. Abdul Majid for the appellant. The application was barred by article 181; the right to apply accrued on August 22, 1915, when the time for payment fixed by the preliminary decree expired. There was no appeal from the order for sale, the appeal being only against the finding that two sums had been repaid. But even if the appeal is to be regarded as an appeal against the preliminary decree

(1) (1917) I. L. R. 39 All. 641. (2) (1922) I. L. R. 1 Pat. 444.

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as a whole, the decision was erroneous. Under article 181 the period of limitation runs from the date "when the right to apply accrues"; the article does not, like article 179 of the Act of 1877, refer to "the date of the final decree or order of the appellate Court." The appeal having been dismissed simply, the decree did not prevent the running of time from the date fixed by the preliminary decree: *Juscurn Bird* v. *Pirthichand Lal* (1). Nor did the presentation of the appeal have that effect: Order XLI, rule 5, sub-rule 1. There was nothing to prevent the mortgagees from applying for a final decree on or after August 22, 1915. The High Court followed *Gajadhar Singh* v. *Kishan Jiwan Lal* (2). In that case however the mortgagor apparently appealed from the preliminary decree. Further, it is submitted that that decision was erroneous, and the decision in *Madho Ram* v. *Nihal Singh* (3) was correct. The present question did not arise in *Abdul Majid* v. *Jawahir Lal* (4); in that case, article 179 of the Act of 1877 applied.

Dunne K. C. and *E. D. Raikes* for the respondents were not called upon to argue, but called attention to *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (5).

June 15. The judgment of their Lordships was delivered by—

VISCOUNT DUNEDIN.—In this case the plaintiffs were mortgagees under a registered mortgage bond granted by the defendant. They brought a suit for the sum of Rs. 52,000 odd, said to be due under the mortgage. The defendant denied that the whole sum was due, as he said the plaintiffs had not given him credit for two sums of Rs. 11,000 odd and Rs. 8,000 odd, which he had paid, such payments having

(1) (1918) I. L. R. 46 Cal. 670; L. R. 46 I. A. 52.
(2) (1917) I. L. R. 39 All. 641.
(3) (1915) I. L. R. 38 All. 21.
(4) (1914) I. L. R. 36 All. 350.
(5) (1900) I. L. R. 23 All. 152; L. R. 27 I. A. 209.

originally been indorsed on the bond, but the indorsations having been erased by the plaintiffs.

The Subordinate Judge gave effect to this contention, but made the ordinary preliminary decree for the sum of Rs. 19,000, being the sum due, with proper computation of interest, after allowing credit for the above mentioned two sums. The date of this decree was February 23, 1915. The six months of grace for payment would, therefore, expire on August 22, 1915. The mortgagees appealed against the decree. The appeal was heard, and dismissed on May 21, 1917.

On February 21, 1919, application was made for a final decree. The defendants opposed the application on the ground that it was time-barred under article 181 of Schedule I, to the Indian Limitation Act, 1908. The terms of that article are:

"Applications for which no period of limitation is provided elsewhere in this schedule; period of limitation, three years; time from which period begins to run, when the right to apply accrues."

The three years had expired or had not expired according as computation fell to be made, as the defendants urged, from the expiry of the time fixed for payment by the original decree, or, as the plaintiffs urged, from the date of the dismissal of the appeal. The Subordinate Judge gave effect to the contention of the plaintiffs.

On appeal the High Court upheld the decision of the Subordinate Judge. The present appeal is against that judgment. The point, therefore, is simply whether the time runs from the expiry of the time fixed by the original preliminary decree, or from the date when on appeal against that decree the appeal was dismissed.

The appellant's counsel strenuously urged that the appeal was not against the decree, but only against the items in the decree. This is a complete misunderstanding. An appeal must be against a decree as pronounced. It may be rested on an argument

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directed to special items, but the appeal itself must be against the decree, and the decree alone.

Which date is then to be preferred? Their Lordships agree entirely with what was said by Banerji J. in the case of *Gajadhar Singh* v. *Kishan Jiwan Lal* (1): "It seems to me that this rule"—i.e., the rule regulating application for final decrees in mortgage actions—"contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties. When an appeal has been preferred, it is the decree of the appellate Court which is the final decree in the cause."

These words are all the more weighty since previously the learned judge had in *Madho Ram* v. *Nihal Singh* (2) held that when there had been an appeal against a preliminary decree the limitation period applicable to an application for final decree ran from the expiry of the time for payment fixed by the original decree, and not from the disposal on appeal, a view which he candidly confessed in this case was erroneous. The point is put with admirable brevity by Tudball J.: "When the Munsif passed the decree it was open to the plaintiff or the defendant to accept that decree or to appeal. If an appeal is preferred, the final decree is the decree of the appellate Court of final jurisdiction. When that decree is passed, it is that decree and only that which can be made final in the cause between the parties."

The same view was incidentally taken without comment by this Board in the case of *Abdul Majid* v. *Jawahir Lal* (3).

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

Solicitor for appellant: *Page Thomas.*

Solicitors for respondents: *W. W. Box & Co.*

(1) I. L. R. 39 All. 641, 643, 644. (2) (1915) I. L. R. 38 All. 21.
(3) (1914) I. L. R. 36 All. 350.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

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

MAHARAJA GURU MAHADEO ASHRAM PRASAD SAHI BAHADUR

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July, 11, 12.

v.

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

Income-tax Act, 1922 (*Act XI of* 1922), *sections* 8 *and* 12 *"Interest on Securities"—Securities pledged with bank to secure overdraft—power-of-attorney given to bank authorising them to transfer the securities to themselves—Interest collected by bank and credited to assessee—Interest on overdraft debited to assessee—Liability of the entire interest on the securities to tax—Nimak sair, whether taxable or not.*

As security for an overdraft an assessee pledged with his bankers his investments in Government Promisory Notes and Municipal and Port Trust Debentures. Some of the securities were endorsed by the assessee in favour of the bankers and the assessee also executed in favour of the bankers a power-of-attorney which authorised them inter alia to transfer all or any of the securities to themselves or to others. A part of the overdraft had been utilized by the assessee in purchasing some of the securities. The bankers collected the income from the securities as it fell due and credited it to the assessee. The interest on the overdraft was periodically debited to the assessee. In assessing the assessee's income for the purpose of income-tax the income-tax authorities included in his income the whole of the income from the securities except such of it as was derived from securities issued free of income-tax and also allowed a deduction in respect of that part of the interest on the overdraft which represented the interest on securities purchased out of the overdraft. The assessee claimed that the interest was not receiveable by him but by the bankers, and, therefore, that he was not taxable in respect of it. He also claimed that in any event he was taxable only in respect of the difference between the income from the securities and the interest on the overdraft.

* Miscellaneous Judicial Case no. 128 of 1925.

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Held, (*i*) that although the bank as the assessee's attorney had a charge upon the income for the interest on the overdraft, it was none the less the income of the assessee, and that the latter had received it through his agent the bank; (*ii*) that the assessee's income from securities had been correctly assessed.

Income derived from nimak sair (i.e., income from the settlement of the right to collect a particular kind of earth in a particular area during a particular season, for the purpose of extracting saltpetre) is indistinguishable from the rents or royalties arising from the letting of coal or other minerals in the earth, and, therefore is income from "other sources" within the meaning of section 12 of the Act.

In a reference made to the High Court under section 66 of the Income-tax Act a finding of fact is binding on the court unless it was come to by some improper process or by failure to give effect to some rule of law.

The facts of the case material to this report are set out in the following Order of Reference by the Commissioner of Income-tax, Bihar and Orissa:—

Under section 66(*3*) of the Indian Income-tax Act, I have the honour to refer the following questions to the Patna High Court. The questions framed by the court are:—

"First, whether from the income of the assessee from his securities the amount of interest charged by the bank on the overdraft of the assessee is deductible for the reason that the bank holds the securities as a pledge and hypothecation against the overdraft allowed by them under express endorsement in their favour or under a power-of-attorney, and whether this income is governed by section 8 or by section 12 of the Act, and secondly, whether the income from nimak sair is not assessable under the law on the grounds that it is the price of the earth sold and is casual and is exempt under the Permanent Settlement Regulations."

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

The assessee, Maharaja Guru Mahadeo Ashram Prasad Sahi of Hatwa, filed a return showing, inter alia, the following income:—

	Rs.	A.	P.
Interest on securities, including debentures already taxed	1,59,523	0	0
Interest on securities of the Government of India or of the local Government that are to be income-tax free	2,310	0	0

Appended to the return was a detailed statement of the securities which make up these items. The former consists of the Calcutta Port Trust Debentures of 1897 and 1900, Calcutta Municipal Debentures

of 1909-10, 1912 and 1913, Government Promissory Notes of 1865, 1900-01, 1896-97 and 1865, and War Loan of 1929-47 and the latter consists of income-tax free 5 year bonds of 1926. At the foot of the statement was the following declaration signed by the assessee himself: " I hereby declare that the securities on which interest as above specified has been received are my own property and were in the possession of the Imperial Bank, Calcutta, at the time when income-tax was deducted ".

So far as these two items are concerned, assessment was made by the Income-tax Officer according to the return but I may mention that in review I allowed a deduction of Rs. 19,644, being the interest on a loan taken for the sole and express purpose of purchasing some of the securities.

The assessee now claims to deduct a further sum of Rs. 82,179 being the interest on an overdraft of nearly 13 lakhs granted by the Imperial Bank on security of the stocks in question. He states that nearly 5 lakhs worth of securities were endorsed in the name of the bank and that the bank holds a general power-of-attorney from him in respect of the rest.

3. It seems convenient to consider first the second part of the first question framed by the court, namely, whether section 8 or section 12 of the Act apply to the income in question. Section 6 of the Act enumerates six heads of income chargeable to income-tax, the second of these being interest on securities. Section 8 describes the head of income more fully and enacts that the tax shall be payable by an assessee under the head " interest on securities in respect of the interest receiveable by him on any securities of the Government of India or of a local Government or on debentures or other securities for money issued by or on behalf of a local authority or company ". I submit that there can be no possible doubt that the debentures and other securities under consideration are securities within the meaning of sections 6(*ii*) and 8. Now, section 12 enacts that the tax shall be payable by an assessee under the head " other sources " in respect of income profits and gains of every kind and from every source to which this Act applies if not included under any of the preceding heads. By the very words of the Act itself, section 12 cannot apply to interest on securities within the meaning of section 8. In my opinion, therefore, the sums in question are chargeable under section 8 and not under section 12.

4. If the income is chargeable, as I contend, under section 8, then under that section the tax shall be payable in respect of the interest " receivable " by the assessee. The assessee argues that the interest is receivable by the bank and not by him, because some of the securities are endorsed in the bank's favour and in respect of the rest the bank holds a general power-of-attorney from him. I would first refer the Hon'ble Court to the assessee's certificate quoted in paragraph 2 of the statement. He there definitely states that the securities are his own property. In the second place, in my review order of May 29, 1925, I arrived at a definite finding of fact that the interest in question was actually received by the assessee. This finding was arrived at after inspecting the assessee's pass-book voluntarily produced by him which showed that the interest on securities was credited to his account and

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that his account was debited with the interest due from him; so far from the interest not being receiveable by him, it was in fact received by him. I submit that under the law the Hon'ble Court cannot go behind my finding of fact. Moreover under the law someone is chargeable to income-tax in respect of these securities and if the assessee is not chargeable, the bank must be. But if an attempt were made to charge the bank, it would surely object that the interest was not received by it, as it had credited the assessee's account with the interest.

5. (*i*) The assessee's return of income showed Rs. 36,057 from other sources which includes Rs. 3,107 from nimak sair which he has given in the detailed explanation of the return. This figure was accepted and assessment was made according to the return. Nimak sair is the income from the settlement of the right to collect a particular kind of earth in a particular area during a particular season for the purpose of extracting saltpetre. This was admitted by the assessee's agent during the hearing of the review. In the statement appended to the return of income for the year 1923-24, nimak sair is alternatively described as " Income from letting out the right to collect earth for saltpetre ". He thus admitted that it is not the price of earth sold. In a note appended to his return for 1925-26 it is stated that nimak sair should be exempt from taxation, because " it is a sort of ground-rent ". The assessee is therefore giving different and irreconcilable descriptions of this source of income in order to evade his liability. I submit that my finding in review that nimak sair is not the price of earth for saltpetre is a finding of fact supported by the assessee's own statement.

(*ii*) Nor again is the income casual. It is shown in the return for 1923-24, 1924-25 and 1925-26. It is thus clearly capable of repetition. A reference is invited to the decision of the Allahabad High Court in Misc. Case no. 307 of 1924 in the matter of *Messrs. Chuni Lall Kalayan Das* (1), printed at page 179 of the Income-tax Manual. That decision is to the effect that a receipt is not necessarily casual because it only occurs once, the test is whether the nature of the transaction is non-recurring. I further submit that under section *4(3)(vii)* a receipt is not exempt merely by being casual but must be both casual and non-recurring. The assessee's own return showed that this does in fact recur. In my opinion therefore the receipt from nimak sair is neither casual nor non-recurring.

(*iii*) As regards the question whether income from nimak sair is " exempt under the Permanent Settlement Regulations ", I submit in the first place that no income is exempt under the Permanent Settlement Regulations which were passed long before the income-tax was enacted. I assume that there is an implied reference to the decision of the Patna High Court in Misc. Judicial Case no. 53 of 1923 that non-agricultural income of permanently-settled estates is not liable to income-tax if it was included in the assets of the estate at the time of the Permanent Settlement and that the real question is whether income from nimak sair is governed by that decision. Now, in the first place, the assessee has at no stage of the case either produced any evidence on this point or even applied for any opportunity to do so. The claim that this sair is governed by the Permanent Settlement was not made

(1) (1925) I. L. R. 47 All. 868.

either in the appeal petition or in the application for review. There is thus no evidence whatever in support of the implicit allegation that nimak sair was included in the assets of the Hatwa Estate at the time of the Permanent Settlement. A reference to the Permanent Settlement Regulations of 1793 further shows that ordinarily only jalkar, bankar, falkar, and ground-rents of markets were allowed to the zamindars and all other sairs were prohibited. If therefore the present contention had been really before me in review, I should have been entitled to find as a fact that income from nimak sair was not included in the assets of the estate at the time of the Permanent Settlement and that it is therefore liable to be assessed to income-tax.

6. On a point of procedure, I beg respectfully to point out that the court has directed me to state a case on an alleged point of law that that was never raised before me. Section 66(3) of the Act provides that the High Court may order the Commissioner of Income-tax to state a case when he has previously refused to state one on the ground that no question of law arose. In the present case I did not refuse to state a case on the question whether income from nimak sair was exempt under the Permanent Settlement Regulations because I was not asked to refer that question. The assessee did not in point of fact definitely frame the question that he wished to be referred; but as he did not even make the claim that is now put forward it is evident that this question of law was not even implicit in his application.

The power of attorney executed by the assessee in favour of the bank was as follows :—

Know all Men by these presents that I do constitute and appoint the Imperial Bank of India, a corporation constituted under the Imperial Bank of India Act, 1920, and every Secretary and Treasurer, Deputy Secretary and Treasure Inspector, Chief Accountant, Chief Cashier for the time being at the local Head Office of the said Bank, the Agent or Sub-Agent for the time being at each of the Branches of the said Bank or any other officer whose appointment in the service of the Bank, or whose power to sign documents on behalf of the Bank shall have been notified as required by section 51 of the Imperial Bank of India Act, 1920, in the Gazette of India, jointly and severally to be my true and lawful Attorneys and Attorney for me and in my name and on my behalf, either individually or jointly with others or as executor or trustee or in any other capacity to sell, endorse, transfer and assign all Government Securities, Shares or Stock in any Joint Stock or Public Company including the said Bank or other Stocks, Funds and Securities of any description whatever and to tender, contract for, and purchase and accept and sign the transfer into my name of any Government Securities, Shares or Stock in any such Joint Stock or Public Company or other Stocks, Funds and Securities of any description whatever, and to apply for and accept allotments of Shares in any such Joint Stock or Public Company and to demand and receive all interest and dividends due or to accrue due on all or any such Shares, Stocks, Funds and Securities, and to demand and receive all debts, sums of money, principal money, interest, dividends and dues of what nature or kind soever (*sic*) which now or at any time hereafter may be due, payable or belong to me on any account or in any capacity whatever, to sign and endorse all Cheques, Promissory Notes, Bills of Exchange, Bills

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of Lading or other orders for payment of money or delivery of property of every description to which my signature may be needed or deemed expedient and for the purposes aforesaid, or any of them to sign application forms, contracts, agreements, transfers, acceptances, receipts acquittances or other documents, and to do all lawful acts requisite for effecting the premises and from time to time to appoint a proxy or proxies for the purpose of representing me and voting at any meeting or meetings of any Joint Stock or Public Company including the said Bank, in respect of any such Shares or Stock as aforesaid and also to endorse and transfer to the said Bank itself any Government Securities, Shares or Stock in any Joint Stock or Public Companies including the said Bank itself or other Stocks, Funds or Securities of any description whatever which may from time to time or at any time be in the possession of the said Bank whether for safe custody or otherwise and which shall be held by the said Bank as security for any money payable to the said Bank by me in respect of any overdraft, general balance of account or otherwise and also to sell, endorse, negotiate, transfer in due course of law or assign all or any such Securities, Shares and Stocks aforesaid and apply the proceeds in satisfaction of any moneys due by me to the said Bank at the time of sale, and generally to act in the premises as effectually to all intents and purposes as I could act if personally present, and also for all or any of the purposes aforesaid to appoint a substitute or substitutes and such substitution at pleasure to revoke, I hereby ratifying and agreeing to confirm whatsoever shall be lawfully done in the premises by virtue of these presents, and I declare that the power hereby conferred shall not be determined or affected by my acting either personally or through another in the premises and in case of my death this Letter of Attorney as to all matters and things which before the fact of my death shall be known to them or him shall be done by my said Attorneys or Attorney by virtue, or under colour, or in pursuance hereof, and all payments made to them or him before the fact of such death shall be known to the person making the payment shall be as binding upon my Executors and Administrators as the same would have been upon me if living

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

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

DAWSON MILLER, C. J.—This case comes before us under section 66 of the Income-tax Act upon a case stated by the Commissioner of Income-tax. The Assessee, the Maharaja Bahadur of Huthwa, complains in respect of two items upon which he has been assessed to income-tax. The first item is the income upon certain Government securities valued at 41 lakhs of rupees which were deposited with the Imperial Bank to secure an overdraft which during the year of assessment has been taken at a sum of

close upon 13 lakhs of rupees. The interest payable upon the overdraft amounted to Rs. 82,179. The securities which were lodged with the Bank to secure payment of the interest upon that overdraft brought in an income in the way of dividends of Rs. 1,59,000. These dividends as they fell due were received by the Bank under a general power of attorney granted by the assessee to the Bank. They were credited to his account and from month to month the sums due for interest on the overdraft were in the same way debited to the assessee's account. The assessee contends that this source of income, at all events to the extent of Rs. 82,179, which represents the interest on the overdraft paid to the Bank, should be deducted from his taxable income. The argument put before us in the case is, in the first place, that these securities having been hypothecated to the Bank by way of security for the overdraft are in fact no longer the property of the assessee and ought to be treated as the property of the Bank. The Bank, however, merely has a charge upon the interest of these properties to secure payment of the interest on the overdraft and possibly a charge upon the corpus to secure repayment of the overdraft itself but the securities in no way cease to remain the property of the assessee and the dividends payable on the securities are undoubtedly part of the income of the assessee.

The main argument addressed to us is an argument based really upon the analogy of the deductions which are made in the case of a business where if the business concerned borrows money from the Bank in order to invest it in the business as part of its capital, then the interest payable to the lender upon the sum so borrowed may be deducted from the profits of the business. The principle in such a case is no doubt a sound one, and it has been recognised by the framers of the Income-tax Act but only in the case of inceme derived from business. Under section 10 of the Income-tax Act the tax is payable under the head " business " in respect of the profits or gains of the

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business carried on by the assessee, but from such profits or gains certain deductions are allowed in computing the taxable income. One of these deductions is,

> "in respect of capital borrowed for the purpose of the business where the payment of interest thereon is not in any way dependent on the earning of profits, the amount of the interest paid."

It seems to me quite right and proper, and in fact it is the law, that where persons carrying on business have to borrow money for the working capital of their business, that which they have to expend in order to obtain the capital should be deducted from the actual profits which they make; but in the case of a private individual no such considerations necessarily arise. In the present case it cannot be said that the overdraft was in any way obtained for the purpose of carrying on any business or, except to the extent of about 3½ lakhs, for the purpose of investment producing profits which might be considered as income. In fact we do not know for what purpose the overdraft was taken with the exception of the sum named. Apart from that sum of 3½ lakhs it does not appear that any of it was invested. It is noticeable that in the corresponding section, which applies to the present case, namely, section 8 of the Act, no such deductions are there mentioned. That section says

> The tax shall be payable by an assessee under the head "interest on securities" in respect of the interest receivable by him on any security of the Government of India or of a Local Government, or on debentures or other securities for money issued by or on behalf of a local authority or a company.

Had it been intended that where a private individual borrows money either from his Bank, or from any other source, he should be entitled to deduct the interest thereon from his taxable income I have not the slightest doubt that some provision would have been made to that effect in the Act, but in the other sections of the Act, apart from those dealing with income derived from business, we find no such exemption included. Prima facie therefore the assessee is bound to pay income tax upon all the profits which

come under the head of "interest on securities." Section 4 of the Act states in very broad terms what sort of profits and gains are to be taxed. It provides that

"Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in section 6, from whatever source derived, accruing or arising, or receiving in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

The income in the present case clearly comes within that section and, unless the assessee can shew that by some provision in the Act he is entitled to deduct the sum claimed from his taxable income, he must prima facie fail. He is unable in the present case to shew any such exemption coming within the Act itself. I have mentioned the fact that a sum of about 3½ lakhs of the overdraft was taken for investment. Those investments form part of the securities deposited with the Bank, and it is interesting to note that the interest on the loan to that extent amounting to Rs. 19,644 has been allowed by the Commissioner as a deduction from the taxable income. This appears to have been done under general instructions from the Central Board of Revenue. Under what provision of the Act it is done has not been discussed, but it seems fair and reasonable that such deductions should be made.

A further point which is of a technical nature was made on behalf of the assessee that the income was not really received by him. It was, however, received by his attorney and received on his account, and although his attorney had a charge upon it for the interest due upon the overdraft that makes it none the less income received by the principal. It was received by the agent on behalf of the principal. On this part of the case therefore I consider that the assessee's claim fails.

The other point relates to a sum of Rs. 3,107 which comes under the head of "Income received from other sources." The actual source from which this income is derived is stated by the Commissioner

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in the case. It is called nimak sair, that is, income from the settlement of the right to collect a particular kind of earth in a particular area during a particular season for the purpose of extracting saltpetre. It appears that earth of this description is found upon the assessee's zamindari. The right to extract that earth is apparently let out to tenants and in return for that right the assessee receives something in the nature of rent or royalty. It was contended that this is merely casual income and non-recurring. That fact, however, seems to be concluded by the findings of the Commissioner. He states in his case that it is not casual income. It is shewn in the return for the years 1923-24, 1924-25 and 1925-26. It is thus clearly capable of repetition, and finally he says that, in his opinion, the receipts from nimak sair are neither casual nor non-recurring. That is a finding of fact and unless that finding of fact was come to by some improper process or by failure to give effect to some rule of law it is binding upon this Court. It has not been shewn to us that the facts before the Commissioner were not such as to justify him in coming to that conclusion and, therefore, by his conclusion we are bound.

It was further argued with regard to this part of the case that the income derived from this source is really not income at all, but in the nature of a sale of a part of the earth appertaining to the assessee's zamindari, in other words that it was a transfer of one kind of capital into another, namely, the transfer of this particular sort of earth into money. It is, however, of a recurring nature and it is not casual and in such cases it seems to me that it is quite impossible to distinguish the rents or royalties, whatever they may be called, arising from this source, from the rents or royalties arising from the letting of coal or other minerals in the earth, or income which arises from the produce of the earth whether it be that on the surface or whether it be that beneath the surface provided that it is not non-recurring or casual, and

provided that it is not in the nature of a sale. On this point therefore I think that the assessee's case must fail.

The result is that the decision of the Commissioner of Income-tax must be upheld and this application must be dismissed. The Commissioner is entitled to his costs in this case.

FOSTER J.—I agree.

REVISIONAL CRIMINAL.

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

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Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections*, 17,144 *and* 195—*Disobedience of temporary injunction issued by subdivisional magistrate—complaint by the magistrate—withdrawal of complaint, whether District Magistrate or Sessions Judge has power as to.*

An order under section 144 of the Code of Criminal Procedure, 1898, not having been obeyed by the petitioner, the subdivisional magistrate (with first class powers) who passed the order made a complaint under section 195 (*1*) (*a*) alleging that the petitioner had disobeyed his order and had thereby committed an offence under section 188, Penal Code. The order under section 144 was, however, subsequently complied with and the petitioner then applied to the Sessions Judge to withdraw the complaint made by the subdivisional magistrate. The Sessions Judge decided that he had no jurisdiction to withdraw the complaint and that the application should have been made to the District Magistrate.

Held, that for the purposes of the Code of Criminal Procedure, unless it is shown that there is some provision to

* Criminal Revision no. 383 of 1926, against an order, dated the 20th May, 1926, passed by R. Ghose, Esq., Sessions Judge of Purnea, confirming an order of the District Magistrate of Purnea, dated the 4th March, 1926

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the contrary, the District Magistrate and not the Sessions Judge is the authority to whom a Subdivisional Magistrate is subordinate, and that as there is nothing in the Code to show that a subdivisional magistrate making a complaint under section 195 (1) (*a*) is subordinate to the Sessions Judge, the authority to which such magistrate is subordinate within the meaning of section 195 (5) is the District Magistrate.

Query. Whether a complaint made under the provisions of section 195 (*1*) (*a*) by a magistrate acting as a public servant is a judicial order.

Sub-section (3) of section 195 applies only where a complaint has been made under sub-section (*1*) (*b*) or (*c*) by a court and not when a complaint has been made under sub-section (*1*) (*a*) by a public servant.

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

S. Sinha (with him *Kailaspati*, *B. P. Varma*, and *P. P. Varma*), for the petitioner.

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

DAWSON MILLER, C. J.—This is an application in revision from an order of the Sessions Judge of Purnea refusing to consider the question of withdrawing a complaint preferred by a Subdivisional Magistrate under the provisions of section 195 of the Code of Criminal Procedure. The learned Sessions Judge considered that he had no jurisdiction to grant the relief sought and consequently refused to interfere.

From that decision the present proceedings are brought asking us to interfere in revision after finding that the learned Sessions Judge had jurisdiction to interfere. In order to understand how the point arose, and ultimately it depends upon the construction of sections 17 and 195 of the Code of Criminal Procedure, it is necessary to state shortly the facts out of which the case arises. It appears that in the district of Purnea there are certain melas held at certain

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times of the year. They are organised by zamindars in the neighbourhood and where two such melas are held at or about the same time there is a certain amount of rivalry which at times is of such dimensions that it is apt to create a breach of the peace. During the holding of two melas, one at Sankerpur and the other at Simarbani, which are two villages a short distance apart the rivalry between the proprietors of these two melas was so great that something in the nature of a riot occurred last year several people being injured, and I believe three being killed. Babu Maini Missir, who is the petitioner in this case, is the proprietor of the mela held at Sankerpur and Babu Sundar Lal is the proprietor of a similar mela held at Simarbani a few miles distant. It has been usual for the petitioner to hold his mela sometime in February but before it comes to a conclusion it has also been the custom for Babu Sundar Lal to hold his mela a few miles distant with the consequence that they are both going on at the same time and the sort of trouble which I have indicated is apt to arise. In order to obviate any such trouble during the present year proceedings were taken by the Subdivisional Magistrate of Araria, who is a Magistrate of the first class, under section 144 of the Code of Criminal Procedure, and both the parties to whom I have referred were called upon under that section to shew cause why they should not take action upon their property in a certain manner indicated by the Subdivisional Officer. They appeared before him and in the result the Subdivisional Officer passed an order that the first mela, the one held at Sankerpur by the petitioner, should take place between the 14th and the 27th February, and that it should end on the latter date, and that the mela held at Simarbani should subsequently take place beginning a week later on the 6th March and should end on the 19th March.

From this order Babu Sundar Lal moved the District Magistrate under section 144 (4) of the Criminal Procedure Code and when the matter came

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before the District Magistrate he had the parties before him and apparently they were willing to pay for the services of armed police during the time that the mela should be going on concurrently in the two different villages if the Magistrate would modify the order passed by his subordinate and allow the melas to be held in the same manner as they had been on previous occasions. In the result the District Magistrate passed the following order:—

"Each party is prepared to pay for armed police to ensure that there should be no breach of the peace in his mela. That being the case there is no necessity for any order against the petitioner under section 144, Criminal Procedure Code The Superintendent of Police will please report the cost of deputing a sufficient number of armed police to each mela, to-day if possible. On receipt of his report I shall pass final orders."

The report was submitted from which it was found that the cost of providing police for the days when the two melas would be going on concurrently would be Rs. 110. Thereupon the Magistrate ordered that upon Sundar Lal depositing half the amount the order under section 144 against him would be rescinded, and he further ordered that if the opposite party, that is the petitioner in the present proceedings, deposited the other half as payment, which he should do without delay, he had no doubt that the learned Subdivisional Officer would be prepared to consider the order with regard to his mela.

The petitioner whose mela was to take plāce first did not deposit his share of the cost of providing armed police but on the 4th March, sometime after the first mela had been in progress, the other party Babu Sundar Lal did deposit his share. Meantime, the petitioner's mela continued notwithstanding that the petitioner had deposited nothing. On the 4th March Babu Sundar Lal, as I say, having deposited his share the Magistrate stated that the petitioner Maini Missir had not fulfilled his undertaking to deposit half the cost of the police force and therefore there was no reason to modify the order under section 144 against him. The order against him was that

he should close his mela on the 27th February and therefore on the 4th March he was contravening the order passed by the Subdivisional Officer. On the 6th March police protection was afforded half the cost of providing the police having been paid by the other party and both melas went on simultaneously. On the 7th March still the petitioner had not paid his share of the police protection and so matters continued until the 11th March. In these circumstances it being found difficult to get the money from the petitioner proceedings were taken under section 188 of the Indian Penal Code against him. These proceedings were taken on the complaint of the Subdivisional Officer. The immediate result was that on the following day the petitioner paid his share of the money for the police protection.

Subsequently the application, to which I have referred, was made to the Sessions Judge to withdraw the complaint put forward by the Subdivisional Officer and the Sessions Judge came to the conclusion that he had no jurisdiction to do so and that in fact the proper person to apply to was not himself but the District Magistrate and therefore he refused to interfere with the result that the prosecution under section 188 is still pending against the petitioner.

It is from that order of the Sessions Judge that the present application in revision is brought. Whether or not the Sessions Judge refused to exercise a jurisdiction which he possessed must depend primarily upon the interpretation of section 195 of the Code of Criminal Procedure. That section provides in sub-section (*1*), clause (*a*), that

> "No court shall take cognizance of any offence punishable under sections 172 to 188 of the Indian Penal Code, except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate."

It may be mentioned that sections 172 to 188 are offences in the nature of contempt for, or disobedience of, the lawful orders of public servants, and in such cases no Court shall take cognizance of such offences

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unless the complaint is made by the public servant himself or by some other public servant to whom he is subordinate. By clause (*b*) of sub-section (*1*) a different class of offences is provided for, a class of offences such as perjury, forgery, using forged documents and matters of that sort which are offences committed in the course of judicial proceedings and in such cases it is provided that no Court shall take cognizance

> " of any offence punishable under any of the following sections of the same Code, namely, sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 and 228, when such offence is alleged to have been committed in or in relation to, any proceeding in any court, except on the complaint in writing of such court or of some other court to which such court is subordinate."

It will be seen by the two clauses of that sub-section that there are two distinct classes of offences referred to and there are two distinct classes of persons by whom the complaint must be made in such cases before the Court trying the offences can take cognizance of them. The first class of persons are the public officers themselves whose orders have been disobeyed or brought into contempt. The second class is the Court in which, or in relation to any proceedings in which, the offence has been committed. Then by sub-section (*5*) of the same section

> " Where a complaint has been made under sub-section (*1*), clause (*a*) " (which applies to the present case) " by a public servant, any authority to which such public servant is subordinate may order the withdrawal of the complaint and, if it does so, it shall forward a copy of such order to the court and, upon receipt thereof by the court, no further proceedings shall be taken on the complaint."

The petitioner's case is that the District Judge is the authority within that sub-section to which the public servant, namely, the Subdivisional Officer in this case, was subordinate and therefore that in applying to the Sessions Judge he applied to the proper person for withdrawal of the complaint. Whether or not it is the Sessions Judge or the District Magistrate who is the authority to which the Subdivisional Magistrate is subordinate seems to me to

depend entirely upon the provisions of section 17 of the Act. Section 17 provides as follows: —

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"All Magistrates appointed under sections 12, 13, and 14," (which includes the Subdivisional Magistrate in this case) "and all Benches constituted under section 15, shall be subordinate to the District Magistrate, and he may, from time to time, make rules or give special orders consistent with this Code as to the distribution of business amongst such Magistrates and Benches"

Then sub-sections (2), (3) and (4) deal with matters which are not relevant to the present discussion and sub-section (5), if there was any doubt as to who is the officer to whom the Magistrate was subordinate seems to put an end to it. Sub-section (5) provides as follows:—

"Neither the District Magistrate nor the Magistrates or Benches appointed or constituted under sections 12, 13, 14 and 15 shall be subordinate to the Sessions Judge, except to the extent and in the manner hereinafter expressly provided."

The result of that appears to me to be that for the purposes of the Criminal Procedure Code, unless it is shewn that there is some express provision to the contrary, the District Magistrate and not the Sessions Judge is the authority to whom the Subdivisional Magistrate is subordinate, and therefore when we find in this Act words relating to an officer to whom the Subdivisional Magistrate is subordinate we must construe that as meaning not the Sessions Judge but the District Magistrate. There are exceptions contained in the Act which have the effect of modifying the provisions of section 17, for instance section 435 gives powers to the High Court, the Sessions Judge and the District Magistrate or the Subdivisional Magistrate in certain cases to call for the records of inferior Courts, but appended to that section is an *Explanation* which states

"All Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 437."

We therefore have in that section an instance of cases in which Magistrates are to be deemed to be inferior to the Sessions Judge, in other words the Sessions Judge is to be regarded as the authority to which they

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are subordinate. There are other sections in the Act making somewhat similar provisions but with regard to section 195 I do not find that there is any provision which takes it out of the general rule laid down in section 17.

It was argued that as the Subdivisional Magistrate being a Magistrate of the first class is subordinate to the Sessions Judge in cases of appeals from his judicial decisions, therefore he must be treated as being subordinate to the Sessions Judge for the purposes of section 195, for it is contended that the order passed by the Subdivisional Magistrate in the present case was a judicial order and was an order therefore which would come, if any appeal lay, to the Sessions Judge and not to the District Magistrate. I am not prepared to find that a complaint made under the provisions of section 195 (*a*) by the Magistrate acting as a public servant, in other words as a complainant in the case, is a judicial order, but even if it were so, it seems to me that under the provisions of that section, there being no exception from the broad rule laid down in section 17 the officer to whom he is subordinate would still remain the District Magistrate. For these reasons I think it is unnecessary to consider the cases which have been quoted to us and in which there appears to be a conflict of opinion as to whether orders passed under section 144 and sanction granted under section 195, before it was amended in 1922, were judicial or administrative orders. I rest my judgment upon the interpretation of section 17 of the Act and the fact that there is no exception from the rule laid down in that section to be found within the provisions of section 195. Therefore it seems to me that the Sessions Judge was right when he said that he was not the proper tribunal to apply to in order to withdraw the prosecution. An argument was based upon sub-section (*3*) of section 195 which provides that for the purposes of this section, a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court.

This sub-section, however, seems manifestly to refer to the cases mentioned in clauses (*b*) and (*c*) of section 195 (*1*) where the complaint must be made by the Court and not to clause (*a*) where the complaint is to be made by a public servant. The magistrate whilst acting under that clause is acting as a public servant and sub-section (3) has I think no application in this case. The antithesis between "public servant" in clause (*a*) and "Court" in clauses (*b*) and (*c*) is marked, and, in my opinion, the magistrate acting under the former clause is acting, not as a Court, but as a public servant.

We have been asked in this case, even if we should consider that the Sessions Judge was right in refusing to interfere, to take the view that it has not been shewn that any real offence was committed under section 188 of the Indian Penal Code and on that ground to set aside the whole proceedings or to direct a withdrawal of the prosecution. It has been said that in the particular circumstances of the case it cannot be shewn that the disobedience to comply with the order either caused or tended to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed. It has further been argued that the offence, if any was committed, was a purely technical one, because the petitioner had agreed to pay his share of the cost of police protection, and the mere fact that he had not paid it in time could really make no difference in the case and therefore the offence was a purely technical one if any. I do not think it can be said that the fact of holding these two melas at the same time having regard to what had taken place in previous years could not by any possibility be regarded as tending to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed. That there was a breach of the Subdivisional Magistrate's order cannot be denied. His order was that unless the petitioner should pay his share of the costs of the police he should close his mela on the 27th February. Nevertheless he kept it

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open and even after the neighbouring mela had started on the 5th March still the petitioner kept his own mela open and the two were running concurrently notwithstanding the order passed by the Subdivisional Officer. It was therefore a clear breach of the order passed. I do not think therefore that any case is shewn for quashing the proceedings or for interfering in any way. At the same time I cannot help feeling that as the affair has passed off without any breach of the peace, without any inconvenience and without subjecting anybody to annoyance, that the matter has now assumed a very different form. The petitioner did in fact, although not till after proceedings were taken by a complaint being lodged by the Magistrate, pay his share of the cost of the armed police, and I have no doubt that even without those proceedings it would eventually have been recovered. However that may be, I think, if the case is persisted in, and the petitioner should be found to have committed the offence, his punishment would probably be nominal, but that is no reason why we should at this stage interfere. The application is dismissed.

FOSTER, J.—I agree.

Application dismissed.

APPELLATE CIVIL.

Before Das and Adami, JJ.

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April, 27.

MAHARAJA PRATAP UDAINATH SAH DEO

v.

LAL GOBIND NATH SAH DEO.*

Chota Nagpur Tenancy Act, 1908 (*Bengal Act VI of* 1908), *section* 139(2), *significance of—suit by landlord against tenure-holder for rent of agricultural land, whether cognizable by Deputy Commissioner.*

*Appeal from Original Decree no. 62 of 1923, from a decision of Maulavi Chaudhari Muhammad Nazir Alum, Deputy Collector of Ranchi, dated the 31st January, 1923.

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Plaintiff was the proprietor of an estate in Chota Nagpur which included a tenure *K*. This tenure, which was liable to plaintiff for the payment of a certain annual rent, was put up for sale on account of arrears of rent due from the tenure-holder. A portion of the tenure, however, was exempted from sale under the proviso to section 208, Chota Nagpur Tenancy Act, and the remaining portion of the tenure was sold and purchased by *B*. who obtained possession of it. On account of this sale the plaintiff had to apportion the rent in respect of the portion excluded from the sale and the portion sold. The defendant tenure-holder having defaulted in the payment of rent the plaintiff brought the present suit for the recovery of the rent apportioned. The Deputy Collector was of opinion that he had no jurisdiction to apportion the rent in a case of this nature under section 139, Chota Nagpur Tenancy Act.

Section 139(2) provides that

"all suits and applications for the determination of the rent payable by any tenant for agricultural land" "shall be cognizable by the Deputy Commissioner, and shall be instituted, tried or heard under the provisions of this Act, and shall not be cognizable in any other court, except as otherwise provided in this Act."

Held, (*i*) that the suit was cognizable by the Deputy Collector under section 139(2), Chota Nagpur Tenancy Act; (*ii*) that the mere fact that the defendant was not a raiyat but a tenure-holder would not exclude the case from the operation of section 139, provided he was collecting rent in respect of agricultural land.

In order that section 139(2) may apply it is not necessary that the defendant should be an agricultural raiyat, but it is necessary that the rent should be payable for agricultural land.

Appeal by the plaintiff.

The material facts of the case are stated in the headnote.

S. M. Mullick and *B. C. De*, for the appellant.

A. K. Roy for the respondents.

DAS, J.—The learned Deputy Collector was right in saying that there was no contract between the landlord and the tenants in this case to pay any

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definite rent for the disputed land; but he was wrong in dismissing the suit on the ground that he had no jurisdiction to apportion the rent in a case of this nature. Section 139(2) of the Chota Nagpur Tenancy Act provides that all suits and applications for the determination of the rent payable by any tenant for agricultural land shall be cognizable by the Deputy Commissioner and shall be instituted and tried or heard under the provisions of the Chota Nagpur Tenancy Act and shall not be cognizable in any other court, except as otherwise provided in the Act.

The defendant, it is true, is not a raiyat but he is a tenure-holder, and if he is collecting rent in respect of agricultural land, then clearly a suit for the determination of the rent payable by him comes expressly under the provision of section 139 of the Chota Nagpur Tenancy Act. In order that section 139(2) may apply, it is not necessary that the defendant should be an agricultural raiyat, but it is necessary that the rent should be payable for agricultural land.

Now the learned Deputy Collector does not say that the land in respect of which the apportionment of rent is claimed is not agricultural land. Agricultural land has not been defined in Chota Nagpur Tenancy Act, and it would appear that this omission is intentional.

It is pointed out by Mr. Rampini in his well-known work on the Bengal Tenancy Act that the question of determining to what classes of land the Act should be applicable was felt to be a difficult one and so it was left to the courts to overcome the difficulties involved in its solution.

We are informed that the record-of-right shows that there are numerous raiyats in these villages from whom the defendant collects rent. If that be so, clearly the land is agricultural land. At all events, if it is land to which the Chota Nagpur Act

applies, there is no reason to take the view that it is not agricultural land.

I would allow the appeal, set aside the order of the learned Deputy Collector, and remand the case to him for disposal according to law.

ADAMI, J.—I agree.

APPELLATE CIVIL.

Before Ross and Kulwant Sahay, JJ.

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Limitation Act, 1908, (*Act IX of* 1908), *Schedule* 1, *Article* 132—*malikana, suit for the recovery of, after declaration of title—plaintiff entitled to recover although claim for declaration barred—" malikana ", meaning of—Article* 132—*suit on the basis of an instrument resisted in former litigation —estoppel.*

Plaintiff, who had in an earlier litigation resisted a certain rafanama, brought the present suit for the recovery of a certain sum as malikana in respect of a village, after a declaration of her right to receive the same, and pleaded, on the basis of the same rafanama, that the village in question was a ghatwali village and that there had been disputes to settle which the rafanama had been drawn up. The defence was, *inter alia*, first, that the plaintiff was estopped from bringing the suit on the basis of the rafanama; secondly, that the right to recover the malikana was barred as the plaintiff could no longer claim a declaration of her right to receive malikana; thirdly, that the malikana claimed did not fall within the term " malikana " referred to in the *Explanation* to Article 132, Schedule 1, Limitation Act, which referred only to malikana under the Bengal Regulations.

*Appeal from appellate Decree no. 209 of 1923, from a decision of W. H. Boyce, Esq., I.C.S., District Judge of Manbhum, dated the 4th November, 1922, confirming a decision of Babu Kamala Prasad, Subordinate Judge of Purulia, dated the 18th April, 1922.

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Held, (*i*) that there was no estoppel in the case inasmuch as the defendant was not prejudiced by the position adopted by the plaintiffs in the previous litigation;

Sreemuthoo Raghoonadha Perya Oodya Taver v. *Kattama Nauchear*(1), *Giris Chandro Bit* v. *Bepin Behary Khan*(2) and *Bhola Singh* v. *Babu*(3), distinguished.

(*ii*) that the claim for a declaration of right to receive the malikana was merely ancillary to the claim for malikana itself, and that, therefore, the plaintiff was entitled under Article 132 to enforce payment for 12 years from the date when the money sued for became due.

Hurmuzi Begum v. *Hirday Narain* (4), followed.

Chhagan Lal v. *Bapubhai* (5), *Raoji* v. *Bala* (6), *Bhinu Bai* v. *Swami* (7), distinguished.

(*iii*) that the term "malikana" as used in Article 132 is not restricted to malikana under the Bengal Regulations, and that the allowance claimed in the present case was malikana within the meaning of that Article. *Mullick Abdool Guffor* v. *Mulaka*(8), distinguished.

The intention of the parties to an instrument must be collected from the language of the instrument and may be elucidated by the conduct they have pursued. *Chapman* v. *Bluck*(9), followed.

The North-Eastern Railway Company v. *Lord Hastings* (10), distinguished.

Appeal by the defendant.

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

Manuk (with him *S. N. Palit*) for the appellant.

A. B. Mukerjee and *B. B. Mukerjee* for the respondent.

Ross, J.—The plaintiff brought this suit to recover Rs. 613—12—5 gandas on account of malikana from 1317 to 1327 for village Bhalubasa by sale

(1) (1866) 10 W. R. (P. C.) 1.
(2) (1918) 27 Cal. L. J. 535.
(3) (1920) 1 Lah. 464.
(4) (1880) I. L. R. 5 Cal. 921.
(5) (1881) I. L. R. 5 Bom. 69.
(6) (1891) I. L. R. 15 Bom. 135.
(7) (1921) I. L. R. 45 Bom. 638.
(8) (1884) I. L. R. 10 Cal. 1112.
(9) (1838) 4 Bing. N. C. 187.
(10) (1900) A. C. 260.

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of the village. The Subordinate Judge decreed the suit with certain deductions from the claim and the District Judge modified the decree in favour of the plaintiff, with the result that the entire claim has been allowed except the claim for interest. The defendant Company appeals.

The plaintiff is the widow of the sardar ghatwal of Taraf Tinsaya in Barabhum, one of the constituent villages of which is mauza Bhalubasa. Between 1881 and 1883 a survey of the ghatwalis of Barabhum was made in which Bhalubasa and other villages were entered as ghatwali villages. The entries were disputed by the zamindar of Barabhum and his ijaradar Messrs. Watson and Company, the predecessors of the defendant Company, who instituted suit no 174 of 1884 for a declaration that Bhalubasa was a mal and not a ghatwali village. The sardar ghatwal and the village ghatwal, whose name was Gopal Singh, were defendants. The suit was decreed *ex-parte* on the 15th of January, 1885; but, subsequently, on the application of the manager of the encumbered estates under whose management the estate of the sardar ghatwal of Taraf Tinsaya was, the *ex-parte* decree was set aside as against the sardar ghatwal; and, when the case came on for rehearing, the plaintiff did not prosecute it further, but undertook to abide by the settlement which had in the meantime been made in 1884. It may be mentioned, however, that as the decree against the village sardar had not been set aside, Messrs. Watson and Company took possession of the village.

The settlement just referred to is known as the ghatwali rafanama and is a general compromise of the whole question of "the lands recently surveyed as ghatwali of Barabhum" and was embodied in an instrument executed on the 6th of March, 1884, by the Government, the sardar ghatwals and the village ghatwals of the one part and the zamindar of Barabhum and Messrs. Watson and Company of the

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other part. It is on the construction of this agreement that the decision of the present appeal principally turns.

In order to understand the effect of the clauses which are the subject of particular controversy in this case, it is necessary to look at the scheme of the rafanama as a whole. It is expressed to be executed with a view to settle the disputes that had arisen in respect of the title to and area of mal and ghatwali lands during the thakbast and survey of ghatwali lands in pargana Barabhum. It was agreed in the first place that the document known as the isimnavisi of 1833 should be assumed to be accurate and that the ghatwali lands should be demarcated in accordance with the columns showing the quantity of ghatwali lands in each village. This was subject to the proviso that, where the ghatwali lands were not entire villages but had been demarcated more or less according to the isimnavisi, the demarcation should hold good in respect of cultivated land but not in respect of jungle or waste. A rule for calculating the area is then laid down in order that effect may be given to the isimnavisi. The rafanama then proceeds to require Messrs. Watson and Company to measure at once the entire area demarcated as ghatwali in the recent survey except entire villages entered in the isimnavisi. When measurement of a village or group of villages is completed, the Superintendent of Surveys is to select the ghatwali area. This must evidently refer to the isimnavisi ghatwali lands which were not entire villages. The next matter dealt with is jungle: and it is provided that no absolute right over the jungles or waste land shall be annexed to the possession of ghatwali lands (this expression appears to be used loosely and not in the restricted sense of isimnavisi ghatwali lands) but the ghatwali is given certain rights of pasturage and fuel, etc., subject to certain rules to be framed. Jungles on the lands not included in the isimnavisi are to be managed by Messrs. Watson and Company and one half of the net

profits are to be divided among the sardar ghatwals, sadials and village sardars in the manner and in the proportions therein laid down. Clause (12) deals with the abadi lands in excess of what is shown in the aforesaid isimnavisi of which the ghatwals are in possession at present. It is provided that this cultivated area is to be settled with the ghatwals on certain terms. These terms are that the excess area shall be measured by Messrs. Watson and Company and the rents payable by the actual cultivators shall be fixed on the scale therein laid down. The sardar ghatwals are to be admitted to take settlement of each village at a rent not exceeding 50 per cent. of the total rent payable by the cultivating raiyats, this proportion being fixed in perpetuity. But it is stipulated that if the rate of rent or the total rent payable is raised or reduced, the rent payable by the ghatwal would vary accordingly. There were certain restrictions on alienation. Each village was to be treated as a separate taluk; and separate pattas and kabuliats embodying these terms were to be exchanged for each village. In villages where there was no sadial, the village sardar was entitled to settlement from the sardar ghatwal of all mal lands in the village at a certain rate; and, where there was a sadial as well as a village sardar, the sadial was first to get the settlement at a particular rate and then he was to settle with the village sardar at a particular rate. The sardar ghatwals were to be designated as bhumijani talukdars, the sadials as sadiali talukdars, and the sardars as bhumijanidar talukdars. Clause (13) provides that the isimnavisi lands should be wholly separate from the mal lands dealt with in clause (12). The title to the latter will not be affected by the dismissal of a ghatwal from his office. Clause (14) provides for hastbud to be made of the bastu rent according to the local custom, in the course of the settlement, of which 50 per cent. is to go to the ghatwals to be divided among them in a specified proportion. Clause (17) provides that the village sardar or sadial might take settlement direct

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from the zemindar or Messrs. Watson and Company; and, in that case, a malikana of 12½ per cent. would be paid to the sardar ghatwal or the sadial. Finally it was agreed that the jama fixed under the settlement should remain unchanged for ten years.

The contention on behalf of the appellant company is that as Bhalubasa was admittedly jungle in 1884, the only right under this agreement which the taraf sardar got over Bhalubasa was a right to a share in the net profits of the jungle under clause (10); but no claim under clause (10) has been made in the present case. The present claim is made under clauses (14) and (17) for 5 annas out of every rupee of the bastu rent and 12½ per cent. of the agricultural rent as malikana; but these clauses have no application. Clause (12) and, consequently, clause (17) which must be read along with it, apply only to the cultivated area then held by the ghatwals in excess of the area shown in the isimnavisi; while as to clause (14) there was no bastu and consequently no bastu rent for Bhalubasa was in contemplation of the parties in 1884. The village has been reclaimed since 1892; and the fact that it is now a cultivated area with homesteads will not entitle the plaintiff to the homestead rent and the malikana which the rafanama provides for in the case of land then under cultivation.

The contention on behalf of the respondent on the other hand is that the rafanama in clause 12 makes provision not only for the settlement of rent of the land then under cultivation, but for the settlement of the entire mal villages with the ghatwal at a rate fixed in perpetuity and that the clause is not to be read as if it were confined only to the land under cultivation in 1884. Learned Counsel for the appellant, however, lays stress on the words " at present " in clause (12). Now it is clear that the meaning of clause (12) is at least this that where there was cultivated land in a mal village then held by a ghatwal, the ghatwal was declared to be entitled to a settlement of the village on payment of 50 per cent of the rent

payable by the raiyats. The area in cultivation, therefore, was immaterial. It might be the whole village or it might be part of the village. But where there was cultivated land in a mal village held by the ghatwal, the ghatwal was entitled to settlement of the village as a bhumijani talukdar. The rent would naturally expand as more and more lands were brought under cultivation. Is it then proper to construe this agreement as if it meant that where a village was jungle in 1884, the ghatwal in possession was not to be entitled to settlement when the village became cultivated but was simply to lose even his jungle rights with the disappearance of the jungle itself? This seems a very forced construction. It appears to me that the real meaning of the agreement is to provide (*a*) for jungle and (*b*) for cultivated land. When a jungle village is reclaimed, it ceases to be jungle and would therefore come under the provisions relating to cultivated land. The only difficulty in the way of this construction is the words "at present" in clause (12). But in my view these words do not relate to the word "cultivated", but to the words "held by the ghatwals." The jungle village was also held by the ghatwals then; and, to say that, because it was not cultivated in 1884 therefore the provisions of the rafanama for cultivated lands held by the ghatwals are not to apply to jungle land which has been reclaimed, seems to me inconsistent with the tenor of the whole document. It admittedly would leave a great gap in the completeness of the settlement; and it is unnecessary to suppose that any such gap was intended to be left or was even left by oversight. The instrument lays down the rights in the jungle and in cultivated land; and the fact that Bhalubasa has passed from the one category to the other is no reason for excluding it from the terms of the rafanama.

The courts below in their judgments on this part of the case relied on the actings of the parties. Learned Counsel contended on the authority of

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The North-Eastern Railway Company v. *Lord Hastings*(1), that the words of an instrument must be construed according to their natural meaning; and, as the present instrument is plain, no evidence of the actings of the parties is admissible. The controversy that had arisen over the interpretation of the document is sufficient to show that it is not plain or unambiguous in its terms. And this seems to me to be very plainly a case in which the words of Park, J., in *Chapman* v. *Bluck* (2) are applicable: "The intention of the parties must be collected from the language of the instrument and may be elucidated by the conduct they have pursued" [quoted in *Watcham* v. *The East Africa Protectorate* (3)]. I think therefore that evidence of the actings of the parties was admissible in this case. This consists of Exhibit 6 and Exhibit 3. Exhibit 6 was a kabuliat executed on the 13th of July 1886 by Messrs. Watson and Company in respect of Taraf Tinsaya in favour of the manager of the encumbered estates. The kabuliat contains the following, among other, terms.

> "During the term of the lease we shall have the right to make fresh settlement, measurement and assessment of rate of rent with all kinds of raiyats and tenants of the lands included in this ijara, in respect of the lands in their possession as well as to make *nayabadi* settlement in respect of patit lands.....Besides the fixed rent, out of the amount of bastukar which is realised from the household lands according to the long standing practice of the pargana, we shall pay separately the five annas share which is due to the sardar ghatwal of Taraf Tinsaya according to paragraph 14 of the rafanama dated the 6th of March 1884 regarding mal ghatwali of pargana Barabhum..... As regards the jungles in the lands included in the ijara, we shall proceed to act according to paragraph 10 of the said rafanama."

This kabuliat covers 28 villages including Bhalubasa and all its terms apparently apply indiscriminately to all. There is nothing to suggest the construction of the rafanama now contended for by the appellant. Exhibit 3 is a petition dated 21st April, 1898, for execution of a decree against the present plaintiff by which Messrs. Watson and

(1) (1900) Ap. Cas. 260. (2) (1838) 4 Bing. N. C. 187.
(3) (1919) Ap. Cas. 533.

Company, the decree-holders, prayed for the sale of 15 villages including Bhalubasa with this note

"According to the rafanama dated the 6th March, 1884, the rent for the judgment-debtors' bhumijani taluqdari right in these mauzas has not as yet been assessed. It will be assessed without delay."

This was in 1898 after the reclamation had begun. Learned Counsel contends that if the right was not there, the use of these words will not confer it But the question for decision is whether the right is there or not; and the use of these words is certainly an indication that in the contemplation of the parties it was. I therefore think that both on the construction of the instrument and on the evidence of the actings of the parties, the courts below were right in holding that the plaintiff was entitled to malikana and to a share of the bastu rent of Bhalubasa.

It was next contended on behalf of the appellant that the plaintiff was estopped from bringing this suit on the basis of the rafanama because in two previous suits—in Suit no. 539 of 1891 she herself as defendant, and, in Suit no. 484 of 1899, she through her tenant Bahadur Singh as defendant had repudiated the rafanama as having been obtained by coercion and undue influence. The plea was accepted and it is contended that unless the plaintiff restores to the defendant the villages Jagudih and Erka which were the subject matter of these suits, she is not entitled to sue on the rafanama which she then successfully repudiated. Reference was made to the decisions in *Sreemuthoo Raghoonadha Perya Oodya Taver* v. *Kattama Nauchear*(1), *Giris Chandro Bit* v. *Bepin Behary Khan*(2) and *Bola Singh* v. *Babu*(3). But the facts of these cases were different from the facts of the present case. In the first case referred to the plaintiff had in an earlier litigation disclaimed title under a certain instrument as a will and in a later suit the same plaintiff set up the instrument as a valid will and testament. The Judicial

(1) (1866) 10 W. R. (P. C.) 1. (2) (1918) 10 Cal. L. J. 535.
(3) (1920) I. L. R. 1 Lah. 464.

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Committee held that this could not be done. In the second case the defendants set up a lease in an earlier litigation as a bar to the plaintiffs' claim for possession and succeeded; and in a second suit by the same plaintiffs they contended that the lease had terminated before the first suit was instituted. It was held that this plea was not open. In the third case it was held that the plaintiffs could not rely upon a will when they had in a previous litigation obtained a declaration of its invalidity against the same defendants. In the present case the plaintiff, who in the earlier litigation had been resisting the rafanama as defendant, now pleads that this village is a ghatwali village and there had been disputes and the Government had intervened and a rafanama had been drawn up to settle the disputes; and she therefore claims such rights as the rafanama gives her, not because it represents her real rights, but because she cannot get anything more. I can see no prejudice to the defendant in her adopting this position and nothing contrary to natural justice. Moreover, as the learned District Judge has pointed out, by two judgments (Exhibit 11 in Suit no. 83 of 1903 and Exhibit 12 in Suit no. 49 of 1901) the rafanama had been affirmed. If there is an estoppel (and I do not think there is) there is also an estoppel against the estoppel and the matter is set at large. In my opinion, this argument fails.

It was then contended that the claim is barred by limitation. The courts below have held that the case is governed by Article 132 of the Limitation Act. Learned Counsel referred to certain decisions, viz., *Chhagan Lal* v. *Bapubhai*(1), *Raoji* v. *Bala*(2) and *Bhinu Bai* v. *Swami*(3), in support of his argument that as the plaintiff could no longer claim a declaration of her right to receive malikana, her right to recover the malikana itself was barred. Now although she has in the present suit in her amended

(1) (1881) I. L. R. 5 Bom. 69. (2) (1891) I. L. R. 15 Bom. 135.
(3) (1921) I. L. R. 45 Bom. 638.

plaint claimed a declaration, this is merely ancillary to her claim for malikana and the plain terms of Article 132 entitle her to enforce payment for 12 years from the date when the money sued for became due; and, in this view, she is within time, as was held in *Harmuzi Begum* v. *Hirday Narain*(1). The learned Counsel also cited *Gopinath Chobey* v. *Bhugwat Pershad*(2) to show that if the suit was for the purpose of establishing a periodically recurring right, Article 131 would apply and the period must be reckoned from the time when the plaintiff was first refused the enjoyment of the right; and argued that the suit of 1901 was notice to her of an adverse title. The finding of fact of the court below, however, is that there was no instance of the malikana having been claimed and refused in the past, and I fail to see how the suit no. 158 of 1901 which was brought against the defendant by Gopal Singh for a declaration that he held a jamai right under the present plaintiff (who was a pro forma defendant) can affect the plaintiff with notice that the defendant would refuse to give her malikana under the rafanama.

It was next contended that the malikana referred to in the explanation to Article 132 is malikana as contemplated by the Bengal Regulations and that the malikana in this suit does not fall within the explanation. Reference was made to an observation in *Mullick Abdool Guffoor* v. *Mulaka* (3) where Garth, C. J., said that a malikana right is the right to receive from the Government a sum of money, etc., But his Lordship was there dealing with the malikana which was in question in that case. That happened to be a malikana under the Bengal Regulations; but I can see no reason for restricting the application of the word as used in the explanation to Article 132 in this way. The allowance claimed in the present case is malikana and it falls within the language of the Article.

(1) (1880) I. L. R. 5 Cal. 921. (2) (1894) I. L. R. 10 Cal. 697.
(3) (1884) I. L. R. 10 Cal. 1112, 1125.

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Then it was argued that even if the 12½ per cent. of the agricultural rent is malikana, the 5 annas in the rupee of bastu rent is not malikana and is not so described in the instrument. But in my opinion, both claims stand on the same footing. The land is not settled with the taraf sardar, but direct with the village sardar or, in this case, with the defendant company which stands in the shoes of the village sardar by reason of their having taken possession of his interest in execution of the decree of 1884 after the rafanama had been entered into. The taraf sardar is given this share of the bastu rent in lieu of the profits arising from the homestead land and it stands on precisely the same footing as the 12½ per cent. of the agricultural rent.

The last point taken was that the learned District Judge has erred in not deducting from the rental 6 annas in the rupee deducted by the Subordinate Judge as a deduction made by the defendant company in favour of its lessee Sham Dhal who got the land reclaimed. Tenants on reclaiming land are given 6 annas out of 16 annas of the land free from rent; and this is the deduction to which the Subordinate Judge refers. But to deduct another 6 annas from the rent of the remaining 10 annas is to make the deduction twice over; and the learned District Judge was right in disallowing this double deduction.

The appeal must be dismissed with costs.

KULWANT SAHAY, J.—I agree. I only wish to say a few words as regards the interpretation of the rafanama of 1884. The circumstances under which the rafanama was executed have to be borne in mind. In the Ghatwali Survey of Barabhum held in 1881-83 certain areas were shewn as included within the ghatwali which the zamindar claimed to be mal lands. A suit was instituted by the ijaradar of the zamindar for declaration that Bhalubasa, the village in dispute in the present case, was a mal and not a

ghatwali village. The rafanama was executed during the pendency of this suit. It dealt with not only the village Bhalubasa, but with the entire dispute between the parties in relation to all lands claimed by the zamindar as mal and the ghatwal as ghatwali. It was agreed to by the parties concerned that the ghatwali title of the ghatwal will be limited to the area shown as such in the isimnavisi of 1833 and the rest of the area in the possession of the ghatwal was declared to be the mal land of the zamindar. On reading the rafanama as a whole it seems to me that the intention of the parties was that although the title of the zamindar to the excess area was declared yet the possession of the ghatwal was retained and limitations to the rights of the parties were prescribed. Clause 10 dealt with jungles and clause 12 with cultivated land. These are the two important clauses upon the true construction whereof this appeal depends. It seems to me that in clause 10 a distinction was drawn between the jungle or waste *land* and the jungle *on* the land. The clause opens with the words that

> " no absolute rights over jungle or waste land shall be annexed to the possession of ghatwali land."

This seems to imply that some limited rights were conferred upon the ghatwal over such lands. Provision is then made as regards the management of the jungle *on* the excess area and the profits arising therefrom were to be divided between the zamindar and the ghatwal in certain proportions. Clause 12 then prescribed the rights of the parties over the lands of the excess area which were not waste or covered with jungle but were then in the possession of the ghatwal. This clause to my mind referred not only to the area which was then actually under cultivation as contended for by learned counsel for appellant, but referred to all lands which were then cultivated or might be brought under cultivation thereafter. This construction finds support from the opening words of clause 10. The ghatwal was not to have an absolute right, but a limited right as set out

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in clause 12 and some of the subsequent clauses. The words " now held by the ghatwals " in clause 12 to my mind are not restricted to the area which was then under actual cultivation, but they refer to the lands then held in possession by the ghatwals. This clause dealt with all lands in the excess area which were cultivable or might become cultivable. Clause 10 dealt with jungle and waste lands and clause 12 with arable lands and these two clauses covered the entire area in excess of the real ghatwali land then in possession of the ghatwal. The real intention of the parties seems to be that the entire excess area, declared to be mal, was to continue in possession of the ghatwals on payment of rent to the zamindar and their status was recognized as tenure-holders, their rights over jungle and waste lands and cultivable lands being separately defined—the object being that whereas before the rafanama the zamindar used to get nothing for the excess area, by the rafanama he got a proportion of the income by way of rent and certain rights over the jungles. The construction placed on the rafanama by the courts below seems to be correct.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Adami, JJ.

BHUPLAL SAHU

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May, 14.

v.

BHEKHA MAHTO.*

Chota Nagpur Tenancy Act, 1908 (*Bengal Act VI of* 1908), *sections* 139(5) *and* 139A, *scope of—suit for declaration of title and recovery of possession of occupancy holding—whether can be entertained by a civil court.*

*Appeal from Appellate Decree no. 669 of 1923, from a decision of Babu Amrita Nath Mitter, Subordinate Judge of Palamau, dated the 17th May, 1923, confirming a decision of Babu Narendra Lal Bose, Munsif of Palamau, dated the 16th March, 1923.

Section 139 of the Chota Nagpur Tenancy Act, 1908, declares :

" The following suits and applications shall be cognizable by the Deputy Commissioner and shall be instituted and tried or heard under the provisions of this Act and shall not be cognizable in any other court except as otherwise provided in this Act—

* * * * * * *

(5) all applications to recover the occupancy or possession of any land from which a tenant has been unlawfully ejected by a landlord or any person claiming under or through the landlord."

Section 139A enacts :

".....no court shall entertain any suit concerning any matter in respect of which an application is cognizable by the Deputy Commissioner under section 139, and the decision of the Deputy Commissioner on any such application.....shall be final."

Where, therefore, the plaintiff sued to recover possession of a certain holding on the ground that he had been dispossessed by the defendant who had been put in possession by the landlord, and also asked for a declaration that he had a right of occupancy in the holding.

Held, that the suit was of the nature mentioned in section 139(5) and, therefore, that it was barred by section 139A.

Held, further, that the question whether the plaintiff had an occupancy right or not in the land was merely a point in the evidence and that the suit was not excluded from the operation of section 139A by the mere fact that the declaration of the plaintiff's title as occupancy raiyat was asked for.

Appeal by the defendant.

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

D. P. Sinha, for the appellent.

Jadubans Sahay, for the respondent.

ADAMI, J.—In the suit giving rise to this second appeal the plaintiff sought to recover possession of a certain holding on the ground that he has been dispossessed by the defendant who had been put in possession of the holding by the landlord. He also asked for a declaration that he had right of occupancy in the holding. In the trial court the question was considered whether under the provisions of section

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ADAMI, J.

139A of the Chota Nagpur Tenancy Act the suit could lie in a Civil Court. The Munsif decided that it could, because it was not merely a suit under section 139, sub-section (5), but was a suit for a declaration of the plaintiff's title as an occupancy raiyat. Therefore the Munsif held that the suit would lie in the Civil Court, it not being a suit exclusively of the nature mentioned in sub-section 5 of section 139 and therefore section 139A would not apply. In the Appellate Court this question does not seem to have been raised. Before us the question was raised again and it was contended that no suit would lie in the Civil Court.

Section 139A was added to the Chota Nagpur Tenancy Act in 1920 and was extended to the district of Palamau, in which the land in dispute lies, in 1920 Therefore it was in force at the time the present suit was instituted. Under that section the Civil Courts are precluded from entertaining any suit

> "concerning any matter in respect of which an application is cognizable by the Deputy Commissioner under section 139."

Under section 139, sub-section (5), as it stood at the time of the institution of the suit, it was provided that all applications to recover the occupancy or possession of any land from which a tenant has been unlawfully ejected by the landlord or any person claiming under or through the landlord could only be brought before the Court of the Deputy Commissioner. Therefore it would seem that the present suit which was based on the allegation that the plaintiff had an occupancy right in the land, but had been dispossessed by the defendant, whom the landlord set up as a tenant in order to get rid of the plaintiff, would seem to be clearly barred by the provisions of section 139A.

It is argued, however, that, since in the plaint a declaration was asked of the plaintiff's title as an occupancy raiyat, the suit was not merely a suit of

the nature mentioned in section 139, sub-section (5), but involved a question of title, so the provisions of section 139A would not apply. As a matter of fact the point whether the plaintiff had an occupancy right or not in this land was merely a point in the evidence. It was not necessary really to ask for that relief, for in order to recover possession the plaintiff would have to show that he was an occupancy raiyat. In my opinion the case is not excluded from the operation of section 139A by the mere fact that the declaration was asked for.

I would hold that this suit was in fact barred under the provisions of section 139A and section 139, sub-section (5), of the Chota Nagpur Tenancy Act and that the plaint should have been filed in the Court of the Deputy Commissioner. I would therefore allow the appeal with costs, and dismiss the plaintiff's suit, with costs in all the courts.

DAS, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

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

RAM PRASAD SAH

v.

MUSSAMMAT FULPATI KUER.*

1926.

May, 24.

Code of Civil Procedure, 1908 (Act V of 1908), section 109 (a)—order refusing leave to appeal in forma pauperis, whether a final order.

An order of the court refusing leave to appeal in forma pauperis is not a final order within the meaning of section 109 (*a*) of the Code of Civil Procedure, 1908.

Sakan Singh v. *Gopal Chandra Neogi* (1), followed.

*Privy Council Appeal no. 40 of 1925.

(1) (1903-04) 8 Cal. W. N. 296. F. B.

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RAM PRASAD SAH v. MUSSAMMAT FULPATI KUER.

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

S. N. Dutt, for the appellant.

H. Imam (with him *Ram Prasad*), for the respondent.

DAWSON MILLER, C. J.—This is an application for leave to appeal to His Majesty in Council from a decision of a Division Bench of this court refusing leave to the petitioner to appeal in formâ pauperis. The petitioner claims that the order of the court refusing leave to appeal in formâ pauperis was a final order which was appealable to His Majesty in Council under section 109 (*a*) of the Civil Procedure Code. The only question is whether the order passed on that occasion is a final order or not. In my opinion it is clearly not a final order which is appealable to His Majesty in Council. The order did not in any way finally determine the rights of the parties. It was merely an interlocutory order prescribing the procedure under which the plaintiff's appeal should be conducted. The court in fact having refused the application for leave to appeal in formâ pauperis granted the appellant time in which to pay the court fee; and had he been able or willing to pay the court fee then his appeal would have proceeded in the ordinary course. His rights as an appellant with regard to the subject matter in dispute in the appeal were therefore in no way determined by the order passed from which it is now sought to appeal. The case of *Sakan Singh* v. *Gopal Chandra Neogi*(1) has been referred to by Mr. Hasan Imam on behalf of the respondent in which it was decided by a full bench of the Calcutta High Court that in the converse case, where the court grants leave to appeal in formâ pauperis such an order is not appealable to His Majesty in Council, on the ground that it is not a final order, and that case appears to me to have been rightly decided. The only argument addressed to us

(1) (1903-04) 8 Cal. W. N. 296, F. B.

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is that the decision does determine the right of the party to appeal in formâ pauperis and therefore it is a final adjudication of that right. That however is not the class of right with regard to which finality must exist in order to make it a final decree or order. Every order in one sense finally determines some right of the parties whether it be a right to appeal or whether it be a right to have an extension of time or whether it be any other kind of right; but before one can have a final decree or order there must be some final adjudication upon the subject matter of the suit, that is to say the rights claimed by one party in the suit itself and denied by the other. The rights claimed in the present suit are rights as to a partition of what is alleged to be joint property. The order passed by the Division Bench of this court in no way determined anything connected with those rights. For these reasons I think that this application must be rejected. The respondent is entitled to his costs of this application.

FOSTER, J.—I agree.

APPELLATE CIVIL.

Before Das and Adami, J.J.

MADHAB PODDAR

v.

LALL SINGH BHUMIJ.*

1926.

June, 2.

Chota Nagpur Tenancy Act, 1908 (*Bengal Act VI of* 1908), *sections* 46, 139*A*—*suit for ejectment of under-tenant, maintainability of.*

No suit for the ejectment of an under-tenant by his immediate landlord lies in the civil court under section 139A read with section 46(*4*), Chota Nagpur Tenancy Act, 1908.

Bholanath Mandal v. *Chhota Gunaram Mighi* (1), distinguished.

* Appeal from Appellate Decree no. 426 of 1923, from a decision of W. H. Boyce, Esq., I.C.S., District Judge of Manbhum, dated the 8th February 1923, affirming a decision of Babu Badri Narayan Rai, Additional Munsif of Purulia, dated the 27th November 1922.

(1) (1914) 23 Ind. Cas. 407.

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MADHAB PODDAR v. LALL SINGH BHUMIJ.

Appeal by the defendant.

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

The following provisions of the Chota Nagpur Tenancy Act, 1908, are referred to in the judgment.

Section 46(*4*).—At any time within three years after the expiration of the period for which a raiyat has, under this section, transferred his right in his holding or any portion thereof, the Deputy Commissioner may, in his discretion, on the application of the raiyat, put the raiyat into possession of such holding or portion in the prescribed manner.

139. The following suits and applications shall be cognizable by the Deputy Commissioner, and shall be instituted and tried or heard under the provisions of this Act, and shall not be cognizable in any court, except as otherwise provided in this Act, namely,—

* * * * * *

(*4*) all suits [and applications] (1) under this Act to eject any tenant of agricultural land or to cancel any lease of agricultural land;

* * * * * *

(*8*) all suits and applications in respect of which jurisdiction is conferred by this Act on the Deputy Commissioner.

139A. Subject to the provisions of Chapter XII [i.e. sections 80 to 100 (Record-of-rights and Settlement of Rents)], no court shall entertain any suit concerning any matter in respect of which an application is cognizable by the Deputy Commissioner under section 139, and the decision of the Deputy Commissioner on any such application shall, subject to the provisions of this Act, be final.

S. C. Mazumdar, for the appellant.

A. K. Roy and *S. S. P. Singh*, for the respondent.

(1) The words " and applications " were added by section 38(*4*) of Chota Nagpur Tenancy (Amendment) Act, 1920 (Bihar and Orissa Act VI of 1920), which came into force in 1924.

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MADHAB PODDAR v. LALL SINGH BHUMIJ.

ADAMI, J.

ADAMI, J.—The plaintiff in this suit sought to eject the defendant from the lands asserting that he was an occupancy raiyat and the defendant was an under-raiyat under him. The defendant set up a claim of occupancy right on the basis of two leases, each of a permanent nature, granted by the father of the plaintiff and the mother of the plaintiff, respectively, in the years 1301 and 1304.

The Munsif decreed the suit in part, but on appeal to the District Judge the appeal was dismissed.

A point was taken before the lower Appellate Court that no suit was maintainable, having in view the provisions of section 139, clause (*4*), of the Chota Nagpur Tenancy Act. The learned District Judge found that clause (*4*) of section 139 only bars suits which are under the Act and that there was no section in the Act providing for the ejectment of an under-tenant. The Courts have found that the defendant was merely an under-tenant.

Before us the only point taken is that the suit was in fact not maintainable by the Civil Court; it should have been instituted in the Court of the Deputy Commissioner. It is true that there is no specific section in the Chota Nagpur Tenancy Act providing for the ejectment of an under-tenant, though there are provisions for the ejectment of occupancy raiyats and non-occupancy raiyats. There is, however, a provision, namely, section 46, sub-section (*4*), which allows a tenant to approach the Deputy Commissioner with an application to eject an under-tenant at any time within three years after the expiration of the period for which the raiyat has transferred his right in the holding or any portion thereof. The section allows the Deputy Commissioner, in his discretion, on the application of a raiyat, to put the raiyat into possession of such holding or a portion thereof in the prescribed manner. It was open, therefore, to the plaintiff in this case to have applied to the Deputy Commissioner to take action under section 46, sub-section (*4*). At the time the suit was instituted,

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section 139 had not been amended by section 38 of the Act of 1920. That section 38 only came into force in 1924, and clause (*4*) of section 139, at the time that the suit was brought referred only to suits under the Act to eject a tenant from agricultural land; there was no mention in that clause of applications.

The Court below, however, has failed to notice section 139A which was introduced into the Act by the Amending Act of 1920 and came into force before the suit was instituted. Under section 139A no court may entertain a suit concerning a matter in respect of which an application is cognizable by a Deputy Commissioner under section 139. Now, section 46 gives the Deputy Commissioner jurisdiction to deal with an application for ejectment of an under-tenant. This has been held by Teunon, J., in *Bholanath Mandal* v. *Chhota Gunaram Mighi* (1). At the time when that judgment was passed the Act of 1908 had not been amended by the Act of 1920, so that the provisions of section 139A could not be taken into consideration by Teunon, J., and those provisions altogether alter the position. It was, however, decided in that case that section 46, sub-section (*4*), covers the case of the ejectment of an under-tenant by a tenant.

Under section 46, then, an application for the ejectment of an under-tenant was cognizable by the Deputy Commissioner and under clause (*8*) of section 139, as it stood before the amendment and as it still stands, an application under section 48 is an application cognizable by the Deputy Commissioner. Thus it seems clear that under the terms of section 139A, no suit could be brought in the Civil Court for the ejectment of an under-tenant by his immediate landlord. In this view, then, this appeal must succeed and the decree of the lower Courts must be set aside with costs in all the Courts.

DAS, J.—I agree.

Appeal allowed.

(1) (1914) 23 Ind. Cas. 407.

APPELLATE CIVIL.

Before Bucknill and Adami, J.J.

AJODHYA PRASAD

v.

RAMKHELAWAN SINGH.*

1926.

June, 9.

Estates Partition Act (Bengal Act V of 1897), section 119—land not being subject-matter of partition proceeding, allotted to one of the parties—objection, no adjudication on—suit for declaration of title and recovery of possession, whether barred—Limitation Act, 1908 (Act IX of 1908), Schedule 1, Article 14, applicability of.

Where, during the partition of an estate, property not comprised in the estate is allotted to a person who is a party to the partition proceedings, the rightful owner of such property can, within 12 years from the date when his right of action accrues, sue for a declaration of his title and, if necessary, for recovery of possession of the property in question, irrespective of whether he was a party to the partition proceeding or not.

Janki Nath Chowdhry v. *Kali Narain Roy Chowdhry* (1), followed.

In a partition proceeding under the Estates Partition Act, certain lands belonging to the plaintiff and appertaining to a tauzi which was not the subject-matter of the proceeding were allocated to the defendant. The plaintiff filed a petition of objection of which no notice was taken by the Batwara Officer and consequently there was no adjudication of plaintiff's claim. Plaintiff brought the present suit for a declaration of his title to, and recovery of possession of the lands in dispute. The defence was, inter alia, that the suit having been brought more than a year after the partition award, was barred under Article 14, Schedule 1, Limitation Act, 1908, and that it was also barred by section 119 of the Estates Partition Act.

*Appeal from Appellate Decree no. 1323 of 1923, from a decision of J. Chatterji, Esq., Additional District Judge of Patna, dated the 30th July 1923, confirming a decision of Babu Ananta Nath Banerji, Munsif of Barh, dated the 29th June 1922.

(1) (1910) I. L. R. 37 Cal. 662.

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Held, (*i*) that the suit was not governed by Article 14 as there was no act or order which could bring the suit within the purview of that Article;

(*ii*) that the suit was not barred by section 119, Estates Partition Act.

Held, further, that if there had been any adjudication upon the question raised by the plaintiff during the course of the batwara proceedings the relative provisions of the Estates Partition Act would have adversely affected his position; but there having been no adjudication upon his petition the mere fact that there was, in the final partition award, an allocation of the land which the objector contended was not properly capable of inclusion in the estate which was being partitioned, could not operate to prevent the claimant from bringing a suit for a declaration of his title and recovery of possession.

Gurybuksh Prasad Tewari v. *Kali Prasad Narain Singh*, (1), referred to.

Appeal by defendant, 1st party.

The facts of the case, so far as they are material to this report, were as follows.

The plaintiffs brought a suit on the 20th October, 1921, against three sets of defendants; the second party and third party defendants need not be considered as of importance for the purposes of this appeal.

The allegation put forward by the plaintiffs was that they had been dispossessed of two pieces of land known as plots no. 2242 and 2735 which properly appertained to mauza Marachi Bhagat Ekhtiyarpur; that this dispossession had come about owing to the fact that in a partition of an adjoining mauza known as Marachi Bariar, the first party defendants had been wrongly allotted these two plots of land which in fact did not belong to mauza Marachi Bariar at all. It may be convenient here to say that the tauzi number of the village Marachi Bhagat Ekhtiyarpur was 86

(1) (1914-15) 19 Cal. W. N. 1322.

and that of Marashi Bariar 641. The plaintiffs claimed the following principal reliefs:—

(1) That on adjudication of their title the Court might be pleased to declare that the two plots in question lay in mauza Marachi Bhagat Ekhtiyarpur; that they were the plaintiffs' bakasht lands in that mauza and that the defendants had no right or title in connection therewith; and

(2) that the Court should be pleased to award the plaintiffs direct possession of the two plots on ouster of the first party defendants.

For a number of years a Collectorate batwara had been taking place in mauza Marachi Bariar; it appeared that these partition proceedings had commenced in 1906; they did not end until 1915. As a result of this partition proceeding, plots 2242 and 2735 were allotted as if they appertained to mauza Marachi Bariar to the defendants first party; delivery of possession appeared to have taken place on the 31st May, and 11th June, 1915, respectively. During the period occupied by this partition proceeding it appeared that a cadastral survey took place sometime in about 1910 or 1911 and there seemed to be no doubt that in the cadastral survey the two plots were entered as part of tauzi number 641; but it was contended by the plaintiffs that that entry was wrong and wrongly obtained. On the 17th July, 1912, the plaintiffs filed a petition in the batwara proceeding asking that plot 2242 should be included in their takhta because they (the plaintiffs) were in possession thereof; however, later, that is to say on the 8th September, 1913, another petition was filed by the plaintiffs pointing out that their previous petition had been discovered to be completely in error and that as a matter of fact both plots 2242 and 2735 did not belong to tauzi number 641 at all but should be excluded therefrom. It was not clear that any notice of any sort was taken of this petition. The manner in which the Additional District Judge dealt with what was supposed to have taken place at the batwara proceedings with regard to these two plots of land is detailed in the judgment of Bucknill, J. It is sufficient to state that these two plots were allocated to the first party defendants as if they appertained to tauzi no. 641, mauza Marachi

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Bariar. The suit was then brought by the plaintiffs some years afterwards for the reliefs already named.

The Munsif of Barh found in favour of the plaintiffs and his decision was affirmed by the Additional District Judge of Patna.

S. N. Rai, for the appellants.

S. Dayal, for the respondents.

BUCKNILL, J. (after stating the facts set out above, proceeded as follows):—There are only two points raised by the learned Advocate, who appeared for the appellants, here. The first of these points is that the period of limitation which applies to a suit of this kind is governed by Article 14 of the Schedule to the Limitation Act, 1918; that is to say that under that article a suit such as this must be brought within one year of the date of the act or order of an officer of Government in his official capacity not otherwise expressly provided for by other articles of the schedule or by the Act itself. In this case, however, there was no act or order, in my opinion, which could be regarded as bringing the period of limitation within the purview of this Article 14.

The second point which was put forward by the learned Advocate who appeared for the appellants was that under section 119 of the Estates Partition Act, it was not possible for the plaintiffs to bring a suit to set aside anything which had taken place under the partition unless they did so under the proviso to that section which proviso however could not be brought into effect under the circumstances of the present case. The material provisions of this section read thus:—

"119. No order (*a*) refusing to admit an application for partition or to carry out a partition on any of the grounds mentioned in section 11, or (*b*) made under section 20; section 30, Chapter V, Chapter VII, Chapter VIII, Chapter IX (except section 81), Chapter X, section 107 or section 117, shall be liable to be contested or set aside by suit in any Court, or by any means other than those expressly provided in this Act: Provided that (*1*) any person claiming a greater interest in lands which were held in common tenancy between two or more estates than has been allotted to him by an order under section 84 or section 83; or (*2*) any person who is aggrieved by an order made under section 88, may bring a suit in a Court of competent jurisdiction to modify or set aside such order".

The learned Advocate contends that there has been no order under section 88 of the Act which is the only possible section which could apply to what took place in this case; and that by the very allocation by the Collectorate of these two plots of land to the defendant first party, the plaintiffs have no recourse to or remedy in any Civil Court. I must admit that I think that this is a fallacious argument. If, as is contended here, property which did not fall in any way within the estate which was being partitioned was allocated to one of the persons, who was a party to the partition proceedings, it seems to me incredible to suggest that the person to whom that property so allocated rightly belonged could not within 12 years from the date when his right of action accrued bring a suit for a declaration of his title and if necessary for recovery of possession of the land in question; and, indeed, I would go a step further and say that it matters not whether such claimant was an outsider, that is to say a person who was not a party to the partition proceedings, or a person who *was* a party to the partition proceedings.

In the case of *Janaki Nath Chowdhry* v. *Kali Narain Roy Chowdhry* (1) this proposition is clearly laid down by Mookerjee and Teunon, J.J. Their Lordships there observed that if in the course of a partition proceeding any question arose as to the extent or otherwise of the tenure, the tenure-holder not being a party to the proceedings, he was not affected in any manner by the decision which might be arrived at by the revenue authorities for the purpose of partition between the proprietors and that it would be unreasonable to hold that a party who appeared before the revenue authorities in his character as a proprietor should be finally concluded by a decision upon a question of title, which would not have been binding upon him, if he had been a stranger to the proceedings.

(1) (1910) I. L. R. 37 Cal. 662.

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BUCKNILL, J.

Now the learned Advocate who has appeared for the appellants here has quoted to us a considerable number of cases of which the general trend has been to insist upon the importance of the bar presented by section 119 of the Estates Partition Act. The case which perhaps most strongly supports this proposition is perhaps that of *Gurubuksh Prosad Tewari* v. *Kali Prosad Narain Singh* (1). In that case where a party to a partition proceeding objected during the proceedings only to the mode in which the partition was being made but never took any objection that land outside the limits of the property which was being partitioned was being included wrongly in the estate and where the final order for partition was made without such objection, that party was precluded, under the provisions of section 119 of the Estates Partition Act, from bringing a suit for a declaration of title in his favour and for recovery of possession of land which in the suit for the first time he declared belonged to him and did not appertain to the estate which alone should have rightly been partitioned. In the other cases, which were quoted by the learned Advocate we find that the party seeking to bring a suit which would affect the final partition award is generally found to have brought forward his objections during the course of the batwara proceedings and in effect to have had a substantive adjudication thereupon.

Now, it is, therefore, I think at this stage important to ascertain, so far as is possible, whether there really was any adjudication upon this question of the plaintiffs' claim with regard to these two plots of land. I do not think that I can do better than quote on this point from the decision of the Additional District Judge. He says:—

"As to the form of the suit, it was one for declaration of right for recovery of possession of the two plots of land in suit, on the ground that it appertained to tauzi no. 86 (mauza Marachi Bhagat Ekhtiyarpur) Lakheraj and had been in the possession of the plaintiffs on private partition with defendants third party, co-owners of the 2 annas Patti to which the lands in suit had been allotted on a previous

(1) (1914-15) 19 Cal. W. N. 1322.

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Civil Court partition effected in a suit (another suit with regard to that mauza). I fail to see how on the suit as framed, the suit would not lie in the Civil Courts, or how section 119 of the Estates Partition Act would oust the Civil Courts of their jurisdiction. Nor do I see how Article 14 of the Limitation Act would apply to the facts of the present case. The suit was not one brought to set aside the order of the Collector nor is there anything to show that any orders had as a matter of fact been passed under section 88 or any action under the provisions of the said section (with regard to these two plots of land) had been as a fact taken by the Collector."

"All that the appellants could produce is Exhibit A, petition with Raibandi put in on behalf of the plaintiffs during the Collectorate Batwara proceedings on the 17th July 1912 praying for being allotted a Takhta to contain plot no. 2242 amongst others as plaintiffs were in possession thereof. This petition and Raibandi were however discovered to have been a mistake and the plaintiffs put in a petition on the 8th September 1913, Exhibit 5 stating that plot no. 2242 really appertained to their Lakheraj property no. 86 and never formed a part of the revenue paying estate which was being partitioned."

"The appellants did not put in any further evidence to show that any action of the several kinds laid down in section 88 were thereupon taken by the Collector or that any inquiry was made, or any report submitted by the Deputy Collector mentioning the existence of any dispute or doubt; apparently no serious notice of the petition had been taken as it (seems to have been) filed after the Deputy Collector had proceeded under section 57 so that the result is that no orders had at all been passed under Chapter IX to come within the bar referred to in section 119, clause (6) or within sub-clause (*ii*) of the proviso of that section. Then again in Collectorate Batwara proceedings based mainly on the previous Cadastral survey, questions of title relating to lands could not be gone into. Having regard to the facts of the present case, I am of opinion that the Court below was justified in holding that section 119 of the Estates Partition Act was no bar to the maintainability of the present suit, and the special limitation provided under Article 14 of the Limitation Act had any application."

It is quite clear, I think, that the authorities indicate that if there had been any adjudication upon this question raised by the plaintiffs during the course of the batwara proceedings (i.e., that plots 2242 and 2735 did not at all lie within the estate which was in the course of being partitioned) the relative provisions of the Estates Partition Act would undoubtedly have affected adversely their position. But it must also be admitted that where there has been no adjudication upon such a claim, the mere fact that there has been in the final partition award an allocation of the land which the objectors have contended was not properly capable of inclusion in the estate which was being

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partitioned cannot operate to prevent the claimants from bringing a suit for a declaration of their title and, if necessary, recovery of possession. If we look at what took place here it certainly appears, as it has appeared to both the lower Courts, that there was no sort of enquiry or adjudication upon the claimants' claim. That being so, it does not appear to me that there was any bar to the right of the plaintiffs to bring the suit in the manner and in the time at which they have so done.

In my view therefore both the lower Courts were correct in their decision and this appeal must be dismissed with costs.

ADAMI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Ross and Kulwant Sahay, J.J.

1926.

June, 10.

DURGA SINGH

v.

MUSSAMMAT RAM DASI KUER.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 158B (2)—*notice to co-sharer landlords, whether essential—omission to serve, effect of—mere irregularity—sale, whether a nullity.*

A sale without a notice under section 158B (2), Bengal Tenancy Act, is not a nullity, but has the effect of a sale under a decree for money.

Ahamad Biswas v. *Beney Bhusan Gupta* (1), *Norendera Bhusan Ray* v. *Jotindra Nath Roy* (2), and *Rajani Kanta Ghose* v. *Sheikh Rahman Gazi* (3), followed.

Sarip Hechan v. *Tilattama Debi* (4) and *Ghanshyam Chaudhury* v. *Basdeb Jha* (5), not followed.

*Appeal from Appellate Decree no. 254 of 1923, from a decision of Babu Raj Narain, Subordinate Judge of Gaya, dated the 21st December 1922, confirming a decision of Babu Bipra Charan Das, Munsif of Aurangabad, dated the 4th February 1922.

(1) (1918-19) 23 Cal. W. N. 931. (3) (1922-23) 27 Cal. W. N. 765.
(2) (1920) 55 Ind. Cas. 402. (4) (1918) 43 Ind. Cas. 3.
(5) (1921) 60 Ind. Cas. 529.

The provision for notice under section 158B (2) to the co-sharer landlords is for the benefit of the co-sharer landlords, and the notice is not essential to the validity of the sale, and omission to serve the notice is a mere irregularity.

Appeal by the defendant.

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

A. N. Lal and *B. N. Mitter*, for appellant.

S. N. Ray, for the respondents.

Ross, J.—This is an appeal by defendant in a suit brought by the plaintiff who was a tenant. The defendant is a co-sharer landlord who obtained a decree for rent under section 148A of the Bengal Tenancy Act and sold the holding of the plaintiff and purchased it himself. The plaintiff sought to recover the holding on the ground that the rent decree was fraudulent and that the execution was defective by reason of suppression of the processes.

The Courts below decided against the plaintiff on the merits of the case, but decreed the suit in his favour on the ground that notice to the co-sharer landlord under section 158B, clause (*2*), of the Bengal Tenancy Act had not been given. The learned Subordinate Judge relied on the decision of this Court in *Ghanshyam Chaudhury* v. *Basdeb Jha* (1). The earliest decision on the point is *Sarip Hechan* v. *Tilattama Debi* (2) where it was decided that the provisions of section 158B (*2*) are mandatory and not merely directory, and that a sale without notice under that section is invalid. The next case was *Ahamad Biswas* v. *Benoy Bhusan Gupta* (3) where that earlier decision was followed, and it was further held that the effect of a sale without this notice was that the purchaser was in the position of an ordinary purchaser under a decree for money. This view was again taken in

(1) (1921) 60 Ind. Cas. 529. (2) (1918) 43 Ind. Cas. 3.
(1) (1918-19) 23 Cal. W. N. 931.

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Norendra Bhusan Roy v. *Jotindra Nath Ray* (1) where it was laid down that the sale was not a nullity but had the effect of a sale under a decree for money. In the latest decision in *Rajani Kanta Ghose* v. *Sheikh Rahman Gazi* (2) it was held that the omission to serve this notice does not nullify the sale and does not even alter its character to that of a sale held in execution of a decree for money, if the co-sharer landlord has knowledge of the sale and acquiesces therein. The provision for notice to the co-sharer landlords is for the benefit of the co-sharer landlords, and the notice is not essential to the validity of the sale and omission to serve the notice is a mere irregularity. In the decision of this court referred to by learned Subordinate Judge these cases were not considered, and it seems to have been assumed without discussion that the sale was void. The weight of authority is that the effect of such a sale is at least that of a sale in execution of a decree for money. This is sufficient to give the defendant a valid defence and the suit must be dismissed.

It is said that the plaintiff filed the suit on the strength of the decision of this court and that he ought now to be allowed to prove that the sale was irregular under Order XXI, rule 90. But the fourth issue was whether the processes in execution case no. 476 of 1920 were properly served and whether the plaintiff had knowledge of them. Evidence on this issue was gone into and it was decided in favour of the defendant. Nothing further could have been done on an application under Order XXI, rule 90.

The result is that the appeal must be decreed and the suit dismissed but, in view of the conflict in the decisions, without costs in any court.

KULWANT SAHAY, J.—I agree.

Appeal decreed.

(1) (1920) 55 Ind. Cas. 402. (2) (1922-23) 27 Cal. W. N. 765.

REVISIONAL CRIMINAL.

Before Jwala Prasad and Macpherson, J.J.

ANWAR ALI

v.

THE CHAIRMAN, DEOGHAR MUNICIPALITY.*

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Santal Parganas Justice Regulation, 1893 (*Bengal Regulation V of* 1893), *section* 4—*Commissioner, powers of, as the High Court of the Santal Parganas—acquittal, power to set aside in revision, whether exercisable by the High Court—"appeal under section* 417 ", *whether includes applications in revision—section* 4, I(*ii*) (*a*)—*Code of Criminal Procedure,* 1898 (*Act V of* 1898), *sections* 417, 439.

Under the first part of section 4 of the Santal Parganas Justice Regulation, 1893, " High Court " means—

(*i*) in reference to proceedings against European subjects or persons charged jointly with European British subjects, the High Court of Judicature at Fort William in Bengal (now the High Court at Patna); and

(*ii*) in reference to proceedings against other persons—

(*a*) in cases tried by the Court of Session and in appeals under section 417, Code of Criminal Procedure, from original or appellate orders of acquittal, the High Court of Judicature at Fort William in Bengal (now the High Court at Patna); and

(*b*) in other cases, the Commissioner [*i.e.*, the Commissioner of the Bhagalpur Division, section 3(*1*)].

Held, that the words " appeals under section 417 " in clause (*ii*)(*a*) do not include an application in revision, under section 439, Code of Criminal Procedure, 1898, to set aside an order of acquittal : such an application can be dealt with only by the Commissioner as the High Court of the Santal Parganas under clause (*ii*) (*b*).

Where, therefore, the Commissioner, acting in revisional jurisdiction, set aside an order of acquittal passed by a Subordinate Magistrate, and the complainant moved the High Court under section 439, Code of Criminal Procedure, 1898, against that order, *held,* that the Commissioner was the final authority under clause (*ii*) (*b*) as the High Court of the Santal

* Criminal Revision no. 355 of 1926, from an order of J. T. Whitty, Esq., I.C.S., Commissioner of the Bhagalpur Division, dated the 23rd April 1926.

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Parganas to deal with the matter in revision and that the High Court had no jurisdiction to interfere.

Per *Macpherson, J*: Jurisdiction in respect of setting aside an acquittal is in fact distributed between the two High Courts, the High Court possessing it on appeal by Government and the Commissioner on application by a private party in revision. In sections 435 to 439, Code of Criminal Procedure, 1898, as in other provisions of the Code " High Court " means in the Santal Parganas, the Commissioner, except where clause (*ii*) (*a*) section 4 of the Regulation operates.

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

Md. Yunus, for the petitioner.

Sultan Ahmed (Government Advocate), for the Crown.

JWALA PRASAD, J.—The petitioner Anwar Ali was prosecuted by the Chairman of the Deoghar Municipality under sections 186(*1*) and 192 of the Bihar and Orissa Municipal Act of 1922. He was tried by a Magistrate of the second class of Deoghar, who by his judgment dated the 19th February, 1926, acquitted the petitioner.

The Chairman of the Municipality moved the Commissioner of the Bhagalpur Division against the order of acquittal and the Commissioner by his order dated the 23rd April, 1926, set aside the acquittal and directed retrial of the petitioner.

Aggrieved by this order of the Commissioner the petitioner moved this court under section 439 of the Code of Criminal Procedure and obtained a rule by this court on the 27th May 1926 which runs as follows:

" This application will be heard by the Criminal Bench. Issue the usual notices. Let further proceedings be stayed pending the disposal of this application."

In reply to a letter of this court, memo. no. 1477-Cr.A., dated the 27th May, 1926, forwarding a copy was addressed by the Assistant Registrar to the Commissioner of Bhagalpur enclosing a copy of letter

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no. 1477-Cr.A. of the same date, to the Deputy Commissioner of the Santal Parganas, calling upon the latter to submit the original record and to stay further proceedings, and requesting the Commissioner to forward the original record and proceedings in his own court. In reply to this letter the Commissioner in his letter no. 98 J/V., dated the 1st June, 1926, pointed out that he had dealt with the case under section 439 of the Code of Criminal Procedure in the exercise of his power as the High Court of the Santal Parganas under section 4 I(*ii*) (*b*) of the Santal Parganas Justice Regulation (V of 1893), and, consequently, the requisitions issued by the High Court were issued by inadvertence. He also intimated that pending further orders of the court, the record of the case had been withheld and the Deputy Commissioner had been asked not to take any action upon the order of this Court dated the 27th May, 1926.

Considering the importance of the question raised by the Commissioner of Bhagalpur, the Government Advocate was asked to appear. The case was argued at great length on both sides. The complainant, Chairman of Deoghar Municipality, has also appeared in this case through Mr. Yunus.

The first question is whether this Court had any power to pass the order of the 27th May, 1926. In the application of the petitioner on the basis of which the aforesaid order was passed the petitioner prayed that the order of the Commissioner setting aside his acquittal and directing his retrial be set aside. It was also prayed that the proceedings re: the trial of the petitioner started upon the basis of the order of the Commissioner be set aside. The Commissioner says that he passed the order in question as the High Court of the Santal Parganas under section 4 I(*ii*) (*b*) of the Santal Parganas Justice Regulation (V of 1893). Section 4 of that Regulation says that the Code of Criminal Procedure of 1898 shall have effect in the Santal Parganas, subject to the modifications indicated in that section. The most important modifica-

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tion is the constitution of the Commissioner of Bhagalpur as the High Court for certain criminal cases in the Santal Parganas within the meaning of the term as defined in section 4 (*iv*) of the Code of Criminal Procedure. The " High Court ", in that section, leaving out the words with which we are not concerned, means the highest Court of criminal appeal or revision for any local area; or, where no such Court is established under any law for the time being in force, such officer as the Governor General in Council may appoint in this behalf. The High Court within the province of Bihar and Orissa known as the Patna High Court established in 1916 under the Letters Patent of that year is the highest Court of appeal in civil and criminal matters and exercises revisional jurisdiction under section 439 of the Code of Criminal Procedure. The jurisdiction of this Court is modified by the Santal Parganas Justice Regulation (V of 1893) referred to by virtue of the definition of High Court with respect to the area called the Santal Parganas given in that section. Clause I of that section defines the " High Court " (*i*) in reference to proceedings against European British subjects, or persons jointly charged with European British subjects, the High Court of Judicature at Fort William in Bengal (now in the province of Bihar and Orissa the High Court of Patna); and (*ii*) in reference to proceedings against other persons, (*a*) in cases tried by the Court of Sessions and in appeals under section 417 from original or appellate orders of acquittal the High Court of Judicature at Fort William in Bengal; and (*b*) in other cases, the Commissioner. Sub-clause (*i*) of clause I applies only to cases against European British subjects and we are not concerned with that case. We are concerned with sub-clause (*ii*) of clause I. In cases coming under that sub-clause the High Court of Patna has jurisdiction in the area called the Santal Parganas. In cases not coming under that clause, in other words, in other kinds of cases, the High Court of the Santal Parganas is the Commissioner of Bhagalpur.

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The question then is whether the present case comes under clause (*a*) or clause (*b*) of sub-clause (*ii*). The present is a case of an accused person tried by the Sub-Deputy Magistrate of Deoghar for offences under the Bihar and Orissa and Municipal Act which is in force in the Santal Parganas. The accused (petitioner) was acquitted by the Sub-Deputy Magistrate. The order of acquittal was appealable and was also revisable by the High Court under section 439 of the Code of Criminal Procedure. An appeal against an acquittal is allowed only to the Local Government and it lies only to a High Court. Any private person just like the complainant might invoke the revisional powers of the High Court to set aside an order of acquittal under section 439 or the High Court may of its own motion set aside such an order. There was no appeal in the present case by the Local Government under section 417. If there was an appeal it would have laid only to the High Court of Patna under clause I (*ii*) (*a*) of section 4. The Chairman of the Deoghar Municipality who was the complainant in the case applied to the Commissioner of Bhagalpur to set aside the order of acquittal in his capacity as the High Court of the Santal Parganas.

The learned Government Advocate contends that the matter dealt with by the Commissioner under section 439 came under I (*ii*) (*b*) of section 4. His contention is that the High Court of Patna has only jurisdiction to deal with appeals under section 417 against an order of acquittal and that it has no power to deal with such an order under section 439 of the Code of Criminal Procedure and that the Commissioner of Bhagalpur is the High Court in such matters. Mr. Yunus on behalf of the petitioner resists this contention of the learned Government Advocate and says that all matters connected with an order of acquittal, be it an appeal from that order or an application in revision, are excluded from the jurisdiction of the Commissioner of Bhagalpur and that the High Court of Judicature at Patna is the

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only authority competent to deal with such matters. He says that although the words used in clause I(*ii*) of section 4 refer especially to appeals under section 417, it includes also applications in revision under section 439 of the Code of Criminal Procedure. In support of his contention he relies upon section 439 of the Code which says that the High Court dealing with matters in revision under that section may exercise any of the powers conferred on a Court of appeal by sections 423, 426, 427 and 428 or on a Court by section 338; and he says that an order of acquittal can only be set aside by the High Court acting under section 439 in the manner prescribed by section 423 of the Code of Criminal Procedure which deals with appeals. Reference has also been made to the provision in section 423(*1*) which says that in dealing with an appeal under section 417 from an order of acquittal the Court may reverse such order or direct that a further enquiry may be made, or that the accused may be retried or committed for trial as the case may be and find him guilty and pass sentence according to law. The contention is that reading sections 423 and 439 together the order of acquittal can only be set aside by the High Court exercising its revisional powers under section 439 by a reference to the provisions in section 417 relating to an appeal from an acquittal. Therefore, the power given to the High Court at Patna to deal with appeals under section 417 against an order of acquittal implies that the power of revising such an order under section 439 is also vested in the said High Court and is taken away from the Commissioner of Bhagalpur. The contention does not seem to be sound. The powers of revision are different from powers exercisable in appeal. The right of appeal can only be conferred by express provision in the Code of Criminal Procedure, whereas the power of revision conferred under section 439 is larger in scope and it deals with matters in which there may or may not be an appeal. It gives a wide power to the High Court to look into the record of

any case and satisfy itself as to the correctness and propriety of the finding or sentence recorded or order passed and as to the irregularity of proceedings of an inferior Court. This power of revision is exercisable at the instance of a party or by the High Court of its own motion. Even in cases where there is an appeal the power of revision may be exercised where no appeal has actually been brought [vide clause (*5*) of section 439]. Under that clause a private party has a right to apply to the High Court to set aside an order of acquittal although it has no right of appeal. Section 439 only indicates the manner in which certain cases coming to this Court might be disposed of. It refers to the powers of the appellate Court defined in section 423 as indicating the mode in which appealable orders may be dealt with by the High Court. It does not mean that an application in revision is converted into an appeal simply because under section 439 a High Court is empowered to exercise the powers defined under section 423 with respect to appeals. It is obvious that an application by a private party against an order of acquittal under section 439 cannot be regarded as an appeal under section 417 for a private party has no right of appeal under that section. Reference to section 417 in section 423 and of section 423 in section 439 simply means that under the revisional powers of the High Court an order of acquittal may also be reversed and further enquiry or retrial of the accused be directed as is indicated under clause (*1*) (*a*), section 423. The application of the Chairman of the Municipality in the present case cannot be treated as an appeal under section 417 by the Local Government, and hence it cannot come under I (*ii*) (*a*) of section 4 which applies only to appeals under section 417 from orders of acquittal. We have to read into that clause the words " and applications under section 439 " or words to that effect in order to amplify the scope of provision and thus to give jurisdiction to the High Court at Patna to deal with applications in revision against orders of acquittal. This we are not permitted to do.

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It may seem to be an anomaly that an appeal from an order of acquittal under section 417 should lie to the High Court at Patna, whereas an application in revision against the same order under section 439 would lie to the Commissioner under section 4 I of the Santal Parganas Justice Regulation, V of 1893. It may be that this is a case of omission; but that is a matter which has to be dealt with by competent authority.

The application to this Court against the order of the Commissioner of Bhagalpur passed under section 439 of the Code of Criminal Procedure setting aside the order of acquittal in the present case did not lie to this Court and it is obvious that it was entertained under a misapprehension. The order of the Commissioner exercising his powers as the High Court of the Santal Parganas under section 4 cannot be dealt with by this Court, and, therefore, the petitioner had no right to come to this Court against the order of the Commissioner.

The result is that the rule issued on the 27th May, 1926, calling for the record of the case and staying further proceedings is discharged.

MACPHERSON, J.—I also entertain no doubt that this application must be rejected.

It has been made under section 439 of the Code of Criminal Procedure on behalf of a person other than a European British subject and other than a person jointly charged with a European British subject, with the prayers that this Court will (*1*) set aside an order of the Commissioner of Bhagalpur purporting to act as High Court of the Santal Parganas in which he set aside the acquittal of the petitioner in the Court of the Sub-Deputy Magistrate of Deoghar and directed his retrial, and (*2*) quash the proceedings now pending against the petitioner in that Court.

The first prayer fails because this High Court has, as Mr. Yunus admits, no jurisdiction under

section 439 or otherwise to set aside the order of the Commissioner. In point of fact the rule was granted to consider the second prayer.

The second prayer fails because this Court possesses no jurisdiction under section 439 over the proceedings against the petitioner in the Court of a Magistrate of the Santal Parganas. Furthermore, the order for retrial of the petitioner was in fact within the jurisdiction of the Commissioner.

Under Chapter II of the Santal Parganas Civil Justice Regulation V of 1893 the jurisdiction of this Court under the Code of Criminal Procedure with reference to proceedings against the petitioner does not extend beyond cases tried by the Court of Session, and appeals under section 417 from original and appellate orders of acquittal [section 4 I (*ii*) (*a*)], the Commissioner being the High Court with reference to all other proceedings against him. The proceedings now pending against him are manifestly not included within such cases or appeals. In fact Mr. Yunus for the petitioner admits that he is out of Court at once if section 4 I(*ii*) (*a*) be strictly construed. His position is that a wide interpretation should be accorded to " appeals under section 417 " so as to make the expression cover also applications under section 439 to set aside orders of acquittal. His ground is that anomalies may result if an appeal under section 417 is made to one High Court and an application to set aside the same acquittal is made under section 439 to the other High Court. The discussion before us has, however, clearly demonstrated that the possibility of divergent orders on the subject of an acquittal being passed by the two High Courts is so remote as to be in practice entirely negligible. It is certainly not such as would lead one to construe " appeals under section 417 " (which are presumably excluded from the jurisdiction of the Commissioner as High Court because they are preferred by the executive Government and the Commissioner is, except for his special judicial functions in the Santal

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Parganas, an executive officer) as including applications under section 439 in respect of acquittals which can only be preferred by the private prosecutor and with which the executive Government is not concerned.

Mr. Yunus next argues, if I understand him aright, that as this Court is the only Court that can set aside an acquittal by a Court in the Santal Parganas, the Court of the Sub-Deputy Magistrate is an inferior criminal Court situated within the local limits of the jurisdiction of this Court, at least so far as acquittals are concerned, and accordingly this Court is empowered to revise the proceedings of such Magistrate in a case such as the present where he is about to try the petitioner whom he has already acquitted.

But there is no reason to hold that this is the only High Court that can set aside an acquittal by the Magistrate in the Santal Parganas. No doubt this Court alone can set aside an acquittal on appeal. The learned Commissioner in his judgment does indeed describe the proceedings before him as an appeal against an acquittal, and he has also set out that the private prosecutor "has a right of appeal under section 439". But that proceeding was in fact not an appeal, still less an appeal by the local Government under section 417, and the intention manifestly was to hold that it was open to him as the High Court to revise an order of acquittal. In fact his order concludes:

> "I accordingly direct that retrial shall take place (under section 439, Criminal Procedure Code)."

That an acquittal may be set aside by the High Court under section 439 at the instance of a private prosecutor is settled law. It had also been so held in several High Courts prior to the date when the Regulation of 1893 was made, and the authority which made the regulation is to be presumed to have been aware of that fact and to have intended that as High Court for the Santal Parganas the Commissioner of Bhagalpur should possess the ordinary power under section

439 to revise orders of acquittal in such circumstances. Mr. Yunus then points out that the powers exercisable under section 439 are " the powers conferred on a Court of appeal under section 423 " and that the only powers conferred under section 423 to set aside an acquittal on appeal, relate to appeals under section 417 which are removed from the jurisdiction of the Commissioner, and contends that in face of these provisions the presumption should not be made. But the argument involves the importation of words into section 439 so as to make the provision quoted run " the powers conferred on (it as) a Court of appeal under section 423 ". The indications are that in section 4 I(*ii*) (*a*) of Regulation V of 1893 the enacting authority specifically set out all the powers which it intended should not rest with the Commissioner as High Court in proceedings against persons of the status of the petitioner, and I can see no justification for importing any words into section 439 which would restrict his jurisdiction by implication. Accordingly this Court is not the only High Court which has jurisdiction to set aside an acquittal by a Magistrate of the Santal Parganas.

Jurisdiction in respect of setting aside acquittals is in fact distributed between the two High Courts: this Court possessing it on appeal by Government and the Commissioner on application by a private party in revision. In sections 435 to 439, as in other provisions of the Code ' High Court ' means the Commissioner except where section 4 I(*ii*) (*a*) of the Regulation operates. It has no operation in the proceeding pending against the petitioner in the Court of the Sub-Deputy Magistrate of Deoghar which for this purpose at least is not an inferior court to this Court. Accordingly this Court has no jurisdiction to quash that proceeding. The same would have been the case if the Magistrate had without the intervention of the Commissioner started suo motu and illegally to retry the petitioner: the petitioner's remedy would have lain in an application for revision in the Court of the Commissioner.

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Mr. Yunus, it may be remarked, adopted in so many words the argument of Mr. Hill in *In the matter of Wilson* (1) in support of his claim that this Court has jurisdiction over all the Criminal Courts of the Santal Parganas under its revisional powers under the Code of Criminal Procedure, but a perusal of the Acts, Regulations and cases there cited has failed to satisfy me that the claim is well-founded.

Rule discharged.

LETTERS PATENT.

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

1926.

June, 28.

MUSSAMMAT RAZIA BEGUM

v.

SHAIKH MUHAMMAD DAUD.*

Transfer of Property Act, 1882 (*Act IV of* 1882)—Interesse termini—*Common Law doctrine, whether applicable to leases in India—Lease reserving annual rent—lessee out of possession, whether can maintain action for damages against lessor.*

The common law doctrine of England which is founded on the view that before actual entry by the lessee he has merely an interesse termini, livery of seisin being necessary to complete his title, is not applicable to leases in India which are governed by the Transfer of Property Act, 1882. *Midnapore Zamindari Company, Ltd.* v. *Ram Kanai Singh Deo*(2), followed.

Gillard v. *Cheshire Lines Co.* (3), *Coe* v. *Clay* (4), *Wallis* v. *Hands* (5), *Deo* v. *Day* (6) and *Ecclesiastical Commissioners* v. *Treemer* (7), referred to.

*Letters Patent Appeal no. 2 of 1926, from a decision of Ross, J., dated the 9th December 1925, overruling a decision of T. Luby, Esq., I.C.S., District Judge of Muzaffarpur, dated the 6th December 1922, which affirmd a decision of Babu Nut Behari Chatterji, Subordinate Judge of Muzaffarpur, dated the 28th February 1922.

(1) (1891) I. L. R. 18 Cal. 249.
(2) (1925) C. W. N. (Pat.) 254.
(3) (1884) 34 W. R. 943.
(4) (1829) 15 Bing. 440.
(5) (1893) 2 Ch. 75.
(6) (1842) 2 Q. B. 147.
(7) (1893) 1 Ch. 166.

Held, therefore, that in the case of a lease reserving an annual rent, delivery of possession not being essential to the vesting of the interest, a lessee who has been out of possession of the demised lands can maintain an action for damages for keeping him out of possession.

Application by the defendant

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

C. C. Das (with him *N. N. Sen*) for the applicant.

Hasan Jan and *Sultanuddin Hussain*, for the opposite party.

DAWSON MILLER, C.J.—This is an appeal under the Letters Patent from a decision of Ross, J., overruling the decision of the District Judge of Muzaffarpur and remanding the case to the trial Court to ascertain the amount of mesne profits due to the plaintiff from the surviving defendant in the suit.

The question for determination in the appeal is whether the plaintiff who obtained a lease of certain property, but was not put in possession by his lessor, can maintain a suit against the defendant for mesne profits by way of damages for keeping him out of possession of the property. Learned Counsel for the appellant, the surviving defendant in the suit, contends that the demise without possession merely gave the lessee a right of entry or, as it is known in English law, an interesse termini, which is not sufficient to found a suit in trespass which, he contends, is the cause of action in this case.

The circumstances under which this litigation arises are as follows:—Mauza Kathia Hussain situate in the Champaran district of this province formed part of the estate of the late Saiyid Hussain Ali Khan, otherwise known as Saiyid Muhammad Nawab, a well-to-do Muhammadan who died in March 1914 leaving a daughter, Mussammat Razia Begum, by a deceased wife,

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and a widow, Mussammat Azizunissa alias Bibi Bakridan. Before his death he had expressed his intention of granting a mukarrari lease of the said village to his wife Bibi Bakridan by way of maintenance and in lieu of her dower debt. A deed was drafted and approved by him but before it could be executed, he died and his property devolved upon his daughter Mussammat Razia Begum as his heir, under the Shia law. About a month after his death in April 1914 Mussammat Razia Begum in pursuance of her late father's wish executed a mukarrari patta of mauza Kothia Hussain in favour of her step-mother for her life at a nominal rental of one rupee per annum and took from her a kabulivat. Bibi Bakridan's name was subsequently recorded in the revisional survey record-of-rights as mukarraridar of the village and she appointed an agent, one Babujan, to collect the rents on her behalf. Disputes arose between them and early in 1917 she sued Babujan for an account but failed on the ground that she had never in fact acquired possession over the property which had remained in the possession of her step-daughter Razia Begum. It appears that Razia Begum refused to give up possession to her step-mother on the ground that the latter had not remained chaste after her husband's death. The execution of the mukarrari lease is not disputed by Razia Begum and it contains no condition as to defeasance in the event of the lessee ceasing to remain chaste. Bibi Bakridan finding her attempts to get possession unsuccessful executed a sub-lease of her life interest in the mauza in favour of the plaintiff Shaikh Muhammad Daud, dated the 25th July 1917, reserving an annual rent of Rs. 875. By this document the right to the arrears of rent for the three preceding years was also transferred. The plaintiff on attempting to take possession and collect the rents was opposed by Mussammat Razia Begum and proceedings were instituted under section 145 of the Code of Criminal Procedure in which the possession of Razia Begum was upheld. The plaintiff accordingly

instituted the suit out of which this appeal arises on the 1st February 1921 impleading Mussammat Razia Begum as principal defendant and Bibi Bakridan as the defendant second party. In his plaint he prayed for (*1*) a declaration of his title and the title of his lessor to the property in suit and possession thereof, (*2*) mesne profits for the three years preceding the suit and until recovery of possession, and (*3*) costs and interest.

Bibi Bakridan by her written statement admitted the plaintiff's claim but repudiated liability for his failure to get possession. Mussammat Razia Begum contested the suit. She admitted that she executed the mukarrari patta of April 1914 in favour of Bibi Bakridan, but denied that the latter ever got possession, although she made several attempts to do so. She alleged that the patta of July 1917 granted by Bibi Bakridan to the plaintiff was fraudulent collusive and nominal, and pleaded that as her stepmother shortly after her father's death turned immoral, which she came to know after the execution of the mukarrari,

> " She did not allow it to take effect "

and did not put her lessee in possession but had herself remained in possession ever since her father's death. She does not plead that there was any condition attached to the grant rendering it defeasible in the event of the lessee's unchastity.

The Subordinate Judge at the trial found that neither the plaintiff nor Bibi Bakridan ever got possession over the mauza in spite of their efforts to do so, and that Mussammat Razia Begum had all along been in possession, and from this he deduces that the mukarrari patta was not given effect to. He did not determine whether the aspersions against the character of Bibi Bakridan were true or not, considering it immaterial as the mukarrari was an unconditional grant. He based his decision on the ground that the plaintiff's lessor had not acquired a perfect title as the mukarrari was not given effect to. Exactly what

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he means by this expression he does not explain. He also thought that the plaintiff's lease was of a speculative nature and therefore gave the transferee no right to retain possession. In support of this conclusion he cites the case of *Kalidas Mullick* v. *Kanhaya Lal Pundit* (1) which does not appear to support the proposition. He also thought that the mukarrari lease was more in the nature of a gift than a lease, as a nominal rental only was reserved and without possession it was not perfected.

On appeal the District Judge agreed with the finding of the trial Court that possession never passed to the plaintiff or his lessor. He further held, with regard to the mukarrari patta of 1914, that there was a separate oral agreement constituting a condition precedent to the attaching of an obligation under the contract. What the exact terms of the oral agreement were he does not very clearly specify, but it may be gathered from the context that what he meant was an oral agreement amounting to a condition which would have the effect of divesting the property if the lessee afterwords became unchaste for he adds,

> The document itself does not make any condition about Bakridan's future conduct but such a condition is usual, and Razia has given evidence that her father included such a condition in his instructions to her. Bakridan herself was not put in the witness box. The karpardaz of Razia (witness no. 8 for the defendant) has corroborated the aspersions cast by Razia on Bakridan's character.

The learned District Judge appears to have had no very clear conception of the difference between a condition precedent which would prevent the instrument from taking effect and a condition which would operate as a defeasance after the interest had vested. The result of his judgment is summed up finally in the following words at the end:

> It appears that effect was never given to the mukarrari patta, and that Muhammad Daud has come into the affair merely as a speculator. I agree with the Subordinate Judge's finding that the plaintiff failed to establish his title to or previous possession of the disputed village.

(1) (1885) 11 Cal. 121.

The plaintiff preferred a second appeal to the High Court which was heard by Ross, J. The learned Judge pointed out that the oral agreement referred to by the lower appellate Court was not pleaded in the written statement by either defendant and that it was not open to the learned District Judge to find that there was any such oral agreement. In any view he considered that the oral agreement which the lower appellate Court found to have been proved did not amount to a condition precedent to the attaching of an obligation under the contract within the meaning of the third proviso to section 92 of the Evidence Act, and if there was any oral agreement it amounted to a condition that the estate vested in the lessee should divest on her becoming unchaste, and evidence of such an oral agreement was not permissible, being in conflict with the written contract which was an unconditional grant for life. In my opinion Ross, J., took the correct view upon this part of the case. He was also of opinion that the suit could not fail on the ground that the plaintiff's lease was speculative. Here again I entirely agree with the learned Judge's view. There was nothing to shew that the lease was not a genuine transaction and a substantial rent was reserved. Nor did the fact that the lessor was out of possession prevent her from transferring her right to her lessee. The learned Judge further held that the finding that the mukarrari lease was not given effect to, if it had any meaning at all, must mean that neither party considered it binding but such a view was contrary to all the facts of the case as it had been found that Bibi Bakridan did her best to obtain possession and to make the instrument effective. Pending the appeal to Mr. Justice Ross and before it came on for hearing Bibi Bakridan died and the plaintiff's term expired. He was therefore no longer entitled to possession. The learned Judge, however, held that this did not prevent the plaintiff from recovering damages by way of mesne profits from the first defendant, Mussammat Razia Begum, for wrongfully keeping the plaintiff out of possession. He accordingly allowed the appeal

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upon that part of the claim, set aside the decree of the District Judge and remanded the case to the trial Court to ascertain the amount of mesne profits due from the 1st February 1918 to the death of the defendant second party.

From that decision the defendant first party has preferred the present appeal under the Letters Patent. The only question argued before us is that the suit is not maintainable, being confined, since the death of Bibi Bakridan, to a claim for damages for keeping the plaintiff out of possession of the demised lands. This argument is based upon the English common law doctrine that a demise of land without delivery of possession passes only a right of entry, or an interest in the term, known as an interesse termini, and such an interest is not sufficient to entitle the lessee to maintain an action in trespass, since actions of this nature are founded on the actual possession of the plaintiff which is interfered with by the trespasser. I had some doubt whether it was open to the appellant to raise the question at this stage, as the plea is not specifically taken in the written statement and was not argued in the Courts below; but as it was alleged that the mukarrari was not acted on and as all the facts necessary to determine the point are before us I propose to deal with the legal argument. The common law doctrine so far as I am aware applies only to a lease for a term of years and is based upon the law relating to English leases of this nature which, for some purposes, regards the lessee before actual entry as not being a tenant. He has, however, a right of entry, a vested interest, which is assignable and which, if he dies, passes to his representatives. He may maintain an action against third parties for injury to the property [*Gillard* v. *Cheshire Lines Co.*(1)]. He may sue his lessor for not putting him in possession. *Coe* v. *Clay*(2) and *Wallis* v. *Hands* (3)] and he may sue in ejectment

(1) (1894) 34 W. R. 943.
(2) (1829) 15 Bing. 440; 130 E. R. 1131.
(3) (1893) 2 Ch. 75.

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[*Doe* v. *Day*(1)]. In fact it would appear that he has a remedy for any infringement of his rights except such rights as arise out of actual possession. But in any event the present claim is hardly one in the nature of an action for trespass, it is one for damages against the appellant for keeping the plaintiff out of possession. The plaintiff's lessor could undoubtedly have sued the appellant for damages for failing to put her in possession. The plaintiff by the sub-lease took an interest in the whole term which is equivalent to an assignment and could therefore, in my opinion, maintain an action against the appellant for damages for failing to put him in possession. Moreover, I doubt whether the English doctrine would apply to a case like the present where the lease is not one for a term of years. It is rather in the nature of a freehold lease. [See *Ecclesiastical Commissioners* v. *Treemer*(2)].

But whether the view just expressed be right or not, I do not consider that the common law doctrine in England which is founded on the view that before actual entry by the lessee he is to be regarded for some purposes as not a tenant, livery of seisin being necessary to complete his title, can be applied to leases in this country which are governed by the Transfer of Property Act. Under that Act, as pointed out by Das, J., in the *Midnapur Zamindari Co. Ltd.* v. *Ram Kanai Singh Deo*(3) certain leases including those reserving a yearly rent, which includes the present case, can be made only by a registered instrument, whilst all other leases of immovable property may be made either by a registered instrument, or by oral agreement accompanied by delivery of possession. Under this Act delivery of possession is essential to the vesting of the interest only where the lease is made by oral agreement, and a lease by oral agreement cannot be made where a yearly rent is reserved. Delivery of possession

(1) (1842) 2 Q. B. 147.
(2) (1893) 1 Ch. 166.
(3) (1925) Cal. W. N. (Pat.) 254.

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was, therefore, not necessary for the vesting of the interest in the lessee in the present case and I can see no reason why we should apply a doctrine applicable to certain kinds of English leases to those governed in this country, not by the English common law, but by the Transfer of Property Act. In my opinion this appeal fails and should be dismissed with costs.

FOSTER, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Ross and Macpherson, JJ.

DINANATH RAI

v.

RAMA RAI.*

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Evidence Act, 1872 (*Act I of* 1872), *section* 66—*notice under, whether necessary where existence of document denied by opposite side—tender of mortgage money, whether a condition precedent to a suit for redemption—Transfer of Property Act*, 1882 (*Act IV of* 1882), *section* 60—*mortgagee whether can acquire title by adverse possession.*

Where the trial court dispensed with a notice under section 66, Evidence Act, and admitted in evidence a certified copy of a mortgage bond, the existence of which was denied by the other side, *held*, that the court rightly dispensed with the notice as on the pleadings it was unnecessary.

Maung Po Ni v. *Ma Shwe Kyi*(1), not followed.

Bhubaneshwari Debi v. *Harisaran Sarma Moitra*(2), and *Krishna Kishori Chaowdhrani* v. *Kishorilal Roy* (3), distinguished.

*Appeal from Appellate Decree no. 12 of 1924, from a decision of Babu Akhauri Nityanand Singh, Subordinate Judge of Saran, dated the 1st of October 1923, modifying a decision of Babu Raghunandan Prasad, Munsif of Chapra, dated the 12th of February 1923.

(1) (1924) 84 Ind. Cas. 373. (2) (1881) I. L. R. 6 Cal. 720, P. C.
(3) (1887) I. L. R. 14 Cal. 486, P. C.

Section 60, Transfer of Property Act, 1882, merely defines the right to redeem and does not lay down that tender of the mortgage money is a condition precedent to the institution of a suit for redemption.

Raghunandan Rai v. *Raghunandan Pandey*(1), followed.

Mahommad Ali v. *Baldeo Pande*(2), dissented from.

A mortgagee cannot acquire a title by adverse possession against his mortgagor.

Appeal by the defendant.

This was a suit for redemption of some land which had been mortgaged by the grandfather of the plaintiff to the grandfather of the defendant in 1891. The defence was that the land was the ancestral kasht land of the defendant and that he was not in possession as zarpeshgidar. He denied that there had been any peshgi money or that he had ever been in possession by virtue of any zarpeshgi deed. The suit was decreed by the Subordinate Judge on appeal.

Sambhu Saran, for the appellant

Hareshwar Prasad Sinha, for the respondent.

Ross, J.—Three points have been taken in second appeal. In the first place it is contended that the trial Court erred in admitting in evidence a certified copy of the mortgage bond, on the ground that no notice had been given to the defendant to produce the original, as required by section 66 of the Evidence Act. I doubt whether this point is open in second appeal as there is no reference to it in the judgment of the lower appellate Court. But in any case there is a proviso to section 66 that no notice shall be required in any case in which the Court thinks fit to dispense with it; and in the present case it must be taken that the Court dispensed with the notice for the sufficient reason that the defendant denied that there was or ever had been a mortgage deed at all. In view of the pleadings it was idle for the plaintiff to give

(1) (1921) I. L. R. 43 All. 638 F. B. (2) (1916) I. L. R. 38 All. 148.

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notice to the defendant to produce a document, the existence of which he denied. The learned Advocate for the appellant referred to the decision in *Maung Po Ni* v. *Ma Shwe Kyi*(1) which to some extent supports his contention. But that decision, so far as the present point is concerned, seems to be based on a decision of the Judicial Commissioner which is not an authority for this Court. Two decisions of the Judicial Committee were also quoted [*Bhubaneshwari Debi* v. *Harisaran Sarma Moitra*(2) and *Krishna Kishori Chowdhrani* v. *Kishorilal Roy* (3)] in which secondary evidence was rejected where the parties failed to account for the non-production of the original. But these decisions are not in point. The only question is, whether this was a proper case for the Court to dispense with notice. In my opinion, in view of the pleadings, notice was altogether unnecessary and was properly dispensed with.

The second contention was that as the mortgage was redeemable at the end of Jeth each year and, according to the plaintiff's case, tender was made in Baisakh, the tender was not valid and therefore, in the absence of valid tender, no suit for redemption would lie. The learned Advocate for the appellant relied on the decision in *Mahommed Ali* v. *Baldeo Pande*(4) which does support that proposition. But that decision has been clearly overruled by the Full Bench of the Allahabad High Court in *Raghunandan Rai* v. *Raghunandan Pande*(5) where that case among others is referred to and it is pointed out that section 60 of the Transfer of Property Act only defines the right to redeem and does not lay down that tender of the mortgage money is a condition precedent to the institution of a suit for redemption. I fail to see how tender can be necessary before a suit can be instituted which is itself necessary in order that the amount payable by the plaintiff for redemption may itself be ascertained.

(1) (1924) 84 Ind. Cas. 373.
(2) (1881) I. L. R. 6 Cal. 720, P. C.
(3) (1887) I. L. R. 14 Cal. 486.
(4) (1916) I. L. R. 38 All. 148.
(5) (1921) I. L. R. 43 All. 638, P. B.

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The third point taken was that as the defendant was recorded as kashtkar in the record-of-rights and in the batwara proceedings to the knowledge of the plaintiff's ancestor, he must be taken to have acquired title by adverse possession. This argument that a mortgagee can acquire a title by adverse possession against his mortgagor runs counter to the elementary principle governing mortgages.

The appeal must be dismissed with costs.

MACPHERSON, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Adami and Kulwant Sahay, JJ.

EAST INDIAN RAILWAY COMPANY, LTD.

v.

KEDARNATH SETH.*

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Railways Act, 1890 (*Act IX of* 1890), *section* 80, *scope of—suit against two defendant companies—appeal against one only—competency of appeal.*

Plaintiff consigned a bale of cloth under contract with the Great Indian Peninsula Railway Company but the goods were never delivered to the consignee. Part of the route having laid over the East Indian Railway, plaintiff sued both the companies for non-delivery of the goods. The suit was dismissed and the plaintiff preferred an appeal but failed to join the Great Indian Peninsula Railway Company as a respondent.

Held, that the contract being with the Great Indian Peninsula Railway Company and there being no allegation or finding that the bale was in fact lost in course of transit on the East Indian Railway, the suit and the appeal should have been brought against the Great Indian Peninsula Railway Company.

*Appeal from Appellate Decree no. 525 of 1924, from a decision of Babu Phanindra Lal Sen, Subordinate Judge of Ranchi, dated the 2nd February 1924, reversing a decision of Babu Ramesh Chandra Sur, Munsif of Palamau, dated the 16th May 1923.

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EAST INDIAN RLY., CO., LTD., v. KEDARNATH SETH.

Appeal by one of the defendants.

The respondents in this second appeal were merchants in Daltonganj and had a bale of cloth consigned from the Victoria Terminus, Bombay, to their firm at Daltonganj. The bale of cloth was never delivered and the respondents therefore instituted a suit joining the Great Indian Peninsular Railway Company and the East Indian Railway Company as defendants since part of the route from Bombay to Daltonganj lay over the East Indian Railway.

In the plaint the plaintiffs stated that the defendant companies had failed to give them delivery of the bale which was worth Rs. 793 and that the non-delivery was due to the wilful negligence and misconduct on the part of the employees of the railways. They asked that the defendants should be required to deliver to them the bale of cloth with compensation or that they should be ordered to pay to the plaintiffs the sum of Rs. 793 with interest.

The two Railway Companies put in a joint written statement in which they pleaded that they were not liable for any loss as the consignment was booked and carried at a reduced rate of freight under Risk Note Form B; they denied that there had been any wilful negligence or misconduct as alleged in the plaint.

The Munsif dismissed the plaintiffs' suit, finding that a Risk Note in Form B had been executed and that therefore the Railway Companies were not liable. He relied on cases decided by the Patna High Court on the points raised in the suit.

The plaintiffs then filed an appeal before the Subordinate Judge, making the East Indian Railway Company alone respondent to the appeal. The Subordinate Judge reversed the finding of the Munsif and relied on cases of the Allahabad High Court and also appeared to have followed certain decisions of the Patna High Court. The Subordinate Judge found that though the plaintiffs denied that the risk

note had been signed with their authority, it had in fact been so signed.

N. C. Sinha and *B. B. Ghosh*, for the appellant.

J. Imam (with him *N. K. Prasad* and *B. K. Prosad*), for the respondents.

ADAMI, J.—(After stating the facts set out above, proceeded as follows): The point on which this appeal must succeed is that the plaintiffs appellants in the lower Appellate Court failed to join as respondents the Great Indian Peninsula Railway Company and directed their appeal only against the East Indian Railway Company.

The goods were consigned under contract with the Great Indian Peninsula Railway Company. There is no finding or allegation that the bale was in fact lost in course of transit on the East Indian Railway or that the non-delivery was by the East Indian Railway Company. The contract being with the Great Peninsula Railway Company and the complaint being that the goods had not been delivered, the East Indian Railway Company alone could not be made liable or perhaps be made liable at all. Section 80 of the Indian Railways Act makes this quite clear. The suit as framed by the plaintiffs should have been brought against the Great Indian Peninsula Railway Company and it was as against the Great Indian Peninsula Railway Company that the appeal should have been filed. It is unnecessary to enter into the question as to the liability of the Railway Companies for the loss or non-delivery or even the question of wilful neglect in this case. The decree of the lower Appellate Court against the present respondents, the East Indian Railway Company, must plainly be set aside, because the East Indian Railway Company could not be made liable alone for the non-delivery of the goods.

This appeal is allowed, the decree of the lower Appellate Court set aside, and the suit dismissed with costs throughout.

KULWANT SAHAY, J.—I agree.

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REVISIONAL CIVIL.

Before Jwala Prasad and Bucknill, JJ.

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March, 26, 29, 31; April, 7, 8, 9, 12 13; June, 8.

SREEMATI SABITRI THAKURAIN

v.

F. A. SAVI.*

Code of Civil Procedure, 1908, (*Act V of* 1908), *section* 151, *Order XXIII, rule* 3—*order to record a compromise, omission to make—decree made in pursuance of the compromise, legality of—case, hearing of, on a date prior to that fixed without consent of parties, effect of—application filed beyond court hours without consent of parties, whether valid presentment—compromise decree obtained by fraud, whether can be set aside under section* 151—*court, inherent powers of.*

Order XXIII, rule 3, of the Code of Civil Procedure, 1908, enacts :

" Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise ..... the court shall order such agreement, compromise ..... to be recorded, and shall pass a decree in accordance therewith....."

Held, that before recording a compromise under this rule, the court should enquire into and be satisfied that the compromise has been lawfully arrived at and should direct that the compromise be recorded only after having been so satisfied; omission to comply with the requirements of the rule goes to the root of the jurisdiction of the court to pass a decree in accordance with the compromise. Where, therefore, the court without directing the compromise to be recorded, made the following order :

" Petition of compromise filed—put up today with the consent of parties. Ordered—suit be decreed in terms of the compromise ".

Held, that, the order was without jurisdiction and the decree made in pursuance of the compromise was illegal.

*Civil Revisions nos. 322 and 457 of 1925, from an order of Babu Ramchandra Choudhry, Subordinate Judge of Monghyr, dated the 6th July 1925 and from an order of Babu N. N. Chakravarti, Subordinate Judge of Monghyr, dated the 26th November 1924.

Paban Sardar v. *Bhupendra Nath Nag*, (1), followed.

Thenal Ammal v. *Sokkammal* (2), referred to.

A case fixed on a particular date cannot be taken up prior to that date unless the parties or their duly constituted agents consent to it.

Where a petition was handed over to the Subordinate Judge at the railway station, after court hours and without any previous appointment consented to by the parties, *held*, that there was no valid presentment of the petition.

A court has inherent powers under section 151, Code of Civil Procedure, 1908, to set aside a compromise decree if it is brought about on account of any fraud practised upon it.

Basangowda Hanmantgowda Patil v. *Churchigirigowda Yogangowda* (3), followed.

Raja Devi Bux Singh v. *Habib Shah* (4), referred to.

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

Civil Revision no. 457 of 1925 was against an order of Mr. N. N. Chakravarti, Subordinate Judge of Monghyr, dated the 26th November, 1924, directing that suit no. 103 of 1920 instituted by the petitioner against the opposite party be decreed in terms of a compromise petition filed on the 25th November, 1924.

Civil Revision no. 322 of 1925 was directed against the order of Mr. R. C. Choudhary, Subordinate Judge of Monghyr, dated the 6th July, 1925, rejecting an application filed by the petitioner under section 151 of the Code of Civil Procedure for setting aside the decree passed on the basis of the compromise referred to above.

The property involved in this litigation was of considerable value comprising large zamindaries in Bhagalpur as well as movables. The last holder of

(1) (1916) I. L. R. 43 Cal. 85.
(2) (1918) I. L. R. 41 Mad. 233.
(3) (1910) I. L. R. 34 Bom. 408.
(4) (1913) I. L. R. 35 All. 331 P. C.

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these properties was one Babu Ugra Mohan Thakur. He died chidless on the 29th January, 1914. The petitioner, Srimati Sabitri Thakurain, was his widow. He was said to have left a will, dated the 10th May, 1913, purporting to give away all his properties to his nephew Surajmohan Thakur opposite party no. 2. Mr. Savi was the executor of the will. He took out probate of the will in Testamentary Suit no. 3 of 1914 after contest by the lady. The probate was confirmed by the High Court as well as by the Privy Council.

The lady, however, instituted suit no. 103 of 1920 in the Court of the Subordinate Judge of Monghyr, seeking to have the will declared invalid and to have her right declared to succeed to the entire property of her husband in preference to his nephews. In that case she impleaded the executor Mr. Savi, the legatee Surajmohan Thakur, Naresh Mohan Thakur another nephew of Babu Ugramohan Thakur, and the trustees of the estate of his brother Pranmohan Thakur, namely, Srimati Sundarbati Thakurain, widow of Pranmohan Thakur, and one Rai Bahadur Debi Prasad Marwari. Hardutta Saithani, wife of Rai Bahadur Debi Prasad Marwari, was also impleaded as a party and so also Baithi Bibi, a mistress of Ugramohan Thakur. Of these, Srimati Sundarbati Thakurain is dead. The suit was brought in forma pauperies, and after some contest as to her right to sue as such she was ultimately permitted to continue her suit without payment of court-fee. By his order no. 121, dated the 5th November, 1924, the Subordinate Judge decided to hear the parties on preliminary issues nos. 6(*a*) to 6(*c*). These issues were—

"6(*a*) Whether the alleged will, dated 10th May 1913, is operative as to all or any other properties in suit? If so, to which of them it is operative?"

"6(*b*) Whether the decree of probate testamentary suit no. 3 of 1914 was fraudulently obtained as alleged by the plaintiff? If so, does it bind the plaintiff?"

"6(*c*) Has the Court jurisdiction to try issues 6(*a*) and 6(*b*) in this suit."

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The plaintiff objected to this course and moved the High Court. The Subordinate Judge, on the 21st of November, 1924, adjourned the hearing of the aforesaid issues " on questions of law only " to the 27th of November, 1924.

In the meantime there was a talk of compromise between the parties, and the lady, who happened to be in Monghyr, came to the railway station on the 25th of November, 1924, on her way to Darbhanga. While she was in the waiting room at the railway station the Subordinate Judge, Mr. N. N. Chakravarti, after finishing his court work, happened to come to the railway station for some business of his own. At that time a petition of compromise was handed over to the Subordinate Judge by the lady's pleader, Babu Hito Rai. The Subordinate Judge made the following note on the top of it :—

" Filed before me at 5-12 P.M. and read over to plaintiff who admitted the same."

The next morning, that is, on the 26th November, the Subordinate Judge recorded the following order in Court :—

" Petition of compromise filed on 25th November 1924 after Court hours put up to-day with the consent of the parties . Ordered—suit be decreed in terms of the compromise. The court-fees payable by the plaintiff will be paid by the defendant in a month and will be set off towards the maintenance allowed to the plaintiff."

On the 4th of December, 1924, a decree in terms of the compromise was signed and sealed by the Court.

On the 7th of April, 1925, the lady petitioner filed an application before the Subordinate Judge of Monghyr for setting aside the compromise and the decree, under section 151 of the Code of Civil Procedure. The principal ground stated in the petition for setting aside the compromise was that the plaintiff consented to comprise the litigation on account of the solicitations of defendant no. 2, the legatee Surajmohan Thakur, and that she agreed to certain terms and believed that the petition of compromise contained

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all the terms to which she had consented and under that belief she signed the compromise petition in the waiting room and the petition was taken away by the opposite party no. 2 Surajmohan Thakur and handed over to the Subordinate Judge at the Monghyr railway station without her knowledge and authority; that somebody standing at some distance outside the waiting room purported to read out the petition but she could not catch the words read out to her and believing that the petition read out to her contained the terms which she had agreed to she answered in the affirmative to a query put by the Subordinate Judge without knowing what actually were the contents of the compromise petition and without suspecting that the important terms were left out from it. Some time after this she came to know at Allahabad from one Balbhadra Thakur, an agent of the opposite party, that the petition of compromise which she had signed did not contain the important terms. She then came to know of the fraud practised upon her by Surajmohan Thakur in omitting from the compromise petition the important terms and obtaining her signature fraudulently upon it and of the compromise petition having been handed over to the Subordinate Judge through Hito Rai, pleader, whom she had never authorized to sign or agree to any terms of the petition or to file any compromise petition and that the real facts were fraudulently suppressed from the Court and consequently the Court on account of the fraud practised upon it passed an order directing the suit to be decreed in terms thereof. She impugned the procedure adopted by the Subordinate Judge as being illegal and ultra vires and consequently the order passed by him directing a decree to be prepared in terms thereof was illegal and without jurisdiction. Upon these allegations she filed a petition under section 151 of the Code of Civil Procedure on the 7th of April, 1925, before Mr. N. N. Chakravarti (Subordinate Judge) to rectify the fraud practised upon the Court and to set aside the compromise and the decree prepared in terms thereof.

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The petition was opposed by defendants nos. 1 and 2, the executor Mr. Savi and the legatee Surajmohan Thakur. The facts alleged in the petition were seriatim denied by the opposite party.

The petition was, upon transfer, heard by another Subordinate Judge, Mr. Ramchandra Choudhary. He did not consider it necessary to inquire into the truth or otherwise of the allegations made in the petition and dismissed the application upon the sole ground that it did not come under section 151 of the Code of Civil Procedure. In passing the order the Subordinate Judge assumed that

> " the allegations of the lady regarding fraud, etc., were true."

He held that her remedy was by a separate suit, and not by an application under section 151 of the Code.

Against this order of the Subordinate Judge, dated the 6th July, 1925, the petitioner moved the High Court in revision [Civil Revision no. 322 of 1925].

As already observed, the lady filed a separate application against the order of the Subordinate Judge, dated the 26th November, 1924, directing the suit to be decreed in terms of the compromise. This application gave rise to Civil Revision no. 457 of 1925. The order complained against was as follows:—

> " Petition of compromise filed on 25th November 1924, after court hours; put up to-day with the consent of the parties. Ordered—suit be decreed in terms of the compromise."

K. B. Dutt (with him *Sultan Ahmad*, *M. Prasad*, *L. K. Jha*, *K. P. Sukul*, and *N. C. Sinha*), for the petitioners in Civil Revision no. 322 of 1925.

K. B. Dutt (with him *Sultan Ahmad* and *K. P. Sukul*), for the petitioners in Civil Revision no. 457 of 1925.

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Manuk (with him *S. N. Palit* and *S. Ghosh*), for the opposite party in Civil Revision no. 322 of 1925.

S. N. Palit, for the opposite party in Civil Revision no. 457 of 1925.

JWALA PRASAD AND BUCKNILL, JJ. (after stating the facts set out above, proceeded as follows): The contention of the lady is that the order of the 25th November, 1924, was ultra vires and without jurisdiction. In support of this contention reliance has been placed upon rule 3 of Order XXIII of the Code of Civil Procedure. It is contended that the order passed by the Subordinate Judge decreeing the suit in terms of the compromise does not show (*1*) that it was " proved to the satisfaction of the Court " that the suit in question was adjusted by any lawful agreement or compromise and (*2*) that the Court did not direct the compromise " to be recorded " in terms of rule 3 of Order XXIII referred to above, and unless these two conditions were fulfilled the Court had no jurisdiction to " pass a decree in accordance " with the compromise petition handed over to Mr. N. N. Chakravarti (Subordinate Judge) at the railway station at Monghyr on the 25th of November, 1924. In support of this contention the learned Counsel on behalf of the lady has referred to the case of *Paban Sardar* v. *Bhupendra Nath Nag* (1). In that case the date for final disposal of the suit was fixed for the 4th May, 1912, and a few days before that day, that is, on the 25th of April the plaintiff filed an application which was consented to by the defendant. The prayer in the petition was that the suit be dismissed. The Court directed the petition to be put up on the date fixed, the 4th of May, 1912, and on that date the plaintiff filed a fresh application praying to withdraw his previous application on the ground that it was procured from him by undue influence. The Subordinate Judge before whom the suit was pending inquired into the matter

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(1) (1916) I. L. R. 43 Cal. 85, 88.

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and held that there was no improper influence exercised upon the plaintiff and that he was bound by the terms of the application of the 25th April. He passed a decree, dismissing the suit in terms of that application. The plaintiff appealed to the District Judge and a preliminary objection was raised as to the competency of the appeal by reason of section 96, clause (*3*), of the Code of Civil Procedure which provides that no appeal shall lie from a decree passed by the Court with the consent of parties. This contention was sought to be met on behalf of the appellant by reference to Order XLIII, rule 1(*m*), which provides for an appeal from an order passed under Order XXIII, rule 3, " recording or refusing to record an agreement, compromise or satisfaction. " The lower appellate Court overruled this contention on the ground that the appeal in question was not directed against the order recording the agreement but against the decree in which that order had been embodied and also upon the ground that the appeal from the order was barred by the statute of limitation. Sir Lawrence Jenkins, C. J. and Chatterjea, J. on appeal by the plaintiff observed as follows :—

" A decree in this case was passed by the Subordinate Judge not after a hearing but on the basis of a compromise, that is to say, it was a decree justified, if at all, by Order XXIII, rule 3. But when the terms of that rule come to be examined, it is apparent that a decree can be passed only after there has been an order that the compromise be recorded. This is not a mere matter of form. It has an important result. If the decree is in accordance with a recorded compromise, then it may well be contended that the provisions of section 96, clause (*3*), of the Code applied, and the person feeling himself aggrieved by such a decree may be without the remedy of an appeal from that decree ..... In this case there was no order that the compromise be recorded; and accordingly there was no order from which an appeal could be preferred. And as there was no order, so there could not be a decree under Order XXIII, rule 3.

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The result has been that though the plaintiff maintains that he did not enter into the compromise he has not had the opportunity which the law provides of discussing this question not only in the court of first instance but, if necessary, in the court below. The appellant, therefore, appears to me to be a person under a distinct grievance and none the less because apparently the learned Subordinate Judge thought badly of him."

The case was accordingly remitted to the court of first instance in order that it might be determined according to law.

Mr. Manuk, on behalf of the opposite party, distinguishes this ruling upon the ground that the order in the present case ordering the suit to be "decreed in terms of the compromise" is an order directing in effect that the compromise be recorded, though not said so in so many words.

Rule 3 of Order XXIII distinctly requires two things to be done when it is proved to the satisfaction of the court that the suit has been compromised—(1) that the court shall order such compromise to be recorded and (2) that it shall pass a decree in accordance therewith so far as it relates to the suit. In this case there is no order of the court directing the compromise to be recorded. The court has only passed a decree in accordance with the compromise. It is difficult to distinguish the order passed in the present case from that which was the subject-matter of the decision by Sir Lawrence Jenkins, C. J. in the Calcutta case referred to above.

Another contention of the petitioner before us is that on the 26th of November, 1924, the day on which the aforesaid order was passed the court had no jurisdiction to take up the case. It is said that the petition was handed over to the Subordinate Judge at the Monghyr railway station after court hours and without any previous appointment consented to by the parties for the case to be taken up at the railway station. The Subordinate Judge casually

happened to be at the railway station and the making over of the petition to him was not a legal presentment of it to a court. Reference is made to the *General Rules and Circular Orders* of this Court, volume I (Civil), rule 9, at page 3, which says—

"Petitions, applications, etc., should always be taken in open Court, and usually at the commencement of the daily sitting of the Court."

Rule 5, at the preceding page 2, says—

"Without the consent of the parties and in the absence of urgent necessity no Civil trial should proceed on Sundays or holidays gazetted under section 15(2) of Act XII of 1887."

It is conceded that with the consent of the parties the court may hear a case outside the usual place of the sitting of the court and beyond the court hours; but it is contended that in this case there was no such consent previously given by the parties. The petition in question handed over at the railway station, according to the contention of Mr. Dutt for the petitioner, was not validly presented to the court. It is said that the Subordinate Judge received it as a mere custodian thereof and in order to have jurisdiction to dispose of it in accordance with law the application should have been formally presented to him in court on a subsequent date and heard and disposed of in the presence of the parties or their duly constituted legal representatives. The petition bears the seal of the court, dated the 25th November, 1925, and it is not known whether the Subordinate Judge had the seal with him at the time when he was at the railway station, or that he sealed it on that date at his house after returning from the station or whether it was sealed on the following day though antedated. The petition in question though presented to the Subordinate Judge on the 25th of November should not be deemed to be on the minutes of the court proceedings on that date. The Subordinate Judge himself did not treat it to be so and consequently he did not pass any formal order upon the petition on the 25th of November though the parties were present before him. If the petition was a valid presentment on the 25th of November at the railway station there was nothing to

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prevent the Subordinate Judge from taking it then and there and disposing of it by passing a judicial order. He does not even direct the petition to be taken up on the date fixed in the case. The note of the Subordinate Judge of the petition having been filed before him at the railway station on the 25th of November cannot in any sense be construed to be a judicial order. This is also apparent from the opening sentence of the order of the 26th November wherein the Subordinate Judge says—

> "Petition of compromise filed on 25th November 1924 after Court hours (not a valid presentment) put up to-day with the consent of the parties."

The Subordinate Judge, therefore, considered the petition as a formal presentment to the court on the 26th of November in terms of the General Rules and Circular Order referred to above. He was also cognizant of the fact that the petition of the 25th of November could not be taken up in his judicial capacity "without the consent of the parties" for that was not the date fixed for the hearing of the case. In order, therefore, to give him jurisdiction on the 26th of November to deal with this petition, he invokes the aid of "the consent of the parties". It is well-known and in fact it is an elementary principle of law that a case fixed on a particular date cannot be taken up prior to that date unless the parties consent to it. It is nobody's case that the parties were present in court personally on that day and certainly the lady petitioner was not present in court in person. "With the consent of the parties" referred to in the order in question must not be understood in its literal sense as a consent having been given by the parties in person. It includes a consent given by their duly constituted agents, such as pleaders, advocates, etc., for any act or appearance required to be done by parties may be done on their behalf by their duly constituted recognized agents (vide Order III, rule 1, of the Code of Civil Procedure). The Subordinate Judge knew that the parties were not personally present before him on the 26th of November; at least the lady was not present and there-

fore the petition was not put up on that date with the consent of the parties themselves. Hence the Subordinate Judge, when he says that it was taken up with the consent of the parties, obviously means with the consent of the legal advisers of the parties.

The question then is whether the petition of compromise was taken up by the court on the 26th of November, a day prior to the date fixed for the hearing of the case, with the consent of any duly constituted pleader or agent on behalf of the lady. There was no consent given, on the 25th of November when the petition was handed over to the Subordinate Judge at the railway station, by the parties or their pleaders for the petition to be taken up on the 26th, for the Subordinate Judge while noting on the petition the fact of its having been filed does not say so. This is also obvious from the order recorded in the order sheet on the 26th of November. Mr. Dutt contends that the lady had already left Monghyr and that she had not authorised any pleader or duly constituted agent to consent on her behalf to the case being taken up on the 26th of November and to agree to the disposal of the case in accordance with the petition. He refers to the vakalatnamah or the power of attorney given by the lady in favour of the pleaders, Babu Hito Rai and Babu Kedar Nath Bose, to conduct her case. This vakalatnamah expressly says that the pleaders shall not file

> "petitions of compromise or withdrawal of suit or petitions for reference to arbitration."

It is contended that under this power of attorney the pleaders of the lady had no right or power to present the petition in question or to consent to its being taken up on the 26th of November. Mr. Dutt relies for this contention upon the case of *Thenal Ammal* v. *Sokkammal* (1). In that case a petition of compromise was filed purporting to have been agreed to on behalf of the parties. It was signed by the pleaders of the parties. A decree was passed in terms of the compromise petition and on an objection by the plaintiffs the

(1) (1918) I. L. R. 41 Mad. 233.

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compromise decree was set aside upon the ground that the Vakil who signed and presented the petition had no right to do so under the terms of the power-of-attorney which contained a provision authorising the vakil

> " to present, if necessary, petitions for razinama, for withdrawal and referring to arbitration and to sign the razinama petitions, etc."

It was held that the aforesaid stipulation did not give authority to the Vakil to enter into a compromise without reference to his clients. The compromise was sought to be supported upon the ground that there was inherent power in the Vakil to enter into the compromise and to withdraw the suit by his mere engagement on behalf of his client. The contention was overruled upon the ground that " it is not the ordinary duty of an Advocate to negotiate terms, without reference to his client, with the opposite party. Such an action is calculated to place the practitioner in a false position. " The learned Judges observed that it was not desirable that such a power should be vested in a Vakil or Advocate in the interest of the profession, nor it is in consonance with the highest ideals of the profession or of justice. It was further pointed out that it is for these reasons that Order XXIII, rule 3, expressly says that there should be an inquiry as to the terms being lawful or not and that the court should direct formally a compromise to be recorded after its having been satisfied that it was a lawful compromise. Their Lordships observe as follows :—

" It is pointed out by all the Lord Justices that the court has plenary powers in any case to inquire into the justness or bona fides of the settlement reported to it. In this country such a power should be exercised by the court even more largely than in England. It is for that reason that the intermediate stage of recording the compromise is introduced in the Code. We are afraid that courts seldom appreciate the significance of this provision. At any rate, we are satisfied that in this case the importance and

necessity of recording the compromise was not realised by the Subordinate Judge. We must hold that there has not been a sufficient inquiry into the question whether the compromise was authorised by the appellants especially as we hold that the vakalat does not give authority to the vakil to enter into the compromise without reference to his clients. ''

This is exactly what his Lordship Sir Lawrence Jenkins, C. J., meant when he held in the case referred to above: [*Paban Sardar* v. *Bhupendra Nath Nag*, (1)] that the provision in the Code of recording the compromise is not a mere matter of form but of substance.

The lady says in her petition under section 151 of the Code of Civil Procedure that she did not authorise Babu Hito Rai (whom she had befriended for the purpose of this case) to file the compromise petition in question or to agree to the case being taken up on the 26th of November or to act in any manner in connection with the compromise of the suit. The case was fixed for the 27th November.

It is difficult to appreciate the anxiety of the Subordinate Judge to expedite the disposal of the application filed before him on the 25th November at the railway station before the 27th of November, the date fixed for the hearing of the case. There is nothing to prevent a petition of this nature being filed previous to the date fixed for the hearing of the case, but there should be a good justification for disposing of the application or the suit before the date fixed for the hearing of the case. In this case the defendants were six in number on the date the compromise petition was filed and almost all of them save perhaps defendant no. 6 had filed written statements and had raised issues in the case resisting the claim of the plaintiff. The compromise petition purports to deal with the dispute between the plaintiff and defendants 1 and 2. The case was fixed for the

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27th of November and therefore it is not understood why, supposing there was consent on behalf of only the plaintiff and defendants 1 and 2, the case was taken up on the 26th November before the date fixed for its hearing. Apart from anything else the result has been an anomalous decree prepared by the court below. On that date, the 26th November, the court obviously did not know that there was any other person impleaded in the suit or interested in it except the plaintiff and defendants 1 and 2. The learned Subordinate Judge obviously did not even know whether all the parties had or had not entered into any settlement of the case. In the order in question he seems to have been under the impression that the entire suit was disposed of not only as between the plaintiff and defendants 1 and 2, but so far as all the other defendants were concerned, or else there would have been some order passed with regard to the other defendants. It may be that those defendants after the compromise had no interest in the litigation. It may be that the plaintiff could not press her claim against those defendants after the compromise in question; still the suit had to be disposed of so far as those defendants (nos. 3 to 6) were concerned either by dismissing the suit against them for want of evidence on behalf of the plaintiff or on account of her not pressing the case against them. The plaintiff claimed certain reliefs against defendants nos. 3 to 6. The court should have recorded an order disposing of those reliefs including directions as to costs. If it was meant to dismiss the suit against them an order to that effect should have found place in the order passed on the 26th of November and the decree which followed it. In order to avoid such a mischief rule 3 of Order XXIII requires that the court should enquire into and be satisfied as to the compromise having been lawfully arrived at and should direct that the compromise be recorded only after having been so satisfied. The omission to comply with the requirements of that rule goes to the root of the jurisdiction of the court to pass a decree

in accordance with the compromise as has been held in the ruling quoted above. The non-compliance with the provisions of the rule has affected the authority of the order of the Subordinate Judge, dated the 26th November 1924, and the decree passed on the basis of that order.

The plaintiff complains that if the case were taken up on the 27th of November, the date actually fixed, and had the court made enquiries about the compromise petition it would have come to know that the lady had no authorised pleader or agent to act in the matter of compromise and the court would then have withheld its sanction to the compromise and would not have directed a decree to be prepared in terms thereof. The suit would have then proceeded in its ordinary course. What would have been the result of the suit on the 27th of November, the date fixed for its hearing, we need not conjecture. That was the date fixed not for disposing of the case on merits but for hearing the parties on preliminary issues nos. 6(*a*) to 6(*c*) in pursuance of order no. 121 passed by the Subordinate Judge on the 5th of November, 1924. The plaintiff was aggrieved by this order and had to come to this Court in revision objecting to the procedure adopted by the Subordinate Judge, directing the issues to be tried piecemeal. She had obtained a rule from two learned Judges of this Court (Mullick and Kulwant Sahay, J.J.) on the 18th November, 1924, and the Subordinate Judge was called upon to give an explanation as to the procedure adopted by him. This Court further directed that the said preliminary issues should not be heard until further orders of the court. The Subordinate Judge submitted his explanation on the 21st of November, 1924, and until the matter was disposed of in this Court the Subordinate Judge could not hear the parties upon the aforesaid preliminary issues on the 27th of November, 1924. As a matter of fact, on the 28th November, 1924, the rule was made absolute and the order was passed by this Court directing the Subordinate Judge not to hear issues 6(*a*) and 6(*b*) and a

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letter to that effect was already issued. The High Court, of course, did not know of what had happened in the meantime in the court of the Subordinate Judge on the 26th of November even before the date actually fixed for the hearing of those issues, namely, that the suit was disposed of in terms of the compromise petition. The Subordinate Judge knew very well that the matter was pending in the High Court on the date he disposed of the suit. This is another reason why he should not have disposed of the compromise petition except on the date fixed for the hearing of those issues.

Mr. Manuk on behalf of the opposite party contends that the petition of compromise is in vernacular and that every page of it was signed by the lady and read out to her at the railway station; she admitted its correctness; it must therefore be presumed that she was fully aware of the contents of the petition and it is not open to her to contend that the petition does not contain all the terms agreed upon between the parties. These facts have, however, not been investigated. The lady repudiates these facts and says that she was deceived into the belief that the petition contained all the terms and that when it was read out to her she did not catch the words being in the waiting room and the person who read it being outside on the platform at some distance. Without investigation the Subordinate Judge assumed these facts to be correct for the purpose of his order. Therefore, we are not in a position to give effect to the contention of Mr. Manuk.

Again, Mr. Manuk says that this petition, though not actually handed over to the Subordinate Judge at the railway station, the lady must be presumed to have known it. She, on the other hand, says that she did not present it nor did she authorise anyone to present it and suggests that it was handed over to the Subordinate Judge fraudulently by the opposite party at the railway station in order to obtain an admission from her hurriedly without letting her

know the contents of the petition. This again is a contentious matter and has not been investigated.

Mr Manuk also contends that the omission on the part of the Subordinate Judge to record any order with respect to the relief sought against defendants nos. 3 to 6 does not vitiate the order of the Subordinate Judge so far as the plaintiff and defendants 1 and 2 are concerned. He says that the irregularity does not go to the root of the case. In this view he distinguishes the cases cited on behalf of the petitioner [*Malchand Boid* v. *Osman Ali Mandal* (1), *Taraprasanna Sarkar* v. *Kalilamohan Sarkar* (2) and *Gobind Chandra Sardar* v. *Bhagabat Sardar* (3)]. In the first case the mortgage itself became infructuous on account of the person interested in the mortgage not having been properly represented in the compromise entered into by the mortgagor and some of the mortgagees and hence the compromise decree was set aside. The other two cases related to suits for partition between co-sharers some of whom had not joined the compromise; consequently the compromise was set aside.

It is also said that the parties not represented in the compromise, that is, defendants nos. 3 to 6, have not made any objection, while in the present case the lady who took benefit under the compromise is the objector and wants to resile from the compromise. Be that as it may, the Subordinate Judge in the present case did not comply with the imperative directions contained in the Code of Civil Procedure in dealing with the compromise in question. He did not inquire as to whether it was lawfully entered into or not and he disposed of it in the absence of the plaintiff and on a date not fixed for the hearing thereof.

The order of the Subordinate Judge of the 26th of November, 1924, is therefore, not only bad in law but is without jurisdiction and the decree prepared on the basis of it is equally so. It seems from

(1) (1924) 80 Ind. Cas. 307 (Cal.). (2) (1923) 75 Ind. Cas. 819 (Cal.).
(3) (1915) 27 Ind. Cas. 242 (Cal.).

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the summary order passed by the Subordinate Judge that he did not at all bestow his mind to the consideration of the compromise and its terms and did not realise the scope of the suit and the parties concerned in it. The compromise was, therefore, not judicially disposed of and the order passed by the Subordinate Judge lacks in judicial sanctity and the plaintiff can very well seek to avoid the order as well as the decree passed on the basis of it.

The plaintiff applied under section 151 of the Code of Civil Procedure to have the order set aside. The application was made before the Subordinate Judge, Mr. N. N. Chakravarti, who had passed the order directing the suit to be decreed in terms of the compromise. On the prayer of the opposite party he directed the question regarding the maintainability of the application to be disposed of first. At this stage the case was under the orders of the District Judge transferred to the file of another Subordinate Judge, Mr. R. C. Choudhary. He held that the application did not come under section 151 of the Code of Civil Procedure and that the remedy, if any, to the petitioner was by means of a separate suit. The Subordinate Judge has referred to a number of authorities cited before him on both sides. There is no doubt as to the principle enunciated in those cases. In *Basangowda Hanmantgowda Patil* v. *Churchigirigowda Yogangawda* (1) a consent decree was set aside under section 151 of the Code upon the ground that the pleader who signed it on behalf of the defendant was not engaged by him nor had he any authority to sign the petition. The vakalatnamah filed in the present case not only does not confer any power to sign any compromise petition or to enter into any compromise but it expressly says that the pleader shall not enter into any compromise or sign or present any application compromising or adjusting the suit on behalf of the lady. Pleader Hito Rai had no power to file the compromise in suit. I fail to understand why the principles of this ruling

(1) (1910) I. L. R. 34 Bom. 408.

should not be applied to the present case. The learned Subordinate Judge does not apply it upon the ground that the petition was signed by the lady and was presented at the railway station. He has not taken into account the fact that the petition was actually taken up on the 26th of November in the absence of the lady and without anybody to represent her on her behalf and that it was taken up on a date not fixed for the case without any valid consent by her or on her behalf by any duly authorised pleader. It is conceded by the learned Subordinate Judge upon the authorities quoted by him that a compromise can be set aside if it was brought about on account of any fraud practised upon the court. It seems that the learned Subordinate Judge did not know that the pleader had no authority to consent to the case being taken up on the 26th of November or to act on behalf of or represent the lady in connection with the compromise petition on the 26th of November. He had no vakalatnama authorising him to act on her behalf in connection with the compromise. This is a fraud practised upon the court, for if the court had known this it would not have acted upon the compromise and directed the suit to be decreed in terms thereof. The Subordinate Judge was under the belief that the petition of compromise contained all the terms to which the lady had consented. This belief was induced on account of the petition having been read out to her at the station when she was in the waiting room. The lady repudiates the compromise on the ground that she did not catch the words when the petition was read out to her, she being in the waiting room and the petition being read out to her from the platform outside. There is no investigation or inquiry upon this point and her allegation has been assumed by the court below to be correct. Assuming her allegation to be true, the Subordinate Judge was deceived into the belief that the terms of the compromise were fully read out to her and that she had consented to all the terms. This is, therefore, a fraud practised upon the court.

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The case, however, stands upon a much higher footing. Section 151 refers to the inherent power of the court which it always possesses to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The present case comes well within this section, and the Subordinate Judge had power to set aside the order of the 26th of November, 1924, being illegal and ultra vires, for the reasons already given. The principle has been enunciated by their Lordships of the Judicial Committee in *Raja Devi Bux Singh* v. *Habib Shah* (1).

The result is that the order of the Subordinate Judge, dated the 6th of July, 1925, dismissing the application of the petitioner under section 151 of the Code of Civil Procedure should be set aside. His order of the 26th of November, 1924, directing the suit to be decreed in terms of the compromise and the compromise decree must also be set aside, and the case restored to its original number to be taken up from the stage at which the compromise was filed and disposed of in accordance with law. This is the only order possible in the circumstances of the case as was pointed out by their Lordships Jenkins, C. J. and Chatterjea, J. in the case of *Paban Sardar* v. *Bhupendra Nath Nag* (2).

It is accordingly ordered that Civil Revisions nos. 322 and 457 of 1925 be allowed with costs throughout:

It is regrettable that the parties have not come to terms although attempts were made by this Court and the terms were also almost settled; the difference was very small between the parties. The protracted litigation ever since the death of the husband of the lady in 1914 has been ruinous to both the parties and the lady has been reduced to pauperism. It is hoped that better sense will prevail and the parties will even now settle their dispute.

(1) (1913) I. L. R. 35 All. 331, L. R. 40 I. A. 151,
(2) (1916) I. L. R. 43 Cal. 85, 89,

APPELLATE CIVIL.

Before Adami and Kulwant Sahay, JJ.

BHAIRO NATH ROY

v.

SHANKE PAHAN.*

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June, 30.

Zarpeshgi lease—bona fide settlement of raiyati lands by zarpeshgidar, whether binding on lessor.

In the absence of a covenant in a zarpeshgi lease restricting the powers of the zarpeshgidars as regards the settlement of raiyati lands, the lessees are entitled in the ordinary course of management to induct tenants upon raiyati lands, and such bona fide settlement of land by the zarpeshgidars is binding upon the proprietor or person who had granted the zarpeshgi.

Sheo Barat Singh v. *Padarath Mahto* (1) and *Thakur Pitambar Singh* v. *Khago Kumar* (2), followed.

Appeal by the plaintiff.

This was an appeal by the plaintiff and it arose out of a suit brought by him for recovery of possession of one pawa of land known as Dabar Chaun Don in the village of Guria. The plaintiff was admittedly the landlord. The defendant claimed to be a tenant of the land. The plaintiff's case was that the land was in his possession as proprietor and he had let it out at first in bhagut bandha mortgage to one Durjodhan Manjhi and later in zarpeshgi to Chaitan Munda, Mangra Munda, Dondra Pahan and Jhirka Munda. The zarpeshgi was granted in 1895 and it was redeemed in the Sambat year 1975. The plaintiff's case was that after redeeming the zarpeshgi he wanted to take possession but he was resisted by the defendant in respect of the land in dispute. The plaintiff said that this land was a part of the bakasht land and the defendant had no right to remain in possession. The defendant's case was that it was not the bakasht land of the proprietor but it was his

*Appeal from Appellate Decree no. 158 of 1924, from a decision of Rai Bahadur Amrita Nath Mitter, Subordinate Judge of Ranchi, dated the 12th July 1923, confirming a decision of W. G. Lacey, Esq., Subdivisional Officer, Munsif of Khunti, dated the 19th January 1922.

(1) (1919) 52 Ind. Cas. 473. (2) (1917) 39 Ind. Cas. 521.

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ancestral raiyati land. He relied upon the entry in the survey khatian which showed the defendant as a raiyat in respect of the land in dispute. Both the courts below held that the land in dispute was not the ancestral raiyati land of the defendant. It was found by the Subordinate Judge on appeal that the land in dispute was not manjihas land or the proprietor's private land in which no right of occupancy could be acquired but that it was land in the khas possession of the proprietor and appertained to the raiyati class of lands. The finding further was that the defendant was inducted as a tenant upon the land in dispute by the zarpeshgidars during the period of the zarpeshgi. It was further found that the settlement by the zarpeshgidars with the defendant was not a collusive settlement but a bona fide settlement. The Subordinate Judge further found that the plaintiff's evidence as regards possession and dispossession by the defendant was hopelessly conflicting and he agreed with the Munsif in holding that the defendant had been in possession at least from the date of the survey and settlement which was more than 12 years before the institution of the suit. The position therefore was that the defendant was inducted upon the land by the zarpeshgidars who had taken the land in zarpeshgi from the plaintiff for a period of time; and the said period having expired and the zarpeshgi having been redeemed, the question was, whether the plaintiff was entitled to take possession of the land on the condition on which he had granted the same in zarpeshgi to the zarpeshgidars on ejecting the defendant. The Subordinate Judge found that the zarpeshgidars were in the same position as lessees; that lessees are entitled in the ordinary course of management to induct tenants upon raiyati lands; and that such settlement of land by the zarpeshgidars would be binding upon the proprietor or the person who had granted the zarpeshgi. He relied upon the observations of the Patna High Court in *Sheo Barat Singh* v. *Padarath Mahto* (1) and *Thakur Pitambar Singh* v. *Khago Kumhar* (2).

(1) (1919) 52 Ind. Cas. 473. (2) (1917) 39 Ind. Cas. 521.

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KULWANT SAHAY, J.

Anand Prasad, for the appellant.

S. Dayal, for the respondent.

KULWANT SAHAY, J. (after stating the facts set out above, proceeded as follows): It has been argued on behalf of the plaintiff in second appeal that the zarpesgidar had no right to settle tenants upon the lands which were in the possession of the plaintiff at the time when the zarpeshgis were granted. In my opinion there is no substance in this contention; unless there is a restriction in the zarpeshgi lease itself restricting the power of the zarpeshgidar as regards the settlement of raiyati lands, the zarpeshgidar in the ordinary course of management would be entitled to settle raiyati lands with tenants. The cases cited by the learned Vakil for the appellant refer to zirat lands or lands which were private lands of the proprietor and to which no right of occupancy could be acquired. Those cases are different from the raiyati lands which are temporarily in possession of the landlord and which are known technically as bakasht lands. Such lands are primarily raiyati lands but are held by the proprietor for the time being on account of surrender or abandonment or purchase in execution of decrees or by such other means. Such lands retain the character of raiyati lands and occupancy right is acquired as soon as such lands are settled with settled raiyats of the village. In any case here the finding is that the defendant has been in possession for more than 12 years and has therefore acquired an occupancy right. Having regard to the finding arrived at it is clear that the plaintiff is not entitled to eject the defendant. His argument is that the zarpeshgidars had no right to create encumbrances or commit acts of waste in respect of the land given to them in zarpeshgi. If the zarpeshgidars have done any such thing the remedy of the plaintiff would be against them As against the tenant who is the only defendant in the present suit no such claim can be raised and the settlement with him which has been found to be a bona fide settlement cannot be held to

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be invalid on account of any act done by the zarpeshgidar to the detriment of the plaintiff. I am of opinion that the decision of the learned Subordinate Judge is correct and this appeal must therefore be dismissed with costs.

ADAMI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Ross, JJ.

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July, 2.

KAYASTHA TRADING AND BANKING CORPORATION, GORAKHPUR

v.

JAI KARAN LAL.*

Companies Act, 1913 (*Act VII of* 1913), *sections* 199, 200 *and* 201—*Order in winding up proceedings—Transfer to court in another province for execution, whether should be to High Court or District Court.*

The High Court at Allahabad having made an order in certain liquidation proceedings pending before it, transferred the order for execution to the court of the District Judge at Gaya, in the Province of Bihar and Orissa. The District Judge of Gaya held that he was not competent to deal with the case and struck off the execution.

Section 199, Companies Act, provides : " All orders made by a Court under the Act may be enforced in the same manner in which decrees of such court made in any suit pending therein may be enforced. " It is further provided by section 200 of that Act that " Any order made by a Court for or in the course of a winding-up of a company shall be enforced in any place in British India other than that in which such court is situate by the court which would have had jurisdiction in respect of such company if the registered office of the Company had been situated at such place ". Section 201 requires the last mentioned court to take the requisite steps in the matter.

Held, that the court described in sections 200 and 201 is the High Court and not the District Court.

*Appeal from Original Order nos. 8 and 9 of 1926, from an order of F. F. Madan, Esq., I.C.S., District Judge of Gaya, dated the 7th November 1925.

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KAYASTHA TRADING AND BANKING CORPORATION, GORAKHPUR v. JAI KARAN LAL.

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

Sambhu Saran and *Rajeshwari Prasad*, for the appellant.

Kailash Pati, for the respondent.

ROSS, J.

Ross, J.—These appeals relate to the execution of a decree by the High Court of Allahabad in certain liquidation proceedings. These decrees were transferred for execution by the Allahabad High Court to the District Judge of Gaya. He held that under section 200 read with section 3 of the Indian Companies Act, 1913, he was not competent to deal with the case and he allowed the objections and struck off the execution.

The contention on behalf of the decree-holder in this court is that, under section 199,

> "All orders made by a Court under the Act may be enforced in the same manner in which decrees of such Court made in any suit pending therein may be enforced"

and, consequently, this section lets in sections 38, 39 and 40 of the Code of Civil Procedure; and, as a decree in a suit by the Allahabad High Court can be transferred for execution to the District Court at Gaya, the same procedure is correctly followed in these liquidation proceedings. Now section 199 is the general section; but the section particularly dealing with the question of enforcement of an order outside the jurisdiction is section 200 and that section provides that,

> "Any order made by a Court for or in the course of the winding-up of a Company shall be enforced in any place in British India other than that in which such Court is situate, by the Court that would have had jurisdiction in respect of such Company if the registered office of the Company had been situate at such place:"

and section 201 requires the last mentioned court to take the requisite steps in the matter. Now the court described in these two sections is not the court of the District Judge as he has rightly pointed out, but it would be this Court. Section 199 and section 200 must be read so as to be consistent with each other. If the interpretation placed upon section 199 by the

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ROSS, J.

learned Advocate for the appellants is correct, then section 200 would be swept away altogether. It seems to me therefore that the learned District Judge is right.

It is then contended that as the case is now before this Court, it may be sent back in order that the District Judge may enforce the decree. But this is to ignore the procedure laid down by the Companies Act which must be strictly followed.

Finally it was argued that the third proviso to section 3 validates these proceedings. But all that that proviso allows is that nothing in the section shall invalidate a proceeding by reason of its being taken in a wrong court But where the objection is taken at the very beginning, the objection must be decided according to law; and the objection has been correctly decided in this case, and there is nothing to validate.

These appeals are dismissed. Appeal no. 8 without costs and Appeal no. 9 with costs.

DAS, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Ross, JJ.

RAJA KIRTYA NAND SINHA BAHADUR

v.

RAM LAL JUBE.*

* 1926.

July, 5.

Bengal Tenancy Act, 1885 (Bengal Act VIII of 1885), section 22(2)—Purchase of occupancy right by co-sharer landlord—settlement with tenant—partition—part of holding allotted to purchaser and remainder to the other co-sharer—status of purchaser in share allotted to other co-sharer.

Under section 22(2), Bengal Tenancy Act, 1885, " If the occupancy right in land is transferred to a person jointly

*Appeal from Appellate Decree no. 566 of 1924, from a decision of H. R. Meredith Esq., I.C.S., District Judge of Purnea, dated the 13th February 1924, confirming a decision of Babu Gajadhar Prashad, Munsif of Purnea, dated the 15th January 1923.

interested in the land as proprietor.....he shall be entitled to hold the land subject to the payment to his co-proprietors.....of the share of the rent which may be from time to time payable to them; and if such transferee sublets the land to a third person, such third person shall be deemed to be a.....raiyat.....in respect of the land ".

Held, (*i*) that where, after a purchase by a co-sharer, there is a partition between the co-sharers and part of the holding is allotted to the purchaser co-sharer and the remainder to the other co-sharers, the status of the purchaser co-sharer in the part allotted to the other co-sharers is not affected; (*ii*) that the interest conferred by section 22(*2*) on a transferee co-sharer is not affected merely by his making a settlement with a tenant.

Jhapsi Sao v. *Musammat Bibi Aliman*(1), *Nandkishore Singh* v. *Mathura Sahu* (2), and *Basudeo Narain* v. *Radha Kishun* (3), referred to.

Appeal by the plaintiffs.

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

S. N. Palit and *G. P. Das*, for the appellants.

Ram Prasad, for the respondents.

Ross, J.—The plaintiffs who will be hereafter referred to as the Banaili Raj represent 13-annas 3-pies interest in mauza Parora; the defendants first party who will be hereafter referred to as the Srinagar Raj represent the remaining 2-annas 9-pies interest; the defendant second party is the receiver of the Srinagar estate; the defendant third party, Ramlal Durbey, is the son of Subaklal Durbey, who was the tenant of a holding of 153 bighas 5 cottahs and 17 dhurs in the village. He sold this holding to Dwarkanath Thakur and Bikan Thakur and in the record-of-rights, prepared somewhere about 1890, the name of Subaklal as vendor and Dwarkanath and another as vendees were both entered in respect of this holding. The plaintiffs brought a suit for rent in

(1) (1926) 7 Pat. L. T. 170. (2) (1922) 3 Pat. L. T. 13.
(3) (1922) 3 Pat. L. T. 22.

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1897 against these vendees and sold the holding in execution of the decree in 1898 and purchased it themselves. They settled the land with different tenants from time to time and, eventually, the defendant fourth party became the tenant in 1911. Subsequently there was a partition of mauza Parora between the Banaili Raj and the Srinagar Raj and, by partition, 71 bighas 15 cottahs and 7 dhurs of that holding was allotted to the Banaili Raj and 81 bighas 10 cottahs and 10 dhurs to the Srinagar Raj; but, in the partition papers, the record-of-rights was used with the result that the name of the recorded tenant was given as Subaklal Durbey. Even after the partition the Banaili Raj continued to pay to the Srinagar Raj the rent of that portion of the holding which had fallen to their takhta and received rent receipts. Notwithstanding this the Srinagar Raj, in 1917, instituted a suit for rent of the 81 bighas against the defendant third party and obtained a decree and took proceedings for sale of the holding. This suit was therefore brought by the Banaili Raj for a declaration that the defendant third party had no connection with the land; that the Srinagar Raj was only entitled to the proportionate rent of the 81 bighas; that the rent decree was null and void; and that the property could not be sold in execution thereof.

The suit was defended only by Ramlal Durbey, defendant third party; and his contention was that since the partition the Banaili Raj had no concern with this holding and that they had no right to maintain the suit.

The Munsif found that Subaklal Durbey had parted with his interest in the holding and that Dwarkanath Thakur and Bikan Thakur were in possession as purchasers. He further held that the Banaili Raj had obtained possession of the holding and had paid rent to the Srinagar Raj both before and after the partition; and that the Banaili Raj

had been realizing from the persons in actual possession and had been paying rent to the Srinagar Raj. He held, however, that inasmuch as the defendant fourth party must be deemed to be raiyat of the land under section 22(2) of the Bengal Tenancy Act, he became a raiyat under all the proprietors and, therefore, since the partition, the plaintiffs have no interest now in the land in suit. He therefore dismissed the suit. The learned District Judge agreed with this view and dismissed the appeal of the plaintiffs.

It is now contended in second appeal that the partition did not affect the rights of the Banaili Raj in this land except to this extent that the Srinagar Raj became entitled to the entire rent of 81 bighas instead of a proportionate rent in the entire 153 bighas; that the Banaili Raj is still in possession through the defendant fourth party; and that they have been recognized by the Srinagar Raj who have accepted rent from them subsequently to the partition. Reference was made to the decisions of this Court in *Jhapsi Sao* v. *Musammat Bibi Aliman* (1), *Nandikishore Singh* v. *Mathura Sahu* (2) and *Basudeo Narain* v. *Radha Kishun* (3). The learned advocate for the respondents sought to distinguish these last-mentioned cases on the ground that they deal with a case where an entire holding has fallen to a co-sharer other than the purchasing co-sharer, whereas in the present case the purchasing co-sharer has in fact obtained 71 bighas and odd cottahs out of the holding already and is therefore not entitled to claim any interest in the remainder which has fallen to the other takhta. This distinction does not seem to me to proceed on any principle. The fact that the proprietary right of part of a holding after partition has fallen to the co-sharer who purchased the entire holding will not affect the question of his status with regard to that portion of the holding which falls in

(1) (1926) 7 Pat. L. T. 170. (2) (1922) 3 Pat. L. T. 18.
(3) (1922) 3 Pat. L. T. 22.

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the takhta of another landlord. The first mentioned decision is sought to be distinguished on the ground that it was a case between co-sharers, whereas the present case is a case between a co-sharer and a person alleging himself to be a tenant. That, however, would be no ground for distinguishing the decision so far as it deals with the effect of a partition upon the interest of a purchasing co-sharer. It was further contended that the Banaili Raj ought to have set up this right in the partition proceedings; but, on the contrary, they allowed the name of the contesting defendant to be recorded in respect of this holding. In my opinion, nothing turns on this. It is stated in the plaint that the partition was made according to the survey papers and that statement has not been controverted. If, for the purposes of the partition, the name of a tenant who had long ceased to have any interest in the holding was recorded, that cannot affect the real rights of the parties.

The main contention, however, on behalf of the respondent is that inasmuch as when the purchasing co-sharer settles the land, the tenant becomes a raiyat under section 22(*2*), the position of the purchasing co-sharer then becomes that of landlord and consequently, on partition, this interest ceases when the holding falls to the takhta of another landlord; when the purchaser makes a settlement, he is not himself a tenant nor a tenure-holder and must therefore be a proprietor. The question is not free from difficulty; but it is important to observe the exact language of section 22(*2*). It is not enacted that if the transferee sublets the land to a third person, such person shall be a tenure-holder or a raiyat, as the case may be, in respect of the land, but that such person shall be deemed to be a tenure-holder or a raiyat; that is to say, the section itself recognizes the relationship as artificial and, by implication suggests that, by making such a settlement, the transferee is not a landlord, but that the peculiar status conferred upon him by the section [as held in *Bambahadur Lal* v.

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Musammat Gungora Kuar (1)] still continues notwithstanding the settlement. Nor is it apparent on principle why the interest of the transferee co-sharer should be affected merely by his making a settlement with a tenant. It has been held in many decisions in this Court that he is entitled to hold the land which he has acquired, after partition, and I do not see how it can make any difference to this right that he has settled it with a person who is deemed to be a raiyat. The position is certainly anomalous; but the anomaly is the creation of section 22(*2*).

In my opinion, therefore, this appeal must be decreed with costs and the decrees of the Courts below set aside and the suit of the plaintiffs decreed with costs throughout against the defendant third party.

DAS, J.—I agree.

PRIVY COUNCIL.*

1926.

July, 6.

NILADRI SAHU

v.

MAHANT CHATURBHUJ DAS.

Hindu Law—Religious Endowment—Mortgage of Math Property—Necessity—Discharge of onerous Debt—Debt not for Necessity—Receiver—Realization of Mahant's Interest in Endowment.

The mahant of a math mortgaged certain of the endowed properties at 1 per cent. per mensem in order to discharge loans at 2 per cent. per mensem which were an accumulating burden upon the endowment; he also covenanted personally to pay. The original loans had been incurred mainly for the purpose of constructing pakka buildings for the accommodation of wealthy devotees visiting the math, and in part for the ordinary expenses of the worship. In a suit to enforce the mortgage against the mahant personally and against the

*Present: VISCOUNT DUNEDIN, LORD ATKINSON and MR. AMEER ALI.

(1) (1926) 7 Pat. L. T. 87.

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mortgaged property, in which the mahant failed to give evidence or to produce the books of the math;

Held, that the mortgage was for necessity so as to be within the power of the mahant, even if the original loans had been incurred recklessly and not for the benefit of the math, which however was not shown to have been the case.

Their Lordships advised that a decree be ordered for payment by the mahant personally, and that, upon his failure to pay, a receiver should be appointed to realize in discharge of the mortgage debt the beneficial interest of the mahant in the endowed property, subject to an allowance for his maintenance.

Prosunno Kumari Debya v. *Golab Chand* (1), followed.

Judgment of the High Court reversed.

APPEAL (no. 154 of 1924) from a decree of the High Court (March 17, 1923) affirming a judgment of the Subordinate Judge of Cuttack.

The first respondent, the mahant of a math, executed on November 6, 1906, a mortgage to the appellant of certain properties of the math to secure a loan of Rs. 25,000 and interest at 1 per cent. per mensem; he also covenanted by the deed to pay personally the sum due.

The present suit was brought by the appellant to enforce the mortgage. The first defendant (the mahant), by his written statement, pleaded that the money was not borrowed for necessity or for the benefit of the thakurs, and that the suit was bad for want of necessary parties, as the thakurs had not been joined.

The Subordinate Judge held that the thakurs were necessary parties in order to enforce the mortgage against the property; he was also of opinion that the money was not borrowed for legal necessity. He accordingly made only a personal decree against the respondents.

The High Court (Jwala Prasad and Foster. JJ.) held that the thakurs were not necessary parties, but they agreed with the finding of the trial judge as to

(1) (1875) L. R. 2 I. A. 145.

the absence of legal necessity. The decree of the trial judge was therefore affirmed.

The facts of the case and the grounds of the decisions in India appear fully from the judgment of the Judicial Committee.

1926. May, 20. *De Gruyther K. C.* and *E. B. Raikes*, for the appellant.

Wallach, for the respondents.

[The arguments were mainly as to the facts, but reference was made, on behalf of the appellant, to *Prosunno Kumari Debya* v. *Golab Chand*(1); *Konwar Doorganath Roy* v. *Ram Chunder Sen*(2); *Murugeson Pillai* v. *Manickavasaka Pillai*(3).]

July 6. The judgment of their Lordships was delivered by—

LORD ATKINSON. This is an appeal from a decree of the High Court of Judicature at Patna, dated March 17, 1923, dismissing an appeal from a decree of the Subordinate Judge of Cuttack, dated February 28, 1922, who in a suit for sale on a mortgage had passed a money decree only against defendant no. 1, but had, in other respects, dismissed the plaintiff's claim.

The defendant, the mortgagor, is the mahant of the math of a thakur or deity of the Vaishnavites called Sri Jagannath Mahaprobhu at Puri. It includes a temple with idols in it. The defendant, with, as it is alleged, the view of increasing the income of the math, built as an addition to it a lodging house, where rajas and other rich devotees visiting the math might obtain during their visit comfortable lodgings, and built in addition a large hall where food might be supplied to those devotees who might visit the math and worship at it.

The revenue of the math, though sufficient to meet the ordinary expenses of the worship in it, was

(1) (1875) L. R. 2 I. A. 145.
(2) (1876) I. L. R. 2 Cal. 341; L. R. 4 I. A. 52.
(3) (1917) I. L. R. 40 Madr. 402; L. R. 44 I. A. 98.

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insufficient to meet in addition the cost of the construction, maintenance, and management of these new buildings. The defendant was accordingly, from the year 1891 downwards, obliged to borrow from time to time from money-lenders on notes of hand, setting forth the purpose of the loans, various sums of money, bearing interest at Rs. 2 per mensem or more. The actual sum expended on the construction of these pakka buildings, as they were styled, only amounted to Rs. 9,337, so that the outlay could not be considered to have been of an extravagant character. Owing, however, to the very high rate of interest charged by the lenders, the defendant's indebtedness to these latter amounted by November, 1906, to the large sum of Rs. 25,000. To meet this indebtedness, the defendant, the mahant, on November 6, 1906, borrowed from the plaintiff the sum of Rs. 25,000, bearing interest at a rate only equal to one-half the rate he had been paying on the loans obtained from money-lenders—namely, 1 per cent. per mensem, and in order to secure the repayment of this loan and the interest accruing upon it, he gave to the plaintiff a mortgage of certain properties which were at the time, and still admittedly are, debattor properties belonging to the math.

As the defendant, on some very unconvincing excuse of illness, obstinately refused to appear as a witness at the trial of this case before the Subordinate Judge at Cuttack, or to examine any witness on his own behalf, or to produce his books, though he had been summoned to produce them, it becomes necessary to extract from the mortgage deed a long passage detailing what was the defendant's real action and what were his objects in undertaking to build a pakka building of the manner described. As he executed the mortgage deed, he must be bound by this narrative, despite his embarrassing refusal to give evidence, to examine any witness in his behalf, or to produce his books, which of all things were of the most importance, as they must have shown how much of

the borrowed moneys was spent in building the pakka houses and how much on the ordinary service of the math.

The extract referred to runs as follows:

"That ere this I had borrowed money from several mahajans for the amrit-manodhri expenses of Shri Jagannath Mahapravu, for the seba and puja of the thakur in Barsanth Math in my marfatdari situate in Markandeswar Sahi, town Puri, and to meet other necessary and legitimate expenses in connection therewith. Being unable to pay the principal and interest and being in urgent need of money to preserve math properties, to increase the profits accruing therefrom and to improve the condition of the said math, I borrowed Rs. 20,000 by a registered bond, dated July 18, 1902, from Bhikari Misra and others, of Markandeswar Sahi, Puri, in order to pay off the aforesaid legitimate debts and to build the pucka one-storied and two-storied buildings and lodging houses, etc., of the math. With that amount I paid off the debts heretofore contracted for the legitimate expenses of the math and the balance I spent for the pakka buildings and kutcha bouses of the math and for the amrit-manodhri expenses of Shri Jagannath Mahapravu and the thakurs of the math. Being unable to pay regulary the interest of Rs. 300 a month due on the said sum of Rs. 20,000 and to pay off the principal and interest, though repeatedly called upon by the creditors, I requested you to lend money. As you agreed to lend me Rs. 25,000 at a low rate of interest, *i.e.*, at Re. 1 per cent. per month for the thakurs, I have thought of paying off the principal and interest due on the said registered unsecured bond, dated July 18, 1902. As the said amount was borrowed for the thakurs and for the preservation and improvements of the properties of the thakurs, I hereby mortgage to you the properties of the thakurs as security for payment of the amount which I borrow from you to pay off the said principal and interest the thakurs, the math and I personally remain liable. On the aforesaid terms I take loan of Rs. 25,000 in cash from you and as to security for payment of the principal and interest I mortgage to you the entire mauza Duaypur (sic) amrit-manodhri lakhraj."

It contains also a personal covenant by the defendant, in the following words, to pay the mortgage debt and the interest thereon, which runs thus:

"I hereby execute this mortgage bond of my own free will and accord without being influenced by others, and agree that I shall per month pay the principal of Rs. 25,000 and interest thereon at 1 per cent. within one year from this date, and redeem the mortgaged property and take back this bond."

The properties comprised in the mortgage are enumerated and described in great detail in the schedule annexed to this instrument. They include amongst other kinds of property the two entire mauzas of Durgapur, 288·36 acres in extent, and include also

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some land rent fee and some let to tenants and also the entire mauza Barudi, 644·17 acres in extent. They include a great number of homesteads, of houses, gardens, miscellaneous crops and some waste land, etc., etc.

The plaintiff on December 23, 1920, instituted in the Court of the Subordinate Judge of Cuttack the suit out of which this appeal has arisen, claiming to recover from the defendant the sum of Rs. 43,114-10-8 due to him for principal and interest under the mortgage deed and praying that a decree might be passed directing the defendant to pay the said sum to the plaintiff within the time prescribed by the Court. It will be observed that this is entirely a personal claim against the defendant, and the remedy prayed for is a personal remedy against him worthless most probably to the plaintiff. The plaintiff then prays for alternative relief in the following paragraphs:

"(Kha) That if the defendant 1 does not pay the decretal amount, etc., within the prescribed time or deposit the same in the Court, his right to redeem the mortgaged properties be forfeited and the decree be made final and the mortgaged property be put up to sale and out of the sale consideration the plaintiff may be paid the decretal amount, etc.

(Ga) That if the sale consideration of the mortgaged property be found insufficient for the satisfaction of the decretal amount, etc., due to the plaintiff, the Court may be pleased to pass a decree awarding the balance to the plaintiff from defendant 1 and the other movable and immovable properties of Barasanth Math.

(Gha) That the Court may be pleased to pass a decree awarding the plaintiff such other relief as he may be deemd entitled to in the justice of the Court."

To this plaint the defendant, the mahant, filed a long written statement signed by his agent. It begins with the assertion that the plaintiff's claim is wholly false and fraudulent. It contains many statements directly contradicted by the contents of the mortgage and other written documents to which the defendant has put his hand and by which he obtained the loan of the money sued for. It is, on the whole, a mean and mendacious production, and it is not to

be wondered at that no witness was put forward, or possibly could be found, to give evidence in its support.

On these pleadings several issues were raised. Of these the following five, with the answers to them, are alone relevant:

1. Is the suit bad for defect of party? Finding, First Court: Yes. Appellate Court: No.

2. Was the bond in suit executed for legal necessity and benefit of the thakur (god)? Finding of both Courts: Not for legal necessity.

3. Were the alleged debts preceding the bond in suit for legal necessity and benefit of the idol? Finding of both Courts: Not for legal necessity.

4. Is the plaintiff entitled to a mortgage decree? Finding of both Courts: No.

5. To what relief is the plaintiff entitled? Finding of both Courts: Only a personal decree against the defendant."

The main defences relied upon by the defendant, as the mahant, were that:

" 15. There was no legitimate and legal necessity for borrowing the amount of the bond in suit. The said bond is wholly inoperative and invalid according to law against the amit-manodhri debottar property and the thakur.

" 23. The acts of the defendant 1 were not the acts of a prudent manager of the debottar property, and by his acts the debottar properties have been ruined and wasted and the debts have swelled. No improvement has been made of the math or of the amrit-manodhri property."

Had he been examined and properly cross-examined he must have either disproved these allegations in whole or in part; or if he came into the witness box he must have admitted that these pakka buildings were wholly useless and of no benefit to the math, though for nine or ten years he had continued to construct them, or that they were part of the math and were functioning wholly to the benefit of the math in the way he had designed and intended; and if he admitted this latter, he would then, if properly cross-examined, have been required to explain upon what principle of justice or equity, when they functioned in the way above mentioned,

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he refused to pay. His excuse for not coming forward as a witness in obedience to a summons served upon him was that he was ill, of what disease he did not say. No medical evidence was given to support that excuse. But his books were not ill. They must have shown how the money borrowed by him had been applied, how much of these loans had been expended for building the pakka houses, and how much, if any, for the services of the idol and the general expenses of the temple. It certainly looks as if the design of the defendant was not to have this case decided on a full examination of all the relevant actual facts involved in it, but to keep from the knowledge of the judicial tribunals all the relevant and decisive information touching the enterprise from which the action springs. In the result, as might have been expected, not a particle of evidence was produced to prove any one of the allegations of fact contained in these defences.

It would appear to their Lordships that this case proceeded as if, in some degree, all the loans discharged by the Rs. 25,000 lent on the mortgage had been spent in constructing the pakka houses. This is an entire mistake. Fortunately, in the interest of justice, the plaintiff has been able to secure several documents, thirteen in number, dealing with several of these loans. [The judgment referred in detail to these bonds and notes of hand, given between 1891 and 1902, pointing out that these documents stated that the loans were for the amrit-manodhri expenses of the math, as well as for the construction of the pakka buildings.] These details are in agreement with the statements of the defendant, contained in the mortgage deed of November 6, 1906.

As to the various sums secured by bond for which he admits he was indebted, the plaintiff was examined on his own behalf and cross-examined at considerable length. Three additional witnesses were also examined on his behalf. The plaintiff proved that

the defendant borrowed the sum of Rs. 29,000 from him, Rs. 25,000 of which was secured by the mortgage bond and Rs. 4,000 by a single bond. This sum of Rs. 29,000 was, he said, paid over to Bhikary Misra, a former creditor of the defendant; that he, the plaintiff, made inquiries about these loans, which his money satisfied, and learned that the money borrowed was used to pay for the pakka buildings and for the expenses of amrit-manodhri or Jagannuth Jeo's service, and that the pakka buildings were situated ten bakhray towards the southern side of the math. The baishnavs are fed there, he said, on the festal occasions of Jagannath and Markanda; that one of the stone houses was built near the temple of the thakur; another house, the katchcha house, was built inside the math, where the baishnavs and pilgrims stayed. The pakka two-storied house, he said, was built for the raja disciples of the math. He says he inspected the jama kharach books from 1891 or 1892 to 1902 or 1903. They contained, he said, the income and expenditure of the math from all sources, including borrowings. He said the borrowings were entered, and the previous tahabil was almost nil, and he saw the expenses of the several necessities day by day. Afterwards ten bakhras houses, he said, were built in 1892 or 1893, the two-storied house in 1895 or 1896, the katchcha house in 1898 or 1899. He says that before these years baishnavs came and lived and were fed in houses that got broken in the meanwhile. He states positively that the defendant, the sebait, said that maharajas and rajas gave properties to himself and to the math. The evidence of the other witnesses corroborates this, and is consistent with that of the plaintiff. Nothing of importance was elicited from these witnesses on cross-examination.

It appears to their Lordships that the fair inference to be drawn from this uncontradicted evidence, coupled with the mortgage and the bonds already referred to, is that the building project which

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the defendant promoted has been successfully effected by the use of a portion of the moneys borrowed by the defendant; that it has been completed in great part if not entirely; that it is functioning as contemplated by its author; that the math is to a great extent benefited by it, in that worshippers are more numerous and of a richer class than theretofore—visited the math for devotional purposes, attracted presumably by the increased and more civilized accommodation the new buildings afford. Their Lordships think that this evidence completely refutes the statements of fact upon which the main defence put forward by the defendant rests.

A partition suit was instituted between the plaintiff and his brothers, and the brothers were consequently made formal defendants in this suit, the real defendant who contracted the loan being styled defendant no. 1; but the Subordinate Judge, quite properly, put the claim for partition aside, and the sebait was therefore referred to as the defendant no. 1. This learned judge, in delivering judgment, said:

"When it is clear that the properties (*i.e.*, the properties mortgaged) do not belong to the defendant no. 1, but to the thakurs, and when the bond in suit was not executed by the defendant no. 1 in his capacity as marfatdar of the thakurs, and if when the decree is to be passed against these properties it is only necessary that thakurs should have been parties to the suit and should have an opportunity of refuting the allegations of circumstances made by the defendant no. 1 personally, which made the bond to all intents and purposes obligatory upon them. Thus the thakurs are necessary parties to this case."

He said he thought the objection fatal to the suit, and decided that it should stand dismissed.

The Subordinate Judge then proceeded to say that after this finding he was not called upon to decide upon the other issues raised in the case, and then proceeded to express himself thus:

"But as I have recorded evidence I think it would not be amiss if I make findings on them. The necessities alleged are building expenses of the math, amrit-manodhri expenses and feeding of sadhus. Pakka buildings were made where there were katcha sheds and a two-storied building added to the math for maharaja and raja disciples.

There is no evidence that katcha sheds would not have done for old dilapidated sheds of that nature. There is no evidence also that maharaja and raja disciples of the math refused contributions to the math without a two-storied building. In fact, in my opinion these were not necessities at all but were raised to show to people that the math is a rich and big math. In these circumstances these buildings cannot be regarded as necessities of the math. Then as regards amrit-manodhri expenses, the defendant no. 1 fell short of his fund for amrit-manodhri purposes, as all the money of the math cannot be absorbed in the pakka buildings erected, which was done to satisfy either his own vanity or for speculative purposes. The shortage of amrit-manodhri expenses therefore cannot come under the head of legal necessity at all. Besides there is no evidence to fix the amount of the amrit-manodhri expenses borrowed. As for expenses for feeding sadhus for the same reason cannot come in category of legal necessity. There is also no evidence to fix the exact amount of it."

It did not occur to the learned judge that but for the convenient illness of defendant all the information he desired could have been supplied to him by the opportune invalid.

The High Court point out that the Subordinate Judge had decided in favour of the plaintiff that the suit was not barred by limitation, and that this finding was not challenged before them, but that he did decide issues 1, 2, 3, 4 against the plaintiff on the ground that the thakurs were necessary parties, and not having been impleaded, the suit was defective; that there was no legal necessity for the loan to the thakurs so as to entitle the defendant no. 1 to mortgage the properties in question; and that the loan did not in any way benefit the thakurs. The learned judges in the High Court held that it was obvious that defendant no. 1 was sued in his representative capacity, and that therefore the deity was not a necessary party, and that the Subordinate Juugde's decision on that point was erroneous.

These learned judges, after referring to the several debts mentioned in the mortgage bond, which the borrowed money, Rs. 25,000, was applied to liquidate, set forth the grounds of their decision in the following passages of their judgment. Referring to the plaintiff's evidence, they say:

"The most important of these necessities is said to be the construction of pakka buildings..... It may have been desirable

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or even commendable on the part of the mahant to construct such luxurious buildings for the comfort and convenience of the raja-disciples if this could be done out of the savings of the income of the math properties. But the construction of such buildings cannot be considered to be such pressing necessities as to justify the construction of them by raising loans. The actual loans taken from 1891 up to 1906 to meet the necessary amrit-manodhri expenses and the construction of the pakka buildings amounted to about Rs. 9,337 and the interest even after payment from time to time swelled the amount of the loan to Rs. 25,000, for which the bond in suit was executed. In the previous loans the exorbitant rate of interest such as Rs. 3-2, Rs. 2,- was stipulated for. Where was the necessity for borrowing at such high rate of interest? The considerations for the loan look very much like speculations, and howsoever advantageous it may be the mahant was not entitled to launch into such speculations by borrowing money at high rates of interest. Therefore the construction of buildings in question was not a pressing necessity for which the sebait, defendant no. 1, could mortgage the properties of the thakur at high rates of interest. The daily expenses of the math as well as the amrit-manodhri may have been necessary, but in order to show whether there was necessity to meet these expenses by borrowing, it was incumbent upon the plaintiffs to show that the income of the math was not sufficient to meet these necessary expenses. The plaintiffs no doubt summoned the defendant to produce accounts of the income and expenditure of the math, but they ultimately failed in this attempt..... The failure of the defendant no. 1 to produce the account books does not very much affect the issues in hand inasmuch as it is not denied, and in fact it has been proved that the money was taken for the purpose of constructing the pakka structures for the raja disciple and for the sadhus. The question is not solved by the establishment of that fact alone. It has further to be proved that they were the dire necessities of the time and could not be postponed and that the loan must necessarily have been taken to meet them. I therefore agree with the learned Subordinate Judge that there was no legal necessity for incurring the loans in question. I also agree with the learned Subordinate Judge when he says that the buildings were constructed only to satisfy either the vanity of the defendant or for speculative purposes."

Their Lordships cannot, in the evidence, find a single particle to support this latter allegation. It has been already demonstrated that the money borrowed by the defendant was not used solely for the purpose of building pakka houses. Had the defendant given evidence as a witness or produced his books, it would probably have been possible to have ascertained what was the amount of the portions of the loan devoted to building purposes and what to the requisite services of the math, and that the plaintiff might reasonably be paid in respect of these latter, but that is not the nature of the defence of the defendant. He first shuts up all avenues through which

information could be obtained, and then, because the plaintiff does not make the decision the defendant has made it impossible for him to make, the plaintiff is to be paid nothing. There is another matter. The pakka buildings are situated in part in the math; they are used by the math authorities as their own; they are functioning, as they were intended to. The defendants and the worshippers use, occupy and enjoy them, but will not pay for them.

The learned judges of the High Court appear to their Lordships to be rather of opinion that the procurement of a loan of money on easy terms for the purpose of paying off antecedent loans obtained on very oppressive terms can never, in a case of this character, be held to be a necessary proceeding unless the obtaining of the oppressive loan was, at the time it was obtained, a matter of necessity also.

If these learned judges held that view, their Lordships cannot agree with them. The case of *Prosunno Kumari Debya* v. *Golab Chand*(1) was decided by a Committee of the Privy Council, composed of Sir James Colvile, Sir Barnes Peacock, Sir Montagu Smith and Sir Robert Collier. The respondent obtained two decrees against the former sebait of an idol upon the latter's bonds for the repayment of moneys alleged and found to have been borrowed for the service of the idol and the expense of the temple. Both decrees directed that the debt should be paid by the sebait personally, or else realized from the profits of the debottar lands.

The appellants were the two succeeding sebaits of the idol. They instituted a suit to set aside these decrees and to have the debottar property released from the attachment issued in execution of the decrees. It was held that the decrees, being untainted by fraud or collusion, as they were held to be, and having been passed after the necessary and proper issues had been raised and determined, were entitled to the force due to judgments of competent

(1) L. R. 2 I. A. 145.

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Courts, and were binding on the succeeding sebaits, who were continuing representatives of the idol's property. Sir Montagu Smith, in delivering the judgment, first pointed out that the case did not come before the Council by way of appeal from the decrees sought to be impeached, but upon a fresh suit to set them aside. He then stated the facts of the case. The appellant, the former sebait, was, he said, a man of profligate habits, and having spent the income of the debottar property on his own pleasure, borrowed Rs. 4,000 from the respondent to repay the expenses of the idol and of repairing the temple. As security for this advance, he gave a bond to the respondent, and also a vahinama, by which he pledged the debottar property for the payment of the money. In both securities it was stated that the money was needed for the services of the idol and the expenses of the temple. The judge of the Zillah Court of Dacca gave a decree for the respondent, having found that the money had been borrowed and expended for these purposes, but that the specific pledge of the property could not be enforced, that a decree founded on the bond for the money lent might be given, to be realized out of the debottar lands, and he framed the decree. Their Lordships held that they were only sitting to determine the operation and effect of the two decrees as they stood, not whether they were right or wrong on questions of law or fact, and approved a decree in the form suggested. The judgment of the Board laid down this proposition(1):

"Notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is, in their Lordships' opinion, competent for the sebait of property dedicated to the worship of an idol, in the capacity as sebait and manager of the estate, to incur debts and borrow money for the purposes of expenses in keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like

(1) L. R. 2 I. A. 145, 151.

objects. The power, however, to incur debts must be measured by an existing necessity for incurring them."

The importance of this case in its application to the present consists in this, that it was the immediate not the remote cause, the causa causans, of the borrowing which has to be considered. The immediate cause of the borrowing was the math's need of money to carry on and pay for its services. The remote cause of the math's need was due to the profligate expenditure of the sebait. It would have been no answer to the creditor's suit to say: "Your money was only borrowed because the income of the math was spent, by a profligate sebait and there was no money available to carry on the services of the math."

So in the present case. Even if the building scheme of the defendant had been reckless, inconsistent, unsound and liable to fail, which has not been proved, what drove him to borrow this money Rs. 25,000 on mortgage, to pay old debts, and so be relieved of the oppressive burden which the exorbitant rate of interest at which these earlier loans were made imposed upon him? It was the high rate of interest, which he was already bound to pay, that was the necessary and immediate cause of his giving this mortgage, though the remote cause of it was the getting into debt by the building operation. In their Lordships' view the principle of the case above mentioned applies to this case.

They therefore think the appeal succeeds, that the judgment appealed from was erroneous and should be set aside, and that a decree should be pronounced in the form adopted in this latter case, declaring that the debt should be paid by the sebait personally or else realized from the profits of the debottar property.

The case should be remitted to the High Court with the following direction: That the High Court

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should make a personal decree against the defendant for the payment of the debt within a specified time, and on his failure to pay, to direct an inquiry to be held by the Court of the Subordinate Judge as to the sums legitimately attributable to the endowment under the Hindu law, and a receiver should be appointed to realize the rents and profits of the debottar estate, and the mahant's share, after payment of a maintenance allowance to be fixed by the Court, should be allocated for the payment of the plaintiff's debt(1).

Their Lordships will humbly advise His Majesty accordingly. The first respondent will pay the costs of the appeal.

Solicitors for appellant: *Watkins & Hunter.*

Solicitors for respondents: *W. W. Box & Co.*

APPELLATE CIVIL.

Before Adami and Macpherson, JJ.

MUSSAMMAT SHEORATNI

v.

MUNSHI LAL.*

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July, 8.

Pre-emption—sale of house in a city—owner of adjoining vacant plot, whether entitled to pre-empt—" hait " and " akar ", meaning of.

Defendant no. 1 having sold to appellant a house situate in Patna City, plaintiff, who was the owner of a plot of home-

(1) Although it was held that the mortgage was for necessity, and accordingly binding upon the property, the decree directed appears to be based solely on the mahant's personal liability; the receiver being appointed to realize his beneficial interest in the entire endowed property.—A.M.T.

*Appeal from Appellate Decree no. 31 of 1924, from a decision of B. Lala Damodar Prasad, Subordinate Judge of Patna, dated the 5th October 1923, confirming a decision of Maulavi Muhammad Khalil, officiating Munsif of Patna, dated the 9th September 1923.

stead land adjoining the house, claimed the right of pre-emption on the ground of vicinage :

Held, that the plaintiff was entitled to pre-empt.

Mahomed Hossein v. *Shaw Mohsin Ali* (1), *Ejnash Kooer* v. *Sheikh Amzudally* (2), and *Abdul Azim* v. *Khondkar Hamid Ali*(3) referred to.

Appeal by defendant no. 2.

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

N. C. Sinha and *N. C. Ghose*, for the appellant.

A. B. Mukharji and *B. B. Mukharji*, for the respondent.

MACPHERSON, J.—The plaintiff sued for pre-emption of a house in mohalla Gudri in Patna City which the appellant had purchased from the owner, defendant no. 1. The suit was decreed and the appeal of the vendee having been dismissed, she has preferred this second appeal.

The plaintiff claimed the right of pre-emption on the ground of vicinage as owner of a plot of homestead land adjoining the house brought by appellant. All the points raised in the Courts below have been determined in his favour and in second appeal Mr. Naresh Chandra Sinha on behalf of the appellant raises only one point. It is that the right of pre-emption on the ground of vicinage does not extend to the case of a person like the plaintiff whose property contiguous to the subject of pre-emption is only a plot of land on which no house stands, and which is not alleged to be a garden or walled enclosure.

The findings of fact are that the plot of the plaintiff is homestead land, that there are on it the remains of a house though these remains cannot at present be described as a house, and that the plaintiff intends to

(1) (1871) 6 Ben. L. R. 41, F. B. (2) (1865) 2 W. R. 261.
(3) (1869) 2 Ben. L. R. (A. C.) 63.

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build upon it. His present dwelling-house is sixteen houses distant. It was conceded in the trial Court on behalf of the defendant-appellant that the owner of the house in suit would have a right of pre-emption in respect of plaintiff's plot.

The learned Advocate for the appellant contends that only the owner of a house or a garden contiguous to the subject of pre-emption has a right of pre-emption on the ground of vicinage. In support of this contention he refers first to the fact that the object of the right is the exclusion of one who might be a disagreeable neighbour. But obviously it may be as desirable to ward off a disagreeable individual from proximity to the plaintiff's building site as from proximity to his garden and for the same reasons. He then cites paragraph 539 of Tyabji's ' Principles of Muhammadan Law ' first as showing that ' akar ' of land alone can validly be the subject of pre-emption, and then for the statement

" (*1*) that 'ákár ' according to the Fatawa Alamgiri strictly means space covered with buildings " and (*2*) that " the Prophet has said that there is no shoofa except in a ruba or mansion, and a háit or garden."

Now all these statements are based on Baillie's Digest and the portions relied upon give, to say the least, an inadequate idea of the original. At page 472 we have

" The thing sold must be ' ákár ', *or what comes within the meaning of it*, whether the ' ákár ' be divisible or indivisible, as a bath or well, or a small house."

To this statement in the text there is a foot-note *2*.

" 2. The strict meaning of the word is ' a space covered with buildings ', so that properly speaking the term is not applicable to a zuyut (Fut. Al., vol. iii, p. 605). But according to the Kifayah (vol. iv, p. 940) and the Inayah (vol. iv, p. 263), *ákár, in the sense in which it is liable to pre-emption*, includes a zuyut. According to Freytag, zuyut is a field, whether arable or pasture."

Again at page 473 we have the following in the text :—

" ' Our ' masters have said that movables are not directly or by themselves proper objects for the right of pre-emption, but that they

are so as accessories to âkár; and that âkár, such as mansions, vineyards, and other kinds of land (literally ' and the rest from among lands ') are directly the objects of the right. There is no pre-emption in movables, because the Prophet has said, there is no shoofa except in a ruba or mansion, and a háit or garden.'

There is a footnote to this statement:—

" 1. Hidayah, and Kifayah., vol. iv, p. 940. Háit means properly a wall, or that which surrounds, though applied elliptically to the enclosure (Freytag). Comparing this with note 3, p. 471, and note 2, p. 472, it would seem that the right of shoofa is, strictly speaking, applicable only to houses and *small enclosures of land*....It has been held, however, to extend to a whole mauza or village—S. D. A. Calcutta Reports, vol. iii, p. 85."

As to shoofa, Baillie says

" In law it is a right to take possession of a purchased parcel of land " (bukut— a " piece or fragment of land " Note 3, p. 471).

Clearly, therefore, the argument finds no support from the quotations when they are read in their context. It is obvious that âkàr in the sense in which it is liable to pre-emption has an extended meaning. It is not confined to land covered with buildings. It may be a well or a bath, no less than a house. It need not be a ' garden ' in our sense of that term but may be a vineyard and if not all, at least certain other lands, besides the site of a house, well or bath and a vineyard, at least if the land is a small enclosure. It is difficult to see what ' other lands ' could be more suitable subjects of shoofa than such as the plot now in controversy, which is less than one katha in area or rather more than the site of the house in suit which extends to half a katha.

It may be observed that the author of the text-book referred to sets out that the ' jar ' or neighbour who may be a pre-emptor " is the owner of property adjoining the subject of pre-emption ", and he appears to consider that the property may be ' neighbouring land ' of any kind. No doubt the view expressed in Wilson's Digest of Anglo-Muhammadan Law is that pre-emption can only be claimed on the ground of mere vicinage as between contiguous houses and gardens. But the only reference given [*Mahomed*

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Hossein v. *Shaw Mohsin Ali*(1)], does not support the proposition as it is stated. As will presently be indicated, the view which obtained in that case was that a neighbour's rights extend only to houses, gardens and *small plots of land*. Mr. Ameer Ali in his "Muhammadan Law" appears to approve that view. In my judgment the word háit in the saying of the Prophet is not adequately represented by the English word 'garden', probably not even literally and certainly not in the sense in which háit is liable to pre-emption. In the latter contingency it includes if not zuyut in the sense of any field arable or pastoral, certainly a small enclosure in the shape of a plot of homestead land, whch has been and is to be utilised as a site for a house, especially when it is situated in a thickly populated area of a large town.

Support is obtained for this view in the observations made in the judgment in *Mahomed Hossein* v. *Shaw Mohsin Ali*(1) and in cases there cited. The decision was indeed that a neighbour cannot claim the right of pre-emption, on the ground of vicinage, in respect of a mauza or a large estate; but in delivering the judgment of the Full Bench, Couch, C.J., remarked that "the better opinion might be that âkár should be constructed to mean houses and small enclosures of land. But we rely rather on the uniform series of decisions, which very clearly recognize that the right of pre-emption, on the ground of vicinage, does not extend to estates of large magnitude, but only to houses, gardens, and *small parcels of land*".

The same question had in 1856 been stated by the Judges of the Agra Sadr Court as "whether entire mahals or estates were intended, or merely *parcels of lands, gardens, and the like*", the latter view being supported by the saying of the Prophet already quoted. In *Ejnash Kooer* v. *Sheikh Amzudally*(2) the principle is considered to be that, "when *either houses or small holdings of land* make

(1) (1871) 6 Ben. L. R. 41, F. B. (2) (1865) 2 W. R. 261.

parties, in fact, such near neighbours as to give a claim on the ground for convenience and mutual service, the claim in right of pre-emption will lie ".

In *Abdul Azim* v. *Khondkar Hamid Ali*(1) it was remarked that " the law was intended to prevent vexation to holders of *small plots of land* who might be annoyed by the introduction of a stranger among them ".

It would seem clear, therefore, that the Courts even when referring to the saying of the Prophet never contemplated that the word ' háit ' there used was restricted to a garden as ordinarily understood; and any small enclosure of land is included at least if it is of the nature of homestead land or what we may call compound land where the convenience of the owner would be impaired by a distasteful neighbour.

On behalf of the respondent it is further pointed out that the doctrine of pre-emption is based upon reciprocity and the appellant having admitted that the owner of the house in dispute would have been entitled to claim pre-emption of the plaintiff's homestead plot, it follows that the plaintiff is entitled to claim pre-emption of the appellant's house and site. The contention has force; but I prefer to rest the decision in this case upon the view that the plot of plaintiff is âkar and that ' háit ' does not merely mean ' garden ' but includes also other lands among which the plaintiff's plot is certainly included.

Upon this view this appeal is without merits and I would dismiss it with costs.

ADAMI, J.—I agree.

Appeal dismissed.

(1) (1864) 2 Ben. L. R. (A. C.) 63.

APPELLATE CIVIL.

Before Adami and Kulwant Sahay, J.J.

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July, 8.

PERMANAND KUMAR

v.

BHON LOHAR.*

Remand—inherent powers—remand of whole case by appellate court, whether appealable—Code of Civil Procedure, 1908, (*Act V of* 1908), *section* 2(2).

Held, that where an order of remand made in exercise of a court's inherent powers merely sets aside the decree of the trial court and does not itself decide any of the points raised for determination and does not determine the rights of the parties with regard to the matters in controversy in the suit, it is not a decree within the meaning of section 2(2) of the Code of Civil Procedure, 1908, and, therefore, no appeal lies from such an order.

Ram Chandra Rao v. *Narain Lal* (1), and *Bhairab Chandra Dutt* v. *Kali Kumar Dutt*(2), disapproved.

Raghunath Das v. *Jhari Singh*(3) and *Achuta Singh* v. *Hit Narain Singh* (4), referred to.

Appeals by the plaintiffs.—

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

L. K. Jha, for the appellants.

T. N. Sahai and *A. N. Lal*, for the respondents.

KULWANT SAHAY, J.—These are appeals by the plaintiffs filed against the decision of the Subordinate Judge of Muzaffarpur whereby he remanded the suits to the trial court for fresh trial laying down certain issues for consideration.

*Second Appeal nos. 1302 to 1309 of 1925, from a decision of Babu Suresh Chandra Sur, Subordinate Judge of Muzaffarpur, dated the 13th August, 1925, reversing a decision of Babu Satyaranjan Prasad Sinha, Munsif of Sitamarhi, dated the 10th April, 1925.

(1) (1920) 58 Ind. Cas. 909.
(2) (1923) 37 Cal. L. J. 491.
(3) (1918) 3 Pat. L. J. 99.
(4) S. A. No. 1382 of 1922.

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A preliminary objection is taken on behalf of the respondents that no Second Appeal lies in these cases. The objection is based on the ground that the remand was made not under the provisions of Order XLI, rule 23, of the Civil Procedure Code against which an appeal would lie under Order XLIII, rule 1, clause (*u*), but that the remand was under the inheret power of the Court and, that, therefore, no appeal would lie to this Court as an appeal from an order; and that the order making the remand was not a decree within the meaning of the Code of Civil Procedure and, therefore, the present appeals as appeals against the appellate decrees of the Subordinate Judge were not maintainable.

On behalf of the appellants it is contended that the orders of the learned Subordinate Judge were decrees and, therefore, second appeal would lie to this Court as an appeal against a decree.

The question for determination, therefore, is whether there was any decree made by the Court of Appeal below against which an appeal would lie to this Court.

The learned advocate for the appellants relies on four decisions; three of which are decisions of this Court and one is a decision of the Calcutta High Court. The decisions of this Court relied upon are *Ram Chandra Raon* v. *Narain Lal*(1), *Achuta Singh* v. *Hit Narain Singh*(2) and *Raghunath Das.* v. *Jhari Singh*(3). The decision of the Calcutta High Court relied upon is in *Bhairab Chandra Dutt* v. *Kali Kumar Dutt*(4). It is necessary to consider these decisions in detail.

The case of *Ram Chandra Rao* v. *Narain Lal*(1) was decided by Jwala Prasad, J., sitting alone. It appears that this appeal was originally filed as an

(1) (1920) 58 Ind. Cas. 909.
(2) S. A. No. 1382 of 1922.
(3) (1918) 3 Pat. L. J. 99.
(4) (1923) 37 Cal. L. J. 491.

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appeal from an order and it was directed against an order of remand which did not come under Order XLI, rule 23. The Registrar was of opinion that the appeal was incompetent and he referred the case to the Bench for orders. The matter came up before the Hon'ble the Chief Justice and Adami, J., and their Lordships made the following order on the 13th June, 1919: "The learned Vakil for the appellant consenting, let this appeal be admitted as an appeal from the decree of the lower Appellate Court reversing the decree of the Munsif. Send for the record and issue the usual notices. This order is subject to a further report from the Stamp Reporter as to the sufficiency of the stamp on a memorandum of appeal on the above basis. The memorandum must be amended accordingly". The appeal was accordingly admitted as an appeal against the decree and it ultimately came on for hearing before Jwala Prasad, J., sitting alone, when an objection was taken on behalf of the respondents that the appeal did not lie. Jwala Prasad, J., overruled this objection. His Lordship observed that the remand in that case was not under Order XLI, rule 23, and, therefore, no appeal lay under Order XLIII, rule 1, clause (*u*), but an appeal lay against the decree made by the lower appellate court setting aside the decree of the trial court. His Lordship relied upon a decision of this Court in *Brijmohan Pathak* v. *Deobhajan Pathak*(1), and upon the order of the learned Chief Justice and Adami, J., dated the 13th June, 1919, referred to above. His Lordship also referred to the decision in *Bhadai Sahu* v. *Sheikh Manowar Ali*(2). No reasons are given by his Lordship for holding that the order setting aside the decree of the trial court was itself a decree. In *Brijmohan Pathak* v. *Deobhajan Pathak*(1), relied upon by the learned Judge, it was merely held that a remand which was not made under rule 23 of Order XLI of the Civil Procedure Code was not appealable. There was no

(1) (1920) 1 Pat. L. T. 509. (2) (1919) 4 Pat. L. J. 645.

decision in this case that the order could be appealed against as a decree. In the order of the learned Chief Justice and Adami, J., dated the 13th June, 1919, directing the appeal to be admitted as an appeal against the decree of the lower appellate court no reasons are given as to how the order appealed against could be treated as a decree. In *Bhadai Sahu* v. *Sheikh Manawar Ali*(1), the question as to whether an appeal could be filed against an order of remand treating it as a decree was not raised or discussed. The question raised there was whether the order appealed against came under rule 23 or rule 25 of Order XLI. Their Lordships observed that there was no reason why there could not be at one and the same time an order both under rule 23 and under rule 25 of Order XLI. In such a case the orders although made upon one piece of paper would in effect be quite separate, and the party affected would be competent to pursue the remedy by an appeal provided by the Code in respect of each; that, with regard to the order under rule 23 he could appeal against the decree or against the remand order itself under Order XLIII, clause (*u*); and, that, the order under rule 25 could be attacked in a second appeal against the final decree in the suit. Now, when their Lordships observed that with regard to the order under rule 23 the party affected could appeal against the decree, I apprehend that what was intended was that an appeal would lie against the final decree made in the case and in that appeal the order of remand under rule 23 could be challenged. It was not laid down that the order of remand itself under rule 23 could be appealed against as an appeal against a decree. The language used by their Lordships is: "With regard to the order under rule 23 it is open to him either to appeal against the whole decree or to appeal against the order of remand only under Order XLIII". Their Lordships merely pointed out that it was open to the party to appeal against that portion of the order which was under

(1) (1919) 4 Pat. L. J. 645.

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rule 23 or he would wait and appeal against the final decree and in that appeal object to the order under rule 23 I am, therefore, of opinion that the cases relied upon by Jwala Prasad, J., in *Ram Chandra Rao* v. *Narain Lal* (1), do not support the contention that an appeal would lie against the decree of the lower appellate court remanding a case to the trial court, the remand being under the inherent power of the court and not under Order XLI, rule 23, of the Code.

The decision of Bucknill, J., in Second Appeal no. 1382 of 1922 merely follows the decision of Jwala Prasad, J., in the case referred to, and the order of the learned Chief Justice and Adami J., made on the 13th June 1919 referred to above. His Lordship gives no reason whatsoever for holding that the order appealed against could be treated as a decree and an appeal could lie against it as an appeal from decree. It is remarkable that the judgment of Bucknill, J., in Second Appeal no. 1382 of 1922, was appealed against in Letters Patent Appeal no. of 1925; but the question of maintainability of the Second Appeal as an appeal against a decree was not raised or decided in the Letters Patent Appeal.

In *Raghunath Das.* v. *Jhari Singh*(2), the appeal was originally filed as an appeal from an order of remand under Order XLI, rule 1, clause (*u*). An objection was taken by the respondent that the appeal was really not an appeal from the order of remand but from an appellate decree. The trial court had dismissed the suit on various grounds. On appeal by the plaintiff the District Judge had held that the plaintiff was entitled to the land which he claimed and that the suit was within limitation and therefore, the plaintiff was entitled to a decree for possession and the remand was made by the District Judge for determining the question as to whether the plaintiff was entitled to

(1) (1920) 58 Ind. Cas. 909. (2) (1918) 3 Pat. L. J. 99.

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mesne-profits and if so, what; and whether the plaintiff had any cause of action against defendant no. 6. The learned District Judge directed that after determining these issues the lower court will pass a decree accordingly. It was held by this Court that the District Judge did really reverse the decree of the first court on merits and that he should have passed a decree for possession in favour of the plaintiff and sent the case to the court below for inquiry as to mesne-profits. Their Lordships, therefore, treated the order of the District Judge as a decree for possession and held that the defendant's appeal against the decision of the District Judge must be considered as an appeal against an appellate decree. The decision of this Court in that case proceeded on the assumption that the District Judge on appeal had conclusively determined the rights of the parties with regard to some of the matters in controversy in the suit and that such a decision was a decree within the definition of the term as given in the Code of Civil Procedure. In this view of the case it was clear that the decision of the District Judge in that case could be treated as a decree and appealed against as such. This case, therefore, does not help the appellants in the present appeals.

It now remains to consider the decision of the Calcutta High Court in *Bhairab Chandra Dutt* v. *Kali Kumar Dutt*(1). This decision, no doubt, is in favour of the appellants in the present case. There also the appeal was against an order which did not purport to have been made under Order XLI, rule 23, of the Civil Procedure Code, but it had been made in the exercise of the inherent power of the Court as explained by the Full Bench in *Ghuznavi* v. *The Allahabad Bank, Ltd.*(2). The Learned Judges, however, remarked as follows: " The order so made (i.e., in exercise of the inherent power of the Court) is a decree which reverses

(1) (1923) 37 Cal. L. J. 491.

(2) (1917) I. L. R. 44 Cal. 929.

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the decree of the Court of first instance and deprives the plaintiffs of the valuable right they had acquired thereunder. The appeal is consequently competent not as an appeal from order under Order XLIII, rule 1, sub-rule (*u*), but as an appeal from a decree under section 96 of the Code read with section 100 ".

With very great respect to the learned Judges, I am unable to agree with the view taken by them. I fail to understand how an order of remand under the inherent power of the Court can be treated as a decree unless the order can be brought within the definition of " decree " as given in the Code of Civil Procedure in other words, unless the Court of appeal making the remand conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit so far as that court is concerned. Where the order of remand merely sets aside the decree of the trial court and does not itself decide any of the points raised for determination and does not determine the rights of the parties with regard to any of the matters in controversy in the suit, I am of opinion that it cannot amount to a " decree " and must be treated as an order; and no appeal would lie against it as a decree. The mere fact that the order reverses the decree of the trial court and deprives the plaintiffs of the valuable right they had acquired thereunder would not make an order of remand a " decree ", unless that order itself determines any of the points arising for determination in regard to the matter in controversy in the suit. Das and Foster, J.J., in admitting the present appeals, now before us, under Order XLI, rule 11, of the Civil Procedure Code expressed grave doubt whether an appeal would lie in the present case. It was conceded before their Lordships that no appeal lay against the order as an order; but it was contended that the order appealed against amounted to a decree and that, as such, it was appealable. Their Lordships observed: " But a decree has been defined in the Civil Procedure Code

as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. In this case there is no expression of an adjudication conclusively or otherwise or at all determining the rights of the parties. All that the Court says is that it is unable to determine the rights of the parties unless certain other matters are decided by the Court of first instance". Their Lordships, however, admitted this appeal in view of the ruling of this Court in *Ram Chandra Rao* v. *Narain Lal*(1), referred to above. I fully agree with the view expressed by Das and Foster J J., in the above order. I, therefore, hold that no Second Appeal lies in this case.

It has then been contended by the learned Advocate for the appellants that the present appeals might be treated as an application in revision and that we ought to set aside the order of remand in exercise of our power of revision under section 115 of the Code. In my opinion there is no question of jurisdiction involved in the case. It is contended that having regard to the finding of the trial court, the Court of Appeal below had no jurisdiction to make the remand and its proper duty was to dispose of the appeal itself. But it appears from the order of remand that the learned Subordinate Judge thought it necessary that certain issues framed by him should be decided before the suit could be finally disposed of. I am, therefore, of opinion that there is no reason to set aside the order of the learned Subordinate Judge in exercise of our revisional powers.

These appeals must be dismissed with costs.

ADAMI, J.—I agree.

Appeals dismissed.

(1) (1920) 58 Ind. Cas. 909.

APPELLATE CIVIL.

Before Jwala Prasad and Bucknill, J.J.

KASHI RAM KAROO RAM

v.

EAST INDIAN RAILWAY.*

1926.

July, 13.

Railways Act, 1890 (*Act IX of* 1890), *Risk Note B—loss of part of consignment—wilful neglect—theft from a running train, whether covered by Risk Note B.*

Seventeen bags of sugar out of a consignment of 126 bags not having been delivered to the plaintiff who had consigned them to the East Indian Railway for delivery, the plaintiff sued the Company for damages for non-delivery. The Company admitted that the bags had been lost while in their custody but, relying on Risk Note B, pleaded that the loss was not due to their wilful neglect or that of their servants.

The guard in charge of the train testified that he had seen the bags falling out of the wagon in which they had been locked when the train was travelling between 10 to 15 miles an hour between two stations. He deposed that he thought the case was one of a " moving train theft " and that he had been unable to communicate with the driver and that he dared not stop the train for fear of an accident.

Held, that the company was liable, for if the guard could have communicated with the driver or have stopped the train, his omission to do so amounted to wilful neglect on his part; if he could not have done so then there was wilful neglect on the part of the company.

B. B. C. I. Ry. Co. v. *Nattaji Partapchand Firm*(1), referred to.

Under the terms of Risk Note B a Railway Company is not exempt from liability for loss occasioned by their wilful neglect : " Provided the term wilful neglect be not held to include fire, *robbery* from a running train or any other unforseen event ".

*Appeal from Appellate Decree no. 981 of 1924, from a decision of F. F. Madan, Esq., I.C.S., District Judge of Gaya, dated the 20th May, 1924 reversing a decision of Babu Satyaranjan Prashad Sinha, Munsif of Gaya, dated the 17th September, 1923.

(1) (1925) A. I. R. (Mad.) 745.

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Held that the proviso does not apply to *theft* from a running train.

East Indian Railway v. *Nathmal Behari Lal*(1), *Great Indian Peninsular Railway Company* v. *Bhola Nath Debidas*(2) and *Gopal Rai Phul Chand* v. *Great Indian Peninsular Railway Company*(3), not followed.

Appeal by the plaintiff.

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

N. K. Prasad and *B. K. Prasad*, for the appellant.

N. C. Sinha and *B. B. Ghosh*, for the respondent.

BUCKNILL, J.—This was an appeal from a decision of the District Judge of Gaya dated the 29th May, 1924, by which he reversed a judgment of the Munsif of the same place dated the 17th September, 1923. The case was one of a claim by the plaintiff against the East Indian Railway Company; the plaintiff's case was that out of 126 bags of sugar, which were sent from Kidderpur Dock at Calcutta to him at Gaya, only 109 bags were in fact delivered. He, therefore, sued the Railway Company for damages for non-delivery of the missing 17 bags of sugar. The Munsif found in the plaintiff's favour and gave him a decree, although he did not award him quite as much damages as he claimed. The District Judge, however, reversed the decision of the Munsif.

In this instance it is fortunate that we are not so much in the dark with regard to what appears to have taken place as we are in so many of these cases. The defendant Company pleaded the usual Risk Note B; they admitted in their written statement that the goods had been lost whilst in their custody; but they alleged that they were lost without any wilful or other negligence by the Company or on their account.

(1) (1917) I. L. R. 39 All. 418. (2) (1923) I. L. R. 45 All. 55.
(3) (1924) I. L. R. 46 All. 887.

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Now it is clear, from the evidence which was produced by the defendant Company, that, when the goods train (of which the wagon or truck containing these goods was an unit) left Asansole on the East Indian Railway on the 4th February, 1922, the wagon, in which the goods lost were placed, was in good order and sealed up. The guard of the train, a Mr. Gown, deposed that between 7 and 8 o'clock in the evening he observed that some doors of some trucks were open whilst the train was actually in motion between Asansole and Sitarampur; he states that he actually saw a quantity of parcels of goods falling or being ejected from one or more these wagons. He could not exactly tell how or why they were falling out and he did not see any person actually engaged in tossing out the bags from the trucks. Now, when the train arrived at Sitarampur, the doors of three wagons were found to be open; they were then sealed up and at a station further on named Jhajha the contents of the wagons were checked and the losses ascertained. It was then discovered that these missing goods consigned to the plaintiff were not there. The guard himself, although he could not see any person actually throwing the goods out, considered that there must have been some person doing so and that it was a case of what he calls " running train *theft* ". The Munsif, however, came to the conclusion that it was perhaps more likely that, owing to faulty padlocks or fastenings of the wagons and the jolting of the train, the doors of these wagons became unfastened and that the bags fell out owing to the movement of the train; presumably the packages were piled up high in the wagon one over the other and they fell out when the doors of the wagons flew open. The Munsif, therefore, came to the conclusion that upon this line of reasoning he should draw the inference that there had been wilful negligence on the part of the Railway Company or its servants in not ensuring that the doors were properly fastened. The District Judge scouts this theory of the Munsif. He came to the conclusion that there was

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nothing to indicate that the doors had been badly fastened and swung open owing to the jolting of the train and that, consequently, no wilful negligence of the Company or of its servants had been satisfactorily proved; and, further, that, in any case, it being, what he calls, a " running train *theft* " the Company under the specific provisions of the Risk Note B was not liable.

The learned Advocate for the appellant has raised in these connections points of some interest. In the first place he contends that the evidence which was adduced on behalf of the defendant clearly showed wilful negligence on the part of the Company or of its servant in the person of this guard. It is evident from the guard's evidence that his position in the train was a surprising one and to my mind extremely unsatisfactory. He deposed that, though he could see these doors open and the goods falling out of the train, he was nevertheless unable to communicate with the driver of the engine or with any one; that he dared not stop or attempt to stop the train and that he was in fact completely helpless. The learned Advocate suggests that, if he *was* able to take any step to stop the train and recover the goods, he ought to have done so and that, if he *was* able to do so and did *not* do so, there was undoubtedly wilful neglect on his part. I must admit that I am inclined to agree. The learned Advocate also, alternatively, contends that, if it is true that the guard *was* really unable to stop or slow down the train or to communicate with the driver of the engine in any way or to do anything effective (whilst he could see the goods falling out of the wagons) then such a condition of affairs shows wilful neglect on the part of the Railway Company in not providing the train with some better facilities. Here again I am bound to say that I am inclined to agree with the learned Advocate. To have to contemplate a position in which a guard at the rear of a train is utterly unable to communicate with the driver or any one or to do anything effective in the event of his observing

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anything wrong with the train in front of him seems to me to be a miserable condition of affairs. What, one might ask, would happen supposing the guard saw a truck on fire? Would he through the lack of facilities for communication with the driver or for bringing the train to a standstill have to remain a passive spectator of what might be a serious catastrophe? It may be noted that this guard states that he *dared* not stop the train whilst it was running; but it will be observed that it was only moving, according to his own account, at the rate of some 10 to 15 miles an hour; a speed which appears to me to be most moderate. In re-examination, this guard added that had he stopped the train there would have been a serious accident. We have no information as to what this means. Why there should have been a serious accident if the train had been stopped by the guard, I do not know; but it would appear that he had some kind of means of putting a brake on the train. It seems difficult to understand why he should not have put the brake on and have brought the train to a standstill in view of the fact that the train was, according to his own statement, only moving at between 10 to 15 miles per hour. Under these circumstances, I am of the opinion that enough has been shown to indicate that there was wilful negligence; either on the part of the guard or of the Company. On the part of the guard if he could have taken any effective step but did not. See in this connection the case of *B. B. C. I. Ry. Co.* v. *Nattaji Partapchand Firm*(1), where it was held that where a train was in motion and the guard observed that the doors of two wagons, in one of which certain goods were kept but subsequently lost, were open and did not stop or try to stop the train, but allowed the train to run on to the next station where the matter was enquired into, there was wilful neglect on his part and consequently that the Railway Company was liable. Or on the part of the Company for, even supposing that it is strictly correct that he was for some

(1) (1925) A. I. R. Mad. 745.

(unexplained) reason unable to put his brake on to bring the train to a standstill, nevertheless if he was as a guard in a position in which he was unable to communicate with the engine driver or any one in any effective manner and was compelled to remain a passive and helpless spectator of such disorders as were taking place in the train which he purports to be guarding, then I think there is wilful negligence on the part of the Railway Company in not providing him with better facilities and owners of goods on the train with better safeguards.

The next point which arises is one which has to be approached with some caution in view of the fact that there appears to be in the Allahabad High Court a short series of decisions upon the question. It is argued by the learned Advocate who has appeared for the Railway Company that, it being presumed that this was an abstraction by some person of the goods from the train in motion, it was a " running train *theft* " and that, therefore, under the terms of the Proviso to Risk Note B the Company under such circumstances cannot be held liable. The Proviso reads as follows:

" Provided the term wilful neglect be not held to include fire, *robbery* from a running train or any other unforseen event or accident ".

Now, the learned Advocate for the appellant has urged that the word " robbery " is not synonymous with the word " theft " which is used in an earlier portion of the selfsame Risk Note B. It will be seen that only a few lines above the passage which I have quoted from the proviso to the Risk Note B there occur the words—

" or to *theft* by or to the wilful neglect of its servants ".

The learned Advocate suggests that the word " *theft* " and the word " *robbery* " are used with the meanings which are attached to them in the Indian Penal Code; or, at the lowest, that the word " *robbery* " is used in its normal legal sense as indicating

" the unlawful and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear " (e.g., as in Wharton's Law Lexicon, 11th Edition, p. 752).

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The learned Advocate suggests that when one examines the proviso, which I have quoted, one sees that the exemptions which are there grouped constitute events over which the Company or its servants cannot be regarded as having any possible control and he contends that what is meant by "*robbery*" from a "running train" is a violent or forcible abstraction of goods therefrom.

The learned Advocate for the respondent Company has, however, drawn our attention to certain cases in the Allahabad High Court which negative the suggestion put forward by the learned Advocate for the appellant. The first of these cases is *East-Indian Railaway* v. *Nathmal Behari Lal*(1). In that case Richards (C.J) and Banerjee (J.) at page 422 observe. "The learned Small Cause Court Judge thought that the expression "*robbery*" from a "running train" did not mean an ordinary *theft* in a running train, but had reference to "*robbery*" as defined in the Penal Code. It is perhaps unnecessary for the decision in the present case, but we doubt very much whether the expression "*robbery* from a running train" in the contract means anything else than an ordinary "*theft.*"

This case was followed by another decision in Civil Revisional jurisdiction by Ryves, (J.) in the case of *Great Indian Peninsular Railway Company* v. *Bhola Nath Debidas*(2). In this case Ryves, (J.) definitely held that the word "*robbery*" in the Risk Note (B) is not used there in the strict legal sense as defined in the Indian Penal Code but means merely *theft* from a running train. In the course of a short judgment he observes—"The learned Judge of the Small Cause Court has given the plaintiff a decree on the ground that the Railway administration were liable. It seems to me that the learned Judge has mis-directed himself. He says—"In short what the

(1) (1917) I. L. R. 39 All. 418. (2) (1922) I. L. R. 45 All. 56.

Risk Note means is supernatural causes or reasons over which the Railway servants in charge of train may not have any control. It would seem that whilst the loss of goods from a running train by reason of any supernatural cause or *robbery* would not be construed as due to ' wilful neglect ' of the servants of the Railway, any other cause short of the above would be so construed. Therefore simple *theft* from a running train would be construed as due to the wilful neglect of the Railway servants. The reason is clear. It is that it may not be possible for the Railway, which is after all a human institution, to fight against the supernatural; and similarly whether owing to the seriousness of the attack, or the odds being against the Railway servants, the latter might find themselves powerless to resist a band of ' *robbers* '. In other words, the learned Judge seems to think that *robbery* from a running train means something very much more serious than *theft* from a running train. It seems to me that *robbery* there is used as synonymous with *theft* and not in the sense as defined by the Penal Code ".

Finally, in a Second Appeal, *Gopal Rai Phul Chand* v. *Great Indian Peninsular Railway Company*(1), a Bench of that Court [Daniels and Neave (J J)] undoubtedly held, referring to the two previous cases which I have quoted, that the word " *robbery* " in the Risk Note was synonymous with *theft*.

This is undoubtedly a somewhat formidable body of opinion but with every respect to the learned Judges of that Court I find myself in considerable difficulty in arriving at the same conclusion. It is said (althogh no case has been quoted to us) that a similar view to that expressed in the Allahabad High Court has been held some years ago in this Court. But unfortunately we have not been favoured with any direct reference to such a decision. It is, however, striking that within

(1) (1924) I. L. R. 46 All. 837, 839.

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a few lines from each other in this Risk Note B the two words which in legal parlance undoubtedly have very distinct meanings and even in non-legal and ordinary parlance have somewhat different meanings should be used. It is suggested that the two words are inter-changeable and were loosely inserted without any particular thought; but this document has to be construed by this Court and I am bound to say when I see in close concatenation the words "*theft*" and "*robbery*" used in the same document, I cannot but think that it was intended that there should be some difference in the meaning of the two. To any ordinary person the word "*robbery*" undoubtedly carries a more sinister meaning than the word "*theft;*" to those accustomed to the Penal Law of India the marked distinction between the two phrases as defined in the Indian Penal Code is of course obvious. Then again, apart from the distinction which I cannot but think should be drawn between the meaning of the two words, we do observe that in the Proviso there are exemptions which undoubtedly contemplate circumstances over which it cannot be expected that the Company's servants or the Company itself could have any effective control, such as an outbreak of fire, an unforseen event or accident or, as I take it, a robbery, (that is to say, a violent or forcible abduction of goods from a running train under circumstances under which the servants of the Company were more or less in a position of helplessness).

Under these circumstances I think that the contention of the learned Advocate for the appellant in this case must be accepted. I am of the opinion that the circumstances indicate that, whether on the part of the guard or whether on the part of the Railway Company or of both, there were in this case facts from which a clear inference of wilful neglect must be drawn. I also with all deference believe that the term "*robbery*" does not mean the same as the term "*theft*"; and we have it in the evidence of the guard

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that there was no intimidation, force or violence and that the theft (if it was a theft) was carried out by some person or persons whom he never even saw.

Under the circumstances I think that the appeal should be allowed; the judgment and the decree of the learned District Judge set aside and that of the Munsif restored. The appellant will be entitled to his costs in this Court and in the Courts below

BUCKNILL, J.

JWALA PRASAD, J.—I agree.

Appeal allowed.

REVISIONAL CRIMINAL.

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

RAMBIRICH AHIR

v.

KING-EMPEROR.*

1926.

July, 15.

Code of Criminal Procedure, 1898 (Act V of 1898), section 109——"taking precautions to conceal his presence", whether continuous act of concealment is contemplated.

Under section 109(*a*) of the Code of Criminal Procedure, 1898, when a magistrate receives information "that any person is taking precautions to conceal his presence within the local limits of such magistrate's jurisdiction and that there is reason to believe that such person is taking such precautions with a view to committing any offence", he may call upon such person to execute a bond with sureties for his good behaviour. *Held*, (*i*) that clause (a) is not limited to cases in which the person proceeded against has not been brought under arrest: (*ii*) that it is not necessary, in order to bring a person within the operation of that clause, to show that he has followed a continuous course of conduct in taking precautions to conceal his presence.

*Criminal Revision No. 386 of 1926, from a decision of A. N. Mitter, Esq., Sessions Judge of Saran, dated the 10th May, 1926, affirming a decision of Pushkar Thakur, Magistrate, 1st Class, of Chapra, dated the 26th April, 1926.

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Reshu Kaviraj v. *King-Emperor*(1) and *Sheikh Piru* v. *King-Emperor*(2), dissented from.

Held, further, however, that the fact that a person was found at night in a bagicha talking to a number of other men, some of them being persons of bad character, and that they all ran away on the approach of police officers, is not sufficient to show that such person was taking precaution to conceal his presence.

The facts of the case material to this report are stated in the following order of Macpherson, J., before whom the case was first set down for hearing.

MACPHERSON, J.—This rule has been issued to consider the legality of an order of a Deputy Magistrate of Chapra under section 109 (*a*) of the Code of Criminal Procedure requiring the two petitioners Rambirich Ahir and Mosafir Ahir to execute a bond of Rs. 200 each with two sureties of Rs. 100 each to be of good behaviour for a period of one year.

The facts established are that about 9 30 P.M. on the 15th March a constable of the Ekma thana with a dafadar and two chaukidars found some twelve men armed with lathis, dantas and bhalas collected in a bagicha near Chainwa railway station and conversing in low tones. On being accosted the twelve men began to run away, but on a cry of "chor, chor" being raised and chase being given they began to ply their lathis against their pursuers. The result was that they escaped except four who were arrested by the constable and his party with the assistance of the villagers. Three of the men arrested had dantas and the petitioner Mosafir had a spear, and also a candle and a box of matches. The petitioner Rambirich Ahir was also arrested there. All four men were proceeded against under section 109 and orders under section 118 were passed against them, but the two others have not applied to this Court in revision. One of them Nawab was a C class bad character and the fourth man Chaturgun is proved to be generally absent from home at night.

The defence of Rambirich was that he has some land and was going to Chapra in connection with a civil suit when he was arrested at Chainwa railway station. The statement about his arrest at the railway station was found to be false. It is, however, true that some land is entered in the record-of-rights in the name of his father and the Magistrate considered that the mere fact that he had a civil suit is sufficient to show that he is in possession of some property. Accordingly his case fell only under clause (*a*) of section 109 and not also, as that of the other three men did, under section (*b*) also.

Mr. Jafar Imam admits that he cannot press the case of Mosafir.

As regards Rambirich, Mr. Jafar Imam contends that the facts found are not sufficient to bring him within clause (*a*) of section 109.

(1) (1917-18) 22 Cal. W. N. 168. (2) (1925) 41 Cal. L. J. 142.

It may be that he was concealing himself on one occasion in the bagicha along with persons of bad or doubtful character armed with lethal weapons or with lathis and even in circumstances which afford reason for the belief that he was concealing himself with a view to committing an offence; but it is argued that that is not sufficient inasmuch as the concealment must be a continuous act. In support of the contention learned Councel refers to *Reshu Kaviraj* v. *King-Emperor*(1) and *Sheikh Piru* v. *King-Emperor*(2), which are also mentioned in this connection at page 99 of Woodroffe's ' Criminal Procedure in British India '. In *Reshu Kaviraj* v. *King-Emperor* (1) the facts were that the petitioner who was a kaviraj and a dealer in cocoons was found at midnight in a lane in association with two other who had in their possession house-breaking implements, that on being discovered he fled and when arrested remained silent, and that the explanation which he subsequently offered to the Magistrate of his presence at the time and place was false. Teunon, J., with hesitation held that the facts did not come within either clause of section 109. Shamsul Huda, J., definitely added that in his opinion clause (*a*) of section 109 refers to a continuous act and does not apply to a case where there is a momentary effort at concealment to avoid detection or arrest. The opinion of Shamsul Huda, J., was approved by M. N. Mukerji, J., in *Sheikh Piru* v. *King-Emperor* (2). The learned Judge observed " In my opinion, passing under a false name or taking precautions to conceal one's presence or identity at a place amounting to a continuous course of conduct is what is meant by the clause. Moreover such precautions for the purpose of concealment must be taken with a view to commit an offence." But in fact the point did not arise in that case which was concerned with clause (*b*) only, so that the observations are obiter.

There are points of fact in which the case of Rambirich is distinguishable from that of Reshu Kaviraj and apart from the view enunciated in Reshu Kaviraj's case I would reject this application in revision. But it can hardly be predicated of the concealment of his presence which Rambirich took precautions to effect that it was a continuous act. Personally I doubt whether the view of Shamsul Huda, J., in *Reshu Kaviraj* (1) is sound, especially as extended by M. N. Mukerji, J. There is, however, no authority of this Court on the point and this rule was in fact issued in order that the correctness of the views expressed in those cases might be considered. The question of the correct interpretation of clause (*a*) of section 109 constantly arises in the subordinate Courts and they exhibit doubt as to the extent to which the view of Shamsul Huda, J., is binding on them and much hesitation in following it. The next case in my list to-day (In the matter of Rakhal Bauri, Criminal Reference No. 46 of 1926) is a reference by the Sessions Judge of Manbhum-Sambalpur, recommending that an order under clause (*a*) of section 109 be set aside. The Additional District Magistrate of Manbhum in appeal had made the following observations regarding the judgment of Shamsul Huda, J., in *Reshu Kaviraj* v. *King-Emperor* (1).

I am not sure if this "opinion" was intended to be binding and I certainly do not consider that it can be held to be binding on courts under the control of the Honourable High Court at Patna. It appears to me to be in conflict with the plain wording and intention of section 109 and, strictly followed, would render it impossible

(1) (1917-18) 22 Cal. W. N. 163. (2) (1925) 41 Cal. L. J. 142.

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to take action against any person, however bad his character or however clear the presumption that he intended to commit an offence, if his attempt at concealment were confined to a solitary instance.

The learned Sessions Judge observes :

The observation (*i.e.*, the judgment of Shamsul Huda, J.,) cannot be said to be an obiter as the point was expressly raised in argument and arose from the facts of the case, as would appear from the judgment. There being no other case of our High Court to the contrary I think that observation is binding on us.

It is manifest that a ruling of this Court is required for the guidance of the courts in this Province, and it is expedient that it should be that of a Division Bench.

Under proviso (*a*), rule 1, Chapter II of the Rules of the Patna High Court, I refer Criminal Revision No. 386 of 1926 to a Division Bench for a decision. I have not passed order as to Mosafir Ahir as it is desirable to refer the whole case.

As it will be convenient to hear along with this case, Criminal Reference No. 46 of 1926 in which the point for determination is the same, I refer it also.

On this reference,

Jafar Imam, for the petitioner.

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

DAWSON MILLER, C.J.—This is an application in revision seeking to set aside an order of the Sessions Judge of Saran dismissing an appeal from the Deputy Magistrate.

The petitioners Rambirich Ahir and Mosafir Ahir were brought before the Deputy Magistrate under section 109 of the Code of Criminal Procedure on the 24th April, 1926, and were each ordered to execute a bond of Rs. 200 with two sureties of Rs. 100 each to be of good behaviour for one year. An appeal to the Sessions Judge was dismissed on the 10th May.

Mr. Jafar Imam now appears on behalf of the petitioners and asks us to set aside the order on the ground that the facts proved do not bring the case within the provisions of section 109. The section enables the magistrates there enumerated to call upon persons to shew cause why they should not be ordered to execute a bond with sureties for their good behaviour. The circumstances under which the

Magistrate may take action are set out in clauses (*a*) and (*b*) of the section. He may act on receiving information

"(*a*) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any offence, or

(*b*) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself."

The facts proved in so far as they are material appear from the judgment of the Sessions Judge and are as follows:—On the 15th March, 1926, a constable of the Ekma police-station was deputed to go round on night duty at villages Chainwa, Charwa and Rasulpur. He took two chaukidars and a daffadar with him and at about 9-30 P.M. went to a bagicha a short distance away from Chainwa railway station on hearing soft voices. There they found about a dozen men armed with lathis, dantas and bhalas talking to one another. On being accosted by the constable they began to run away. An alarm was raised and the men began to use their lathis. The constable and his men, however, warded off the blows and it does not appear that any body received any injury. With the help of villagers who came upon the scene they managed to arrest four persons including the two petitioners. The petitioner Mosafir was carrying a spear and Rambirich carried a danta which, I understand, is a stick of any kind less formidable than a lathi. They gave their names but apparently not correct addresses. These, however, were supplied later. Rambirich lives at Rasulpur within the local limits of the Magistrate's jurisdiction. Mosafir lives at Maharajganj. Mosafir was unable to give a satisfactory account of himself and was dealt with as coming within clause (*b*) of the section. So far as he is concerned the learned Counsel who appeared on his behalf was unable to suggest any valid reason why the order should be set aside and accordingly the application in his case must be dismissed.

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With regard to Rambirich it was shewn that he and his father had certain property at Rasulpur and that he was engaged in a law suit in connection therewith. He stated that he was going to Chapra to get copies of certain documents in connection with the law suit and was arrested by the constable and the chaukidars at Chainwa railway station. This was not quite accurate as the place where he was arrested was some distance from the station. He was able, however, to give a satisfactory account of himself and was not a person of no ostensible means of subsistence so that clause (*b*) of the section was not applicable in his case. He was, however, found by the Magistrate to come within the provisions of clause (*a*). Before a person can be ordered to execute a bond under clause (*a*) it must be shewn that he was taking precautions to conceal his presence within the local limits of the Magistrate's jurisdiction and, further, that such precautions were taken with a view to committing some offence. The offence is not definitely stated but it appears from the evidence of the Sub-Inspector that Rambirich was reported to be a bad character. It does not appear however that he was convicted of any crime. He called some witnesses who spoke to his character but apparently their evidence did not impress the Magistrate.

It was contended on behalf of Rambirich that a mere momentary effort at concealment in order to avoid detection or arrest was not sufficient to bring the case within clause (*a*) of the section but that there must be some continuous course of conduct shewing that the subject was taking precautions to conceal his presence within the local limits of the magistrate's jurisdiction. In support of this contention the case of *Reshu Kaviraj* v. *King Emperor*(1), was referred to in which Shamsul Huda, J., is reported to have said that in his opinion clause (*a*) of section 109 refers to a continuous act and does not therefore apply to a case where there is a momentary effort at concealment to avoid detection

(1) (1917-18) 22 Cal. W. N. 163.

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or arrest and further that that clause cannot apply to the case of a person brought under arrest for it cannot be said of such a person that he *is* taking precautions to conceal his presence. That case was referred to with approval in a later case of the same High Court [*Sheikh Piru* v. *King-Emperor*(1)]. I am not prepared to go so far as to limit the application of the clause to cases where a person has not been brought under arrest. A reference to section 55 of the Act shews that an officer in charge of a police-station may arrest any person found taking precautions to conceal his presence within the local limits of such station under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence, or any person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself. If it is to be held that after he is once arrested and brought before the Magistrate no action can be taken under section 109 (*a*) on the ground that the arrested person is no longer taking precautions to conceal his presence, there would appear to be little object in allowing him to be arrested at all, for the only manner in which he can be dealt with is under section 109, and a large proportion of the cases dealt with under that section are cases where the person has already been arrested. Nor am I prepared to say that it must in all such cases be proved that the accused has followed a continuous course of conduct in taking precautions to conceal his presence. I consider, however, that a person, whether he be of good or bad character, who merely shows a disinclination for the society of the police and endeavours to avoid them by running away on their approach cannot be said to come within the mischief aimed at in clause (*a*). Now apart from the fact that the petitioner and his companions endeavoured to run away from the police there is practically nothing in this case which can be said to shew that the petitioner Rambirich was taking precautions to conceal his presence. The fact that he was found at half past

(1) (1925) 41 Cal. L. J. 142.

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nine at night talking to a number of other men some of whom are proved to have been persons of bad character in a bagicha close to a public railway station is, in my opinion, no evidence that he was taking precautions to conceal his presence. It is perhaps impossible, it is certainly undesirable, to lay down any general principles as to the conditions which would bring a case within the purview of the clause, for the circumstances which may arise are so multiple and various; but I think it may be said that there must be some definite attempt at concealment by taking precautions with that object in view, whether it be by disguise or otherwise, indicating a desire to hide the fact that the accused is present within the local limits of the Magistrate's jurisdiction. The clause is one which should be used with proper discretion and was never intended to apply to a person merely found talking at night time with bad characters in a place which is open to the public. I am unable to find that in the circumstances proved the petitioner Rambirich was taking any precautions to conceal his presence. The orders of the Magistrate and of the Sessions Judge must be set aside and the petitioner Rambirich who has been unable to find securities and is at present in prison must be released.

FOSTER, J.—I agree.

Order set aside.

REVISIONAL CRIMINAL.

Before Ross and Foster, JJ.

1926.

July, 16.

PURENDAR JHA

v.

NUNULAL JHA.*

Substitution of Parties—Application for—verification not necessary—false verification—Penal Code, 1860 (*Act XLV of* 1860), *sections* 191 *and* 193.

* Criminal Revision no. 824 of 1926, from a decision of R. Ghose, Esq., Sessions Judge of Purnea, dated the 22nd April, 1926, affirming a decision of Babu Khetra Mohan Kunar, Munsif of Araria, dated the 23rd of December, 1925.

Under section 191, Penal Code,

" whoever being legally bound.....by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false.....is said to give false evidence."

The offence of giving false evidence is punishable under section 193.

Held, that the law does not require a petition for substitution of parties to be verified, and, therefore, that the person who presents to a court a verified petition for substitution containing a false statement of the death of the defendant, is not punishable under section 193 of the Penal Code.

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

K. B. Dutt (with him *L. K. Jha*), for the petitioner.

FOSTER, J.—This application in revision arises out of a decision of the District Judge of Purnea, refusing to withdraw a complaint lodged by the Munsif of Araria on the 21st of December, 1925.

The said learned Munsif had been moved to take action under section 476 of the Code of Criminal Procedure in respect of a false statement in an application for substitution of one Nunu Lal Jha as the legal representative of Musammat Ratnabati. The petition was presented by the present petitioner in the following circumstances:

The petitioner Purendar Jha brought a suit for arrears of rent (suit no. 1892 of 1924) against a tenant Musammat Ratnabati in the Munsif's Court at Araria. The defendant entered appearance and, in her written statement, denied the relationship of landlord and tenant. This written statement was filed on the 11th of September, 1924. On the 18th of November 1924 the petitioner, as plaintiff in that suit, filed a petition to amend the plaint in the Munsif's Court on the ground that Musammat Ratnabati had died on the 2nd of Kartick, 1332, Mulki, and prayed that one Nunu Lal Jha should be

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substituted as her legal representative. This was done; and, subsequently, Purendar Jha succeeded in obtaining an ex parte decree against Nunu Lal. Subsequently Nunu Lal moved the Court to set aside the ex parte decree. In the course of that proceeding it was brought to light that the petition of Purendar Jha filed on the 18th of November, 1924, contained an incorrect statement. It may now be assumed as a fact beyond question that Musammat Ratnabati was not dead at the time of the ex parte decree. The petition filed on the 18th of November, 1924, was therefore made the subject matter of an application by Nunu Lal Jha to the Munsif's Court, asking the Court to take action under section 195 (*1*) (*b*) of the Code of Criminal Procedure. Subsequently the complaint was drawn up and dealt with in the manner indicated in section 476 of the Code and an appeal was carried to the Court of the District Judge under section 476B. That appeal was, as I have already stated, decided in December 1925; and the present petition in revision to this Court questions the legality of the proceedings.

The case first came before Mr. Justice Macpherson alone and, as the question involved was one which has not been dealt with as yet in this Court, he thought it advisable to remit the case for decision by a Division Bench.

The question can be succinctly stated on the facts. A party to a civil suit put in a petition for substitution of a named person in the place of a defendant falsely alleging the latter to be dead. The petition for substitution was verified or, at any rate, purported to be verified. There was some question raised, but it has not been necessary to enquire whether the verification in fact conformed to the requirements of the law. For the purposes of the case before us we may assume that the verification, quantum valeat, was in order. The question is whether a person presenting a verified petition for substitution, containing a false statement of the death of a defendant, can be considered to fall within the mischief of section 193 of the Indian Penal

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Code. The argument is that where no verification is required by law, a volunteered and unnecessary verification is not such a sworn statement as is contemplated in the definition of false evidence in section 191 of the Indian Penal Code.

So far as the requirement of a verification for an application for substitution of a defendant is concerned, I have not been able to find any provision of law which makes it necessary. Certainly, for a plaint a verification is required; but it does not follow that a verification is required for a petition for substitution of parties by amendment of the plaint; nor does one find in the law as to substitution any mention of the requirement of a verification. Neither in Order VI, nor in Order XXII have I been able to find any requirement of a verification in respect of such a petition.

Taking it then that the verification is not required by law, it remains that the act of the petitioner in verifying his application for substitution of Nunu Lal in place of Musammat Ratnabati was unnecessary and purely voluntary. Now looking into sections 191 and 193 of the Indian Penal Code, it will be seen that a person who has to be punished must be legally bound by an oath or by an express provision of law to state the truth or bound by law to make a declaration upon any subject; and section 193 adds to this that the false evidence to be given by this person subject to punishment must be evidence given at any stage of a judicial proceeding or fabricated for the purposes of being used at any stage of a judicial proceeding. The first part of this definition is the most important; the question being whether the petitioner, when he lodged his application for substitution, was legally bound by an oath or express provision of law to state the truth, or bound by law to make a declaration upon any subject. The suggestion is that he was legally bound by an oath because of his verification; and in section 51 the word "Oath" is described as including "a solemn affirmation substituted by law for an oath, and any declaration required or authorised by law to

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be made before a public servant, or to be used for the purpose of proof, whether in a Court of Justice or not". So the declaration must be required or authorised by law to be made. Now as I have found before, there is no requirement or even authorization in the law of any such declaration as is embodied in the verification of the application for substitution: nor is there any express provision of law requiring the applicant for substitution to state the truth or to make a declaration upon any subject.

The fact is that the Court has made a mistake in finding the section of the Penal Code which is applicable to the peculiar circumstances of this case. Certainly section 193 cannot be applied to a case of this nature. The authorities are almost entirely on the side of the petitioner. He has quoted with considerable effect the case of *Queen* v. *Kartick Chandra Holdar* (1), *Haran Mundul* (2), *Juggut Chunder Mozumdar* v. *Kasi Chunder Mozumdar* (3) and *Emperor* v. *Ganeshi* (4). There are other cases which appear to be pertinent and also in favour of the petitioner's argument, quoted in notes (5) and (6) at page 1007 of Gour's Penal Law of India, Third Edition.

I therefore am of opinion that sections 191 and 193 do not apply to a false statement in a petition for substitution, even though it be verified by the petitioner, for the reason that the verification is not required, and that the solemn declaration embodied in such an unnecessary verification is not a declaration within the meaning of these sections or of section 51 of the Indian Penal Code. I would therefore set aside the orders of the Courts below and direct withdrawal of the complaint by the District Judge of Purnea.

ROSS, J.—I agree.

(1) (1868) 9 W. R. (Cr.) 58.
(2) (1866) 10 W. R. (Cr.) 31.
(3) (1881) I. L. R. 6 Cal. 440.
(4) (1903) 26 All. W. N. 52.

Ref. 29 P&H 70

APPELLATE CIVIL.

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

GANESH DASS BISHESHWAR LAL

v.

EAST INDIAN RAILWAY COMPANY.*

1926.

July, 29.

Railways Act, 1890 (*Act IX of* 1890), *section* 72—*risk note B. scope of—railway company, whether bound to plead and prove "loss"—loss, destruction or deterioration—railway company, general liability of, as bailee—Contract Act*, 1872, (*Act IX of* 1872), *sections* 151, 152 *and* 161.

When a railway company relies on risk-note B, it must at least admit loss in its pleadings and then the onus will be on the plaintiff to prove that the loss was due to wilful neglect of the company or its servants.

Query, per *Bucknill, J.*—Whether, when the railway company admits loss in its pleadings, such an admission is a good answer to the plaintiff's suit unless such admission is accompanied by evidence adduced by the company of a character showing how the goods had disappeared whilst in the company's custody?

Great Indian Peninsular Railway v. *Jitan Ram* (1), *East Indian Railway Company* v. *Jogpat Singh* (2), *Ganesh Lal* v. *East Indian Railway Ltd.* (3), *Gopiram Behariram* v. *Agents, East Indian Railway* (4), *Barada Chandra Dhar* v. *Assam Bengal Railway Company* (5), *B. B. and C. I. Railway Company, Ltd.* v. *Nattaji Pratapchand Firm* (6), *East Indian Railway Company* v. *Tota Ram Pirbhu Dayal* (7), *East Indian Railway Company* v. *Brij Kishore* (8), *Great Indian Peninsular Railway* v. *Kupy Behari Lal Sharma* (9), *East Indian Railway Cimpany* v. *Kali Charan Ram Prasad* (10), *Great Indian Peninsular Railway Cimpany* v. *Jital Ram Nirmal Ram* (11), *East Indian Railway Company* and *Great*

* Appeal from Appellate Decree no. 849 of 1924, from a decision of J. A. Sweeney, Esq., I.C.S., District Judge of Patna, dated the 4th April, 1924, confirming a decision of Lala Damodar Prasad, Subordinate Judge of Patna, dated the 24th April, 1923.

(1) (1923) I. L. R. 2 Pat. 442.
(2) (1924) I. L. R. 51 Cal. 615.
(3) (1924) 80 Ind. Cas. 426.
(4) (1926) 30 Cal. W. N. 209.
(5) (1926) 43 Cal. L. J. 211.
(6) (1925) A. I. R. (Mad.) 745.
(7) (1925) 86 Ind. Cas. 162.
(8) (1925) 89 Ind. Cas. 497.
(9) (1926) 92 Ind. Cas. 993.
(10) (1922) 3 Pat. L. T. 215.
(11) (1922) 3 Pat. L. T. 223.

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Indian Peninsular Railway Company v. *Sukdeo Das* and *Gobardhan Das* (1), *East Indian Railway Company* v. *Mohan Lal Panna Lal* (2), *Jamnadhar Baldevdas Firm* v. *Burma Railway Company Ltd.* (3), *Daudbhai* v. *Great Indian Peninsular Railway Company* (4), referred to.

Per *Jwala Prasad, J.*—(*i*) The agreement absolving the railway company from liability under certain circumstances set forth in the risk note being an exception to the general liability of the railway company as a bailee under sections 151, 152 and 161, Contract Act, 1872, and section 72(1) of the Railways Act, the risk note must be proved by the railway company to have been duly executed;

(*ii*) the words "loss, destruction or deterioration" used in risk note B do not cover the case of "non-delivery". Therefore in a case of a claim against a railway company based on non-delivery of the goods consigned, it is in the first instance for the company to plead and prove loss, destruction or deterioration, and, when this is done, the onus then shifts upon the claimant to show that the loss, destruction or deterioration was due to the wilful negligence of the company.

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

Shiveshwar Dayal, for the appellant.

N. C. Sinha, for the respondents.

BUCKNILL, J.—This was an appeal from a decision of the District Judge of Patna dated the 4th April, 1924, confirming a judgment of the Subordinate Judge of Patna dated the 24th April, 1923.

The facts in the case were of simple character. The plaintiff was one Mali Ram who carried on the business of a cloth merchant as a firm known as Ganesh Das Biseshur Lal at Mokameh in the Patna district. In November 1920 a Bombay firm consigned to the plaintiff to Mokameh a bale of cloth valued at Rs 975-8-6. This bale was never delivered to the plaintiff and accordingly, after several vain attempts to obtain some satisfaction from the Railway

(1) (1923) 4 Pat. L. T. 443.
(2) (1923) A. I. R. Lah. 432.
(3) (1921) 64 Ind. Cas. 395.
(4) (1922) 69 Ind. Cas. 750.

Companies which carried the goods, the plaintiff brought a suit against the East Indian and the Great Indian Peninsular Railway (by which the bale had presumably been carried) claiming damages for non-delivery of the cloth. With the Great Indian Peninsular Railway we are not concerned; as it seems to be common ground that the bale of goods was handed over to the East Indian Railway at a place called Manikpur Junction. The Subordinate Judge dismissed the suit and on appeal the District Judge upheld his judgment. It is from this decision of the District Judge that this present appeal has come before this Court.

Now, it will be observed that the written statement which was filed by the East Indian Railway Company was of (what is in my experience) a most unusual character. It will be noticed that the plaintiff in his plaint did not allege that the defendant had lost the goods; presumably he was quite in the dark as to what had happened to the bale; all that he could say was that the goods had not been delivered to him. The defence of the Great Indian Peninsular Railway was as I have mentioned that they had handed over the goods to their co-defendants (the East Indian Railway); this allegation in the written statement of the Great Indian Peninsular Railway was not denied by their co-defendant and seems to have been admitted. The defence of the East Indian Railway seems to me to disclose on the pleadings no defence to the suit. Their defence was in effect that the consignment was booked at owner's risk in consideration of a reduced rate of freight in terms of the well-known risk note form B. The despatch of the bale of goods was admitted but the East Indian Railway Company did not allege in what respect they claim to be exempted under the provisions of the risk note B. They did not admit that they had lost the goods; they alleged further that as there was no contract to carry the goods within a specified time they were not liable for any loss of profits to the plaintiff; they denied that

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there was any neglect on their part in the non-delivery of the goods.

Now, I do not think that I have yet seen a written statement quite of this character; in the numerous cases with which I have had to deal connected with the claims against railway companies for damages due to goods not having been delivered, I have, to the best of my recollection, always observed either that the plaintiffs pleaded loss or that the railway company admitted loss and, in all germane cases which I can remember, the question has therefore turned upon the liability of the company in view of the exemptions contained in the risk note B. In the present pleadings there is not even an allegation of loss either by the plaintiff or the defendant company.

In this case the defendant company has called no evidence to show the loss and the utmost which could be urged by the learned Advocate who appeared for the defendant company was that it might perhaps be implied that the defendants tacitly admitted having lost the goods. I do not ,however, think that any such admission can be implied either from the pleadings or from the conduct of the case. From the terms of the risk note B it is clear that there might be a variety of circumstances under which the defendant company might not be liable; but for the company merely to state that it simply relies upon the terms of the risk note B without even mentioning upon what portion of the elaborate risk note it relies is to my mind no proper pleading at all and is, in my view, no defence to the suit. I should, however, in this connection, mention a point which is I think of no little importance. It is the fact that in this Court it has been at one time held that, if a Railway Company relying on risk note B simply admits loss in their pleadings, the onus was then upon the plaintiff to prove that that loss was due to wilful neglect by or on behalf of the Company. [See *Great Indian Peninsular Railway* v. *Jitan Ram* (1)]. But there is, since that decision,

(1) (1923) I. L. R. 2 Pat. 442.

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a considerable body of authority which indicates that the more recent view is that it is not sufficient for the Company merely to admit the loss but that the Company must prove, so far as is possible, in some way in what fashion the loss of the goods whilst in its hands has occurred. It would seem from an unreported case [Second Appeal no. 1289 of 1923] that Das and Adami, JJ., propose to refer this question to a Full Bench of this Court; this would appear to be so from the judgment of their Lordships dated the 7th July last. It is, therefore, undesirable that I should say anything further on this matter especially as I was associated with Mullick, J., in the case of *Great Indian Peninsular Railway* v. *Jitan Ram* (1) which I have quoted above. I have only mentioned this question because it will be at once observed that it is now a moot point whether, even if the defendant company had admitted loss in their pleadings, such an admission would have been a good answer to the plaintiff's suit unless such admission was coupled by evidence adduced by the Company of a character showing, so far as possible, how the goods had disappeared whilst in the Company's custody [vide *East Indian Railway Company* v. *Jogpat Singh* (2), per Suhrawardy and Page, JJ., *Ganesh Lal* v. *East Indian Railway Limited* (3), per Suhrawardy and Chotzner, JJ., *Gopiram Behariram* v. *Agents East Indian Railway* (4), per Chatterjea and Cuming, JJ , *Barada Chandra Dhar* v. *Assam Bengal Railway Company* (5), per Suhrawardy and Mukherji, JJ., *Bombay Baroda and Central Indian Railway Company, Limited*, v. *Nattaji Pratapchand Firm* (6), per Ramesam, J., *East Indian Railway Company* v. *Tota Ram Pirbhu Dayal* (7), per Sulaiman and Daniels, JJ., *East Indian Railway Company* v. *Brij Kishore* (8), per Sulaiman and Daniels, JJ., *Great Indian Peninsular Railway* v. *Kupy Behari Lal Sharma* (9),

(1) (1923) I. L. R. 2 Pat. 442.
(2) (1924) I. L. R. 51 Cal. 615.
(3) (1924) 80 Ind. Cas. 426.
(4) (1925) 80 Cal. W. N. 209.
(5) (1925) 43 Cal. L. J. 211.
(6) (1925) All. Ind. Rep. (Mad.) 745.
(7) (1924) 86 Ind. Cas. 162.
(8) (1925) 89 Ind. Cas. 497.
(9) (1926) 92 Ind. Cas. 998.

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per Daniels, J., *East Indian Company* v. *Kali Charan Ram Prasad* (1), per Jwala Prasad, J., *Great Indian Peninsular Railway Company* v. *Jital Ram Nirmal Ram* (2), per Jwala Prasad, J., *East Indian Railway Company and Great Indian Peninsular Railway Company* v. *Sukdeo Das and Gobardhan Das* (3), per Foster, J., *East Indian Railway Company* v. *Mohan Lal Panna Lal* (4), per Zafar Ali, J., *Jamnadhar Baldevdas Firm* v. *Burma Railway Company Limited* (5), per Robinson, C.J., *Daudbhai* v. *Great Indian Peninsular Railway Company* (6), per Dhobley, A. J. C.].

In the present appeal it will be seen that the plaintiff's case is really far stronger than if the defendant company had admitted loss in its written statement. In this appeal the defendant company had done nothing beyond, as it were, throwing at the plaintiff the risk note B and telling him to make the best of it. This appears to me to be no pleading and no defence.

Under those circumstances I think this appeal should be allowed as against the East Indian Railway Company and that the judgment of the Subordinate Judge of the 24th April, 1923, and that of the District Judge, dated the 4th April, 1924, should be set aside.

As for the amount which the plaintiff claimed it should be observed that in his plaint he claimed the following sums:—

(*a*) Rs. 975-8-6 for price of the undelivered goods;

(*b*) Rs. 100-0-0 damages for loss of profits on the cloth; and

(*c*) Rs. 57-7-6 interest for 5 months and 10 days.

(1) (1921) 3 Pat. L. T. 215.
(2) (1922) 3 Pat. L. T. 223.
(3) (1923) 4 Pat. L. T. 443.
(4) (1923) All Ind. Rep. (Lah.) 432.
(5) (1920) 64 Ind. Cas. 395.
(6) (1921) 69 Ind. Cas. 750.

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The defendant company denied that it was liable for any loss of profits, did not admit the value of the goods and submitted that the plaintiff was not entitled to any interest. The plaintiff proved quite satisfactorily that the value of the bale of cloth not delivered to him was as claimed, namely Rs. 975-8-6: and he is entitled to recover this sum. He did not, however, prove at all clearly any loss of profit and I do not think he is entitled to recover any sum under this heading. I do not see how he can claim any interest save that he will be entitled to recover six per cent. interest on the decretal amount from the date of the decree. The result will be that the judgments of both the lower Courts will be set aside and the suit decreed in favour of the plaintiff for Rs. 975-8-6 with interest at 6 per cent. from the date of the decree. The appellant will recover his costs throughout.

JWALA PRASAD, A.C.J.—I entirely agree. I had occasion to deal with a similar point in the case of *East Indian Railway Company* v. *Kali Charan Ram Prasad* (1). Since then I have had the advantage of knowing the views both for and against, and all the cases bearing upon the subject were placed before us. After careful consideration of the criticisms against the view taken by me in the aforesaid case as well as those that have been advanced in support of my view I find that I am confirmed in my opinion expressed in that case. I do not propose to go over the grounds again upon which I based my decision in that case. It seems to me that the point can be simplified. Sections 72 to 76 of the Indian Railways Act deal with the responsibility of the Railway Company in the matter of the carriage of goods. Clause (*1*) of section 72 makes the railway company liable as bailees under section 151, 152 and 161 of the Indian Contract Act, 1872. Clause (*2*) of that section forbids any limitation of that responsibility except as provided therein. One of those provisos is that the responsibility of the company can be limited by agreement in

(1) (1922) 3 Pat. L. T. 215.

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writing signed by or on behalf of the person sending or delivering the goods to the railway administration. Risk note B was introduced by the railway company in order to define and describe the limited responsibility of the company with regard to the goods conveyed by them at reduced rates. Generally speaking the carriage of goods under this risk note is said to be at the owner's risk. Under the risk note the consignor agrees and undertakes to hold the railway administration and all other railway administrations working in connection therewith and all other transport agents or carriers employed by them respectively over whose railways or by or through those transport agency or agencies the said goods and animals may be carried in transit

"harmless and free from all responsibility for any loss, destruction, or deterioration of, or damage to, the said consignment, from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration, or to theft by or to the wilful neglect of its servants, transport agents, or carriers employed by them before, during and after transit.....provided the term 'wilful neglect' be not held to include fire, robbery from a running train or any other unforeseen event or accident."

This agreement absolving the railway company from the liability under certain circumstances set forth in the risk note is an exception to the general liability of the railway company as a bailee under sections 151, 152 and 161 of the Indian Contract Act. Section 151 requires the bailee to take as much care of the goods bailed to him as a man of ordinary prudence would in similar circumstances take of his own goods. Section 152 makes the railway company responsible as bailee for the loss, destruction, or deterioration of the thing bailed unless it has taken the amount of care described in section 151. Section 161 makes the Railway Company responsible as bailee for the delivery and tendering at the proper time to the bailor of the goods bailed, failing which the company is liable to the bailor for any loss, desruction or deterioration. The risk note is an exception to the ordinary responsibility of the company for the loss, destruction

or deterioration of the goods consigned. As an exception to the general responsibility the risk note must be proved by the railway company to have been duly executed. It must also be proved that the circumstances under which the exemption from the ordinary responsibility is claimed exist in the case. In other words, the railway company must prove that the goods consigned were lost, destroyed or deteriorated before they can take advantage of the agreement contained in the note. It is not sufficient for the railway company to plead the execution of the risk note or to plead the loss, destruction or deterioration, but the railway company must prove that there was loss, destruction or deterioration such as is contemplated in the agreement set forth in the risk note. Unless this is primarily proved the ordinary responsibility of the railway company as bailee under sections 151, 152 and 161 does not cease. The object of this requirement for the railway company to prove loss, destruction or deterioration is that the consignor will then be in a position to know how his goods were dealt with and that the railway company exercised primarily the ordinary care that is required of it as a bailee. It is only after this is established by the railway company that it can plead exemption from the liability for the loss, destruction or deterioration under risk note B unless the claimant proves that the loss, destruction or deterioration was due to wilful neglect on the part of the railway company. To put it shortly in a case of claim against a railway company based on non-delivery of the goods consigned it is in the first instance for the company to plead and prove loss, destruction or deterioration and when this is done then the onus shifts upon the claimant to shew that the loss, destruction or deterioration was due to the wilful negligence of the company. The agreement in the risk note is an exception to the general principle governing the responsibility of the railway company as common carriers and bailees. The railway company relying upon the agreement as an exception to the general rule must prove the conditions under

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which the agreement would apply, that is, they must prove the loss, destruction or deterioration of the goods in order to exonerate themselves from the liability.

Now risk note B to my mind does not cover the case of non-delivery. Sections 151, 152 and 161 of the Contract Act deal with the case of loss, destruction or deterioration and the risk note protects the railway company from loss, destruction or deterioration as used in the Indian Contract Act, sections 151 and 152. The case of non-delivery comes under section 161 of the Indian Contract Act which says that a bailee is bound to deliver or to tender at a proper time and place the goods bailed. If this is not done thereafter their responsibility arises for loss, destruction or deterioration. Now the words " loss, destruction or deterioration " are not wide enough to cover the case of non-delivery, misdelivery, detention, etc. These last words are expressly stated in the risk note in the case of *H. and C. Smith and Company, Limited* v. *Great Western Railway Company* (1) referred to and relied upon by Mullick, J., in the case of *Great Indian Peninsular Railway Company* v. *Jitan Ram Nirmal Ram* (2). The risk note form in that case clearly shews that non-delivery and misdelivrey are quite different from loss, destruction or deterioration. The risk note must be construed strictly and if for some reason the legislature did not think it proper to include cases of non-delivery or misdelivery or detention in spite of the words having been used in section 161 of the Indian Contract Act and in spite of those words being found in the risk note referred to in *H. and C. Smith and Compnay, Limited* v. *Great Western Railway Company* (1) we cannot add those words to the section in order to amplify the scope of it and to limit the liability of the railway company with regard to goods consigned to them. Now the difference between non-delivery on the one hand and loss, destruction or deterioration on the other has

(1) (1921) L. R. 2 K. B. 237.

(2) (1923) I. L. R. 2 Pat. 442.

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been recognized in Articles 30 and 31 to Schedule I of the Indian Limitation Act. It was after careful consideration that Article 30 was added. Before that, provision similar to Article 31 only existed which related only to loss, destruction or deterioration. Questions were then raised as to whether the case of non-delivery would come under that Article or under Article 149 or Article 115 of the Limitation Act, the latter being applicable to cases where there is no express provision in the Act. It is with a view to set at rest the questions raised that Article 30 was subsequently added to the Limitation Act. In spite of that the word non-delivery, mis-delivery or detention was not added to risk note B. This view seems to have been taken by Das and Adami, JJ., in S. A. no. 1289 of 1923, and I entirely agree with the reasons given by Das, J., in his judgment.

There seems to be a sharp divergence in the decisions of this Court as well as of the other High Courts. The trend of the recent decisions of the other High Courts, however, notably of the Calcutta High Court, seems to be in favour of the view taken by me [vide *East Indian Railway* v. *Jagpat Singh* (1), *Gopi Ram Behary Ram* v. *Agent, East Indian Railway* (2), *Ganesh Lal* v. *East Indian Railway* (3), *Badri Prasad* v. *Great Indian Peninsular Railway* (4), *Mohan Singh* v. *Great Indian Peninsular Railway* (5), *East Indian Railway* v. *Firm Mukha Lal* (6) and *Ghelabhuai Punsi* v. *East Indian Railway Company*(7)]. All the decisions for and against have been summarised in VII Pat. L. T. pages 77n to 86n.

I have, therefore, no hesitation in agreeing with the decision delivered by my learned brother and I would therefore allow the appeal.

Appeal allowed.

(1) (1924) I. L. R. 51 Cal. 615.
(2) (1926) 30 Cal. W. N. 209.
(3) (1924) 80 Ind. Cas. 426.
(4) (1924) 80 Ind. Cas. 725.
(5) (1883) I. L. R. 7 Bom. 478.
(6) (1923) I. L. R. 45 All. 575.
(7) (1921) I. L. R. 45 Bom. 1201.

PATNA HIGH COURT
13 MAR
LIBRARY.

PRIVY COUNCIL.

J. C. 1926.

July, 30.

JAGDISHWAR NARAYAN

v.

MUHAMMAD HAZIQ HUSSAIN.*

Bengal Land-Revenue Sales Act (XI of 1859), section 33 —Validity of Sale—Notice of Sale—Error in area stated— Absence of objection on appeal to Commissioner.

A notice of sale under the Bengal Land-revenue Sales Act, 1859, for arrears of revenue stated correctly the ijmali share to be sold and the revenue payable in respect of it, but understated the area of one of the mauzas, the error being about 1½ bighas out of a total of 158 bighas to be sold. No objection on the ground of the error was made on an appeal to the Commissioner under section 25 of the Act, and it was not proved that any substantial injury had been sustained thereby.

Held, that a suit to set aside the sale could not be maintained having regard to section 33 of the Act:

Quaere: Whether section 33 would have precluded the suit if, as was alleged but not proved, the sale had been at a date earlier than was permissible under the Act.

Mahant Krishna Dayal Gir v. *Syed Abdul Gaffar* (1), disapproved.

Judgment of the High Court reversed.

Appeal (no. 124 of 1924) from a decree of the High Court (August 13, 1923) affirming a decree of the Subordinate Judge of Monghyr.

The suit was brought by the respondents against the appellant to set aside a sale, under the Bengal Land Revenue Act, 1859, of an ijmali share in an estate for arrears of revenue.

The facts are stated in the judgment of the Judicial Committee.

* PRESENT: Viscount Cave, L.C., Lord Justice Warrington and Chief Justice Anglin.

(1) (1917) 2 Pat. L. J. 402.

The High Court, affirming the decree of the trial Judge, set aside the sale. The learned Judges (Das and Macpherson, JJ.) were bound by the decision of the High Court in *Mahant Krishna Dayal Gir* v. *Syed Abdul Gaffar* (1) to hold that an error in the area of the land as stated in the notice of sale made it wholly invalid, and that consequently section 33 of the Act did not preclude the suit although no objection on the above ground had been raised on an appeal to the Commissioner under section 25 and no substantial injury was proved.

1926 July 13 *Dunne, K. C.* and *Hyam* for the appellant.

Abdul Majid, for the respondents.

Reference was made in the decision above mentioned, also (for the appellant) to *Govind Lal Roy* v. *Ramjanam Misser* (2); for the respondents to *Bhawani Kuer* v. *Afzal Hussain* (3), *Haji Buksh Elahi* v. *Durlav Chandra Kar* (4), and *Balkishan Das* v. *Simpson* (5).

July 30. The judgment of their Lordships was delivered by—

VISCOUNT CAVE, L. C.—This is an appeal from a decree of the High Court of Judicature at Patna affirming a decree of the Subordinate Judge of Monghyr, by which a sale of certain land under the Bengal Land Revenue Sales Act (XI of 1859) was set aside as invalid.

The suit related to a portion of an estate known as Chak Maharuddin Khatik bearing no. 3309 on the Tauzi of the Collectorate of Monghyr, and paying an annual revenue to the Government of Rs. 129-13-0. The estate had belonged to a number of proprietors in several shares, but in respect of some of the shares separate accounts had been opened under section 11

(1) (1917) 2 Pat. L. J. 402.
(2) (1893) I. L. R. 21 Cal. 70; L. R. 20 I. A. 165.
(3) (1907) I. L. R. 34 Cal. 361.
(4) (1912) I. L. R. 39 Cal. 981; L. R. 39 I. A. 177.
(5) (1898) I. L. R. 25 Cal. 833; L. R. 25 I. A. 151.

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of the Act, leaving a residue belonging to the respondents jointly and bearing an annual revenue of Rs. 80-9-0 payable by quarterly instalments. By a rule made by the Board of Revenue under section 3 of the Act, the latest dates for the payment of all arrears of revenue in respect of this and other estates had been determined to be the 7th June, 28th September, 12th January and 28th March.

It appeared by the books of the Collector of the district, that on the 7th June, 1917, the sum of Rs. 1-11-9 was in arrear and unpaid in respect of the residuary share of the estate belonging to the respondents jointly, and accordingly on the 5th August, 1917, the Collector gave notice in accordance with the Act that the ijmali (or joint) share constituting the residue of the estate would be put up for sale by auction on the 24th September, 1917, for the arrear of revenue; and at the auction held on that date the appellant was the highest bidder for the share and was declared the purchaser at the price of Rs. 850.

On the 10th December, 1917, some of the respondents preferred an appeal to the Commissioner of Revenue under section 25 of the Act against the sale, alleging a number of irregularities in the sale (none of which are now relied upon) and that it was a hardship that property which they alleged to be worth a very large sum should be sold on account of an arrear of only Rs. 1-11-9 for Rs. 850. The Commissioner, having heard the appeal, found on the 8th February, 1918, that no material irregularity had been disclosed or indeed pressed in argument; as regards the plea of hardship, he said that the then appellants appeared to be habitual defaulters and that accordingly he felt precluded from making a recommendation to the Board on the ground of hardship. The appeal was accordingly dismissed, and the appellant paid his purchase-money and was let into possession of the property on the 29th April, 1918.

On the 7th February, 1919, the present suit was instituted by some of the respondents against the

appellant, praying that the sale might be set aside, the other respondents (who had been co-proprietors with the plaintiffs) being made co-defendants. The Subordinate Judge framed issues for trial, of which the following only are now material:—

"9. Whether there was any arrear due in respect of the kist for which the sale took place?

"10. Is the sale liable to be set aside?"

The suit was heard by the Subordinate Judge who, on the 31st January, 1920, delivered judgment, holding that the sale was void on two grounds. First he held (under issue 9) that the sum of Rs. 1-11-9 in respect of which the sale was made, did not become payable under the settlement and kistbundi of the mahal until the 7th June, 1917, and accordingly did not become an arrear under section 2 of the Act until the 1st July, 1917; and this being so, he held that the latest date for payment of the arrear under section 3 of the Act was the 28th September, and accordingly that the sale on the 24th September was irregular. Secondly he held (under issue 10) that one of the mauzas included in the property sold, which was described in the notification of sale as containing 17 cathas 19 dhurs, in fact contained 2 bighas 15 cathas 12 dhurs, and accordingly that the sale must be deemed to be a sale of a portion only of the residuary share and not of the whole, and was therefore made without jurisdiction. He accordingly made a decree setting the sale aside.

On an appeal by the first defendant (the present appellant) to the High Court at Patna, that Court (consisting of Das, J. and Macpherson, J.) disagreed with the Subordinate Judge on the first ground of his judgment, holding on the documents that there was an arrear in respect of which the 7th June, 1917, was the latest day for payment. They further held that in any case this objection, not having been taken on the appeal to the Commissioner of Revenue, was not open to the plaintiffs in the suit. Upon the second point dealt with by the Subordinate Judge the Court held itself bound by the decision of a Full Bench of

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the High Court in *Mahant Krishna Dayal Gir* v. *Syed Abdul Gaffar* (1), to affirm the decision of the Subordinate Judge; and accordingly, while expressing their dissent from the decision in the case cited, and agreeing with the dissenting judgment of Chapman, J., in that case, they dismissed the appeal. It is against this decision of the High Court that the present appeal is brought.

With reference to the first ground upon which the learned Subordinate Judge rested his decision, their Lordships agree with the High Court in holding that it has no foundation in fact. Their Lordships entirely accept the contention, put forward on behalf of the respondents, that if the sum in question in fact became payable on the 7th June, 1917, it did not become an arrear under section 2 of the Act until the 1st July, and that in that case the latest date for payment under section 3 of the Act and the rule made by the Board of Revenue was the 28th September, so that a sale on the 24th September was irregular. This view of the law is in accordance with the decision of this Board in *Haji Buksh Elahi* v. *Durlav Chandra Kar* (2). But the argument depends for its validity upon the assumption that under the settlement and kistbundi of the mahal the amount in question did not become payable until the 7th June, 1917, and for the reasons given by the learned Judges of the High Court their Lordships do not accept that assumption. The result of an examination of the Collector's books, of the grounds of appeal to the Commissioner of Revenue and his replies, and of the pleadings in the suit, is to make it plain that the sum in question became due at some time before the 1st June, 1917, and so became an arrear on that date; and if so, the latest date for payment of the amount under section 3 of the Act and the rules of the Board was the 7th June, 1917, so that a sale on the 24th September was regular. Upon this view of the facts it is unnecessary to consider whether, if the sale had been shown to be

(1) (1917) 2 Pat. L. J. 402.

(2) (1912) L. R. 39 I. A. 177.

premature, section 33 of the Act would have been an answer to this objection.

The second ground taken by the learned Subordinate Judge in his judgment is of a different nature. It appears to be the fact that, while the property offered for sale, namely the ijmali share which formed the residue of the estate, was correctly described on the face of the notice of sale, and the revenue payable in respect of it (namely Rs. 80-9-0) was correctly given, there was an error in the details of the area of the property noted on the reverse side of the notice, this error amounting to about $1\frac{1}{2}$ bighas out of a total of 158 bighas. It was not alleged or proved that the price given for the property was affected by the misdescription, nor was the point raised on the appeal to the Commissioner; but it has nevertheless been held on the authority of the previous decision of the High Court that the misdescription was sufficient to invalidate the sale. The correctness of the decision under this head depends upon the effect to be given to section 33 of the Act of 1859, which provides as follows:—

"No sale for arrears of revenue, or other demand realizable in the same manner as arrears of revenue are realizable, made after the passing of this Act, shall be annulled by a Court of Justice except upon the ground of its having been made contrary to the provisions of this Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of: and no such sale shall be annulled upon such ground, unless such ground shall have been declared and specified in an appeal made to the Commissioner under section XXV of this Act; and no suit to annul a sale made under this Act shall be received by any Court of Justice unless it shall be instituted within one year from the date of the sale becoming final and conclusive, as provided in section XXVII of this Act."

At first sight this section appears to be a complete answer to this part of the case. The effect of it is that, in order that a sale may be annulled by the Court, a plaintiff must prove (1) that the sale was made contrary to the provisions of the Act, (2) that he had sustained substantial injury by reason of the irregularity complained of, and (3) that he specified the irregularity in question in his appeal to the Commissioner; and in the present case, while it may be assumed that the sale under an inaccurate description was contrary to the provisions of the Act, it is

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plain that the plaintiffs proved no substantial injury by reason of the misdescription and did not raise the point before the Commissioner. But it was held in the case cited, which the High Court felt itself bound to follow, that the section had no application to such a case; and the point for decision is whether that view is correct.

In the Patna case cited (1), as in the present case, the residuary share of an estate was offered for sale and the sadr jama of the residuary share was correctly stated in the notice of sale; but an error was made in stating the particulars of the property, a small interest being omitted from those particulars. An appeal to the Commissioner had failed as having been preferred out of time, and on a suit being brought to set aside the sale, it was not proved that the error had seriously prejudiced the sale; but the Full Bench, holding that the Collector must be taken to have offered for sale less than the whole amount of the residuary share and that he had no jurisdiction so to do, set the sale aside. In other words, they held (as Das, J. put it in his judgment in the present case) that the existence of the Collector's jurisdiction to sell, and not its exercise only, was affected. No doubt that decision covered the present case, and the High Court was under an obligation to follow it; but in their Lordships' opinion the decision cannot be sustained. In that case, as in this, the notice showed plainly the intention of the Collector to offer for sale the whole of the residuary share; for the expression "the ijmali share" which appeared upon the face of the notice, denotes (as Chapman, J. said in the case cited) the rights of those proprietors who have not opened separate accounts. Further, the sadar jama specified on the face of the notice was the amount payable in respect of the whole residuary share. The intention to offer the whole residue for sale was, therefore, clear; and although an error occurred in noting on the reverse side of the notice the particulars of the area of the property, that was an error in the exercise

(1) (1917) 2 Pat. L. J. 402.

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of the Collector's powers and had no effect on his jurisdiction. This being so, it might have been made the subject of an appeal to the Commissioner, and the omission to specify the point as a ground for that appeal is a bar to its being raised in suit. The point is stated with admirable lucidity in the judgment of Das, J., with which Macpherson, J., concurred; and their Lordships are entirely satisfied with his reasoning on this point.

It is only necessary to add that it would be regrettable if the title of a purchaser under the Act of 1859 were liable to be impeached by suit in respect of a trifling error which is not proved, as in *Ravaneshwar Prasad Singh* v. *Baijnath Ram Goenka* (1), to have substantially affected the price given for the property. As was pointed out by the Board in *Gobind Lal Roy* v. *Ranjanam Misser* (2) the first persons to suffer by such an interpretation of the Act would be the defaulting proprietors, for the effect would be to deter purchasers from bidding freely at a Revenue sale.

Counsel for the respondents attempted to raise a further point, based on an alleged breach of duty by one of the defendants in not paying the amount due for revenue; but this argument, which was negatived by the Subordinate Judge and was abandoned in the argument before the High Court, is not now open to the respondents.

For the above reasons their Lordships are of opinion that this appeal should be allowed, and that judgment in the suit should be entered for the first defendant (the present appellant) with costs here and below, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Barrow, Rogers and Nevill.*

Solicitors for respondents: *Chapman, Walker and Shephard.*

(1) (1914) I. L. R. 42 Cal. 897; L. R. 42 I. A. 79.
(2) (1898) I. L. R. 21 Cal. 70, 83; L. R. 20 I. A. 166, 175.

REVISIONAL CRIMINAL.

Before Ross and Kulwant Sahay, JJ.

1926.

August, 3.

ABDUL HAMID

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 235, 269(3), 423(2), 494—*Joint trial of offences triable by jury and offences triable with the aid of assessors—acquittal on charges triable by jury—trial on other charges by some of the jurors as assessors—convictions—retrial ordered by appellate court—whether whole case re-opened—re-trial only on charges triable with the aid of assessors—validity of re-trial.*

Out of nineteen persons accused in the present case one was charged under section 436, Penal Code, ten others were charged under section 380 and all under section 147. The offences under sections 436 and 380 are triable by jury and the offence under section 147 by the Court of Sessions with the aid of assessors. The jury acquitted the accused of the charges under section 436 and 380. Four of the five jurors were appointed by the Assistant Sessions Judge for trial of the charge under section 147 and they were of opinion that the accused were not guilty. With respect to twelve of the accused persons the Judge differed from this opinion and convicted them. In appeal the Sessions Judge hold that the trial was illegal inasmuch as he was of opinion that under section 369(3), Criminal Procedure Code, all the five jurors should have been appointed as assessors; he ordered a re-trial of the twelve persons who had been convicted. The latter were re-tried on the charge under section 147, Penal Code, and the assessors were again of opinion that they were not guilty. The Assistant Sessions Judge differed from their opinion and convicted them. On appeal the Sessions Judge set aside the convictions of five of them. Of the remaining seven, five had originally been convicted on charges triable

* Criminal Revision no. 399 of 1926, from an order of S. B. Dhavle, Esq., I.C.S., Sessions Judge of Monghyr, dated the 27th of May, 1926, modifying the order of Babu Ram Chandra Chowdhury, Assistant Sessions Judge of Monghyr, dated the 10th of March, 1926, on remand, the original order being dated the 7th December, 1925; the order of retrial by the Sessions Judge is dated the 4th January 1926.

by jury. All seven moved the High Court to order a re-trial on the ground, inter alia, that both the first and second trials were illegal.

Held, per *Ross*, *J.*—(*i*) that if the first trial was a nullity and if the accused persons considered that they were being prejudiced in the second trial by being tried only on the charge under section 147, Penal Code, they ought to have raised the objection before pleading to the charge; and that prejudice being a question of fact it was impossible to hold in revision that there had in fact been any prejudice;

Ram Krishna Reddi v. *Emperor* (1) and *Amiruddin* v. *Farid Sirkar* (2), referred to;

(*ii*) that the order of the Sessions Judge, since it did not contain any express words of limitation, had to be construed with reference to the proceedings before him, and inasmuch as the appeal before him was only in respect of the convictions under section 147, the order, by necessary implication directed a re-trial of the charge under section 147 only, and such a limited order was not bad;

Krishnadhan Mandal v. *Queen Empress* (3), *Nizamuddin* v. *Emperor* (4) and *Queen Empress* v. *Jabanulla* (5), referred to;

(*iii*) that where there has been the verdict of a jury acquitting the prisoners of certain charges, and that verdict has not been impugned by way of appeal by the Crown, it is opposed to principle that the prisoners should again be put on trial for the same offences.

Per *Kulwant Sahay*, *J.*—(*i*) where a joint trial is held under section 235, Criminal Procedure Code, and the accused is charged with offences some of which are triable by jury and some by the Sessions Judge with the aid of assessors, the joint trial must be held as provided by section 269(3) (i.e., all the jurors must be appointed as assessors) otherwise the whole trial is illegal; (*ii*) that the re-trial ordered by the Sessions Judge re-opened the whole case and the accused could have been tried again for all the offences originally charged. But at the re-trial it was open to the Public Prosecutor to confine himself to some only of the charges; (*iii*) that the failure of

(1) (1903) I. L. R. 26 Mad. 598.
(2) (1882) I. L. R. 8 Cal. 481.
(3) (1895) I. L. R. 22 Cal. 377.
(4) (1913) I. L. R. 40 Cal. 163.
(5) (1896) I. L. R. 23 Cal. 975.

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the Public Prosecutor to obtain the sanction of the court under section 494, Criminal Procedure Code, to the withdrawal of a charge, is a mere irregularity.

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

ROSS, J.

Hasan Imam (with him *S. Sharfuddin* and *S. P. Varma*), for the petitioners.

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

Ross, J.—As the result of an occurrence which took place on the 1st of April, 1925, nineteen persons were committed to the Court of Session at Monghyr for trial. One was charged under section 436 of the Indian Penal Code, ten under section 380 and all under section 147. The charges under section 436 and 380 were triable by jury and the charge under section 147 by the Court of Sessions with the aid of the jurors as assessors under section 269 (*3*) of the Code of Criminal Procedure. The Assistant Sessions Judge, who tried the case, appointed only four of the five jurors as assessors. The jury unanimously found the accused not guilty under sections 436 and 380 and they were acquitted. The four assessors were of opinion that the nineteen accused were not guilty under section 147. The Assistant Sessions Judge differed from them with regard to twelve of the accused and convicted them and sentenced them to eight months' rigorous imprisonment each, acquitting the other seven. These twelve persons appealed to the Sessions Judge who held that the trial was illegal, because only four of the jurors had been chosen as assessors instead of the whole five; and he set aside the conviction and ordered a retrial. These twelve persons were retried under section 147 only; and the four assessors were again of opinion that they were not guilty. The Assistant Sessions Judge again differed from the assessors and, convicting them under section 147, passed the same sentence as before. Five were acquitted by the Sessions Judge on appeal

while the appeals of the remaining seven were dismissed. It is now contended on behalf of the seven petitioners in revision that both the first and the second trials were illegal and that therefore there ought to be a retrial of the petitioners (five of whom had been committed for trial on charges triable by jury) on all the original charges; secondly, that the Courts below have made errors of record and have failed to consider material evidence and that there ought to be at least a rehearing of the appeal; and, thirdly, that in view of the nature of the occurrence and the manner in which the petitioners have been harassed by these protracted proceedings, the sentences are too severe.

On the first point it is contended that the original trial was a nullity, because the Court was not properly constituted In *Ram Krishna Reddi* v. *Emperor* (1), the trial was defective in the same manner as in the present case. The question now raised was not discussed; but it may be mentioned that an appeal against the verdict of the jury was dismissed while the appeal against the conviction of the offence triable by the Judge with assessors was allowed on the ground of illegality. But it is not necessary to decide whether the trial was a nullity, because, if it was, then only the second trial has to be considered and, in that trial, the only charge to which the accused were required to plead was the charge under section 147. If the accused thought that they were being prejudiced by the non-prosecution of the other charges (and it is difficult to see how they could have been prejudiced by a procedure which was obviously favourable to them) then they ought to have raised the objection before pleading to the charge actually laid against them. Prejudice is a question of fact; but the question was never raised and it is impossible therefore to hold now that there was any prejudice in fact. It may also be pointed out in this connection that section 235 of the Code is an enabling section and does

(1) (1903) I. L. R. 26 Mad. 598.

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not necessitate the inclusion of all the charges triable under that section in one trial [*Amiruddin* v. *Farid Sircar* (1)].

It was further contended that, when the Sessions Judge ordered a retrial, the whole case was necessarily re-opened and the charges on which the accused had been acquitted by the jury revived; and the Court ought to have been constituted as required by section 269 (*3*). In support of this contention, learned Counsel referred to the decisions in *Krishnadhan Mandal* v. *Queen Empress* (2), *Nizamuddin* v. *Emperor* (3), *Queen Empress* v. *Jabanulla* (4) and other cases in which these decisions have either been followed or referred to but which throw no independent light on the subject. The question turns on the construction of section 423 (*i*)(*b*) of the Code. Section 423 (*2*) lays down that:

> "nothing herein contained shall authorize the Court to alter or reverse the verdict of the jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him."

If the first argument that the original trial was a nullity be accepted, then this sub-section will have no effect, because there is no verdict of a jury to consider. But the effect of that argument has already been discussed. For the purposes of the present argument it must be assumed that there was a verdict of the jury; and, in that case, this sub-section would be a complete bar to a retrial for the offences on which the jury had returned a verdict of not guilty. *Nizamuddin's* case (3) and *Jabanulla's* case (4) were cases of trials with assessors and, therefore, they do not assist in dealing with the present question. The only case which is really in point is *Krishnadhan Mandal's* case (2). There the trial was by jury and the conviction was set aside on the ground of misdirection and a retrial was ordered. The question after the second trial was whether a conviction in respect of an offence of which the accused had been acquitted at the previous

(1) (1882) I. L. R. 8 Cal. 481.
(2) (1895) I. L. R. 22 Cal. 377.
(3) (1913) I. L. R. 40 Cal. 163.
(4) (1896) I. L. R. 23 Cal. 975.

trial could be maintained; and it was held that in cases falling within section 236 of the Criminal Procedure Code where a retrial is ordered without any express limitation, it must be taken to mean a retrial of the whole case But the Judges were careful to point out that in cases not falling under section 236, that is to say, where an accused person is charged at one trial with distinct offences constituted by distinct acts, a different principle would apply; and, with regard to that class of cases nothing was decided. But that is the case with which we are now concerned and in that matter there is an indication in *Krishnadhan Mandal's* case (1) that it is governed by a different principle; and that is obvious. In cases falling within section 236 there is one set of facts which may be viewed in different ways. When a retrial is ordered the whole facts are necessarily re-opened and nothing can prevent the jury from coming to any verdict that they consider right upon the facts proved before them. But where there are two different sets of facts and a verdict has been given on one set which no one impugns, then it is difficult to see why, when an appeal is brought on the other set of facts, the order for retrial should re-open both. There is certainly no authority for the proposition that a retrial necessarily opens up the whole case, at all events where a verdict of the jury is concerned. On the contrary, *Krishnadhan Mandal's* case (1) distinctly contemplates the possibility of a limited trial. In the present case it is true that the learned Sessions Judge merely ordered a retrial without any express words of limitation; but his order must be construed with reference to the scope of the proceedings before him; and all that was being dealt with was an appeal from a conviction under section 147. I would therefore hold that the order, by necessary implication, was an order for retrial of the charge under section 147 only; and I find no authority for the proposition that in a case of this nature such a limited order is bad. On the other hand it seems clearly opposed to princi-

(1) (1895) I. L. R. 22 Cal. 377.

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ple that, where there has been a verdict of a jury acquitting the prisoners of certain charges and that verdict has not been impugned by way of appeal by the Crown, the prisoners should again be put in peril for the same offences. I am therefore of opinion that the order of retrial and the trial which followed upon it were both valid in law.

On the merits of the case, learned Counsel contended that the Courts below had misconstrued the orders in certain proceedings under section 147 of the Code of Criminal Procedure and, in particular, the trial Court had erred in holding that Exhibit 9 referred to plot no. 540 which is in question in the present case and that in the judgment (Exhibit 8) it was found that there was no encroachment by the complainant in this case upon the Nullah of which plot no. 540 was a part. The order (Exhibit 9) is of no material importance; and with regard to Exhibit 8 all that the learned Assistant Sessions Judge said was that the Magistrate held that there was no encroachment on plot no. 540 so as to cause obstruction to the right of passage; and that is strictly correct.

Then it is said that the trial Court misconstrued a saneha [Exhibit 2(*a*)] which is represented as stating that a breach of the peace was apprehended. The learned Judge gives the substance of the saneha and adds that a breach of the peace was apprehended. Whether this was stated in the saneha or was his inference from the facts stated therein, is altogether immaterial.

The third point was that the evidence with regard to the existence of a room C shown in the sketch map (Exhibit 4) prepared by the head-constable has not been properly considered and, in particular, that of the Deputy Superintendent of Police. The learned Assistant Sessions Judge has given reasons for doubting the correctness of the sketch map. It is true that he has not expressly referred to the evidence of the Deputy Superintendent of Police whose signature appears on the document. But the Sessions

Judge in dealing with this part of the case has observed that the Deputy Superintendent did not check Exhibit 4 on the spot. He therefore clearly considered the evidence of the Deputy Superintendent of Police and thought that it did not establish the correctness of the sketch map.

It was next contended that the trial Court had erred in examining the Sub-Inspector of Police as a Court witness. The prosecution did not trust the Police investigation in this case. It was evidently desirable that the evidence of the investigating officer should be taken and I see no illegality in his being examined by the Court in order to give both parties an opportunity to cross-examine him.

Finally it was urged that no sufficient weight has been given to the facts that persons were injured on both sides and that this was concealed by the prosecution. The case for the prosecution was that, after the riot had taken place, the rioters in retiring had driven away some cattle. The Courts below have found that in all probability there was some scuffle in connection with this. I can see no defect in this part of the judgments; and the Courts below have given good reasons for holding that the substantive case of the defence arising out of the impounding of cattle was false. On the merits, therefore, there is no ground for this Court to interfere.

The question of sentence remains to be considered. The petitioners have been put to the expense of two trials before the Court of Sessions and two appeals and that was the direct result of a mistake in procedure committed at the original trial for which the petitioners were in no way responsible. In that view it does not seem to me proper that the same sentence that had been inflicted at the first trial should be maintained, especially as the riot, which arose out of a dispute about a passage for water, was not in itself an occurrence of any very great gravity, the accused having been acquitted of the more serious charges.

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While upholding the conviction, I would set aside the sentence of imprisonment and in lieu thereof would impose fines of Rs. 100 each upon Abdul Hamid, Syed Mohammad Nawab, and Syed Abdul Halim and of Rs. 50 each upon Pairu, Jamait, Akloo and Bhobi Kahar and in default of payment a sentence of one month's rigorous imprisonment each.

KULWANT SAHAY, J.—I agree. I, however, desire to say that I am inclined to accept the contention of the learned Counsel for the petitioners that the first trial was a nullity. Section 235 of the Criminal Procedure Code is no doubt an enabling section, and does not prevent a separate trial under section 233 But where a joint trial is held under section 235 and the accused is charged with offences some of which are triable by jury and some by the Sessions Judge with the aid of assessors, the joint trial must be held as provided by section 269(*3*), otherwise the whole trial will be illegal. In such joint trial the accused is entitled to have the opinion of all the jurors as assessors in relation to offences not triable by jury. In the case now before us the jury no doubt returned a verdict of not guilty as regards the offences triable by jury, but if they had returned a verdict of guilty and the accused had been convicted upon such verdict there would clearly have been a case of prejudice to the accused, if at the retrial, such trial was confined only to charges for offences not triable by jury. Section 269(*3*) provides for certain advantages to the accused, such as trial by jurors as assessors for offences not triable by jury and it would be manifestly illegal to deprive him of such advantages by splitting up the trial. I am therefore inclined to hold that the retrial ordered by the Sessions Judge re-opened the whole case and the accused could have been tried again for all the offences they were charged with. The first trial being illegal and without jurisdiction, section 423(*2*) would have no application, inasmuch as there would be no verdict of a jury to consider. But at the retrial it was open to the Public

Prosecutor to confine himself to some only of the charges. Section 494 no doubt lays down that the consent of the Court is first to be obtained, but the failure to obain such consent would amount to a mere irregularity and on the analogy of the principle involved in section 536(2) the second trial cannot be held to be invalid, inasmuch as no objection was taken by the accused to such trial.

Order varied.

REVISIONAL CRIMINAL.

Before Ross and Kulwant Sahay, JJ.

GANPAT LAL

v.

KING-EMPEROR.*

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August, 4.

Code of Criminal Procedure, 1898 (Act V of 1898), sections 423(1)(b), 439(4)—conviction altered by appellate court—High Court in revision may re-alter it—Legal Practitioner, duty of.

The petitioner having been charged and convicted of abetting an offence under section 205, Penal Code (false personation for doing any act for the purpose of a suit or prosecution), appealed to the Sessions Judge who was of opinion that upon the facts established the offence did not come within section 205/109 but within section 419 (cheating by personation) and altered the conviction to one under that section.

Held, that the petitioner had not been acquitted of the offence under section 205/109 and, therefore, that section 439(4), Code of Criminal Procedure, was not a bar to the High Court in revision from re-altering the conviction of the petitioner from one under section 419 to one under section 205/109.

* Criminal Revision no. 438 of 1926, from a decision of A. C. Davies, Esq., I.C.S., Sessions Judge of Patna, dated the 18th June, 1926, modifying a decision of Babu R. N. Sahi, Magistrate, First Class, of Patna, dated the 25th May, 1926.

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Per *Kulwant Sahay, J.*—A legal practitioner should not draft and sign a petition of compromise and an affidavit in a case in which he was not engaged from before and in which he knows that other lawyers were engaged, without consulting the latter.

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

Nageshwar Prasad, for the applicant.

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

KULWANT SAHAY, J.—The petitioner was charged with an offence punishable under section 205/109 of the Indian Penal Code and the Subdivisional Magistrate of Patna convicted him of the offence charged and sentenced him to six months' rigorous imprisonment. On appeal the learned Sessions Judge found that upon the facts established in the case the offence did not come within section 205/109 but under section 419, and he accordingly set aside the conviction under section 205/109 and altered it to one under section 419 maintaining the sentence passed by the learned Magistrate.

The petitioner admits that he is a tout and his occupation is to introduce litigants to lawyers and that as such he introduced two persons, who called themselves Sital Prasad and Bihari Mahto, to Mr. *X*, an advocate of this Court, with the object of preparing a petition of compromise to be filed in two Miscellaneous Appeals pending in this Court in which one Ram Narain was the appellant and Musammat Pan Kuer was the respondent. A typed copy of a petition of compromise was handed over to Mr. X which was in Roman character and was originally intended to be filed in the Court of the Subordinate Judge, but it was represented to him that as the records of the suits were in the High Court in connection with the two Miscellaneous Appeals the petition of compromise could not be filed in the Subordinate Judge's Court, and the parties were directed to file the petition in

the High Court, and Mr. X was asked to draft a petition of compromise to be filed in the High Court in the above two Miscellaneous Appeals. Mr. X did prepare a petition of compromise and did actually sign the same as Advocate for the appellant and also signed the affidavit which was to be sworn in support of the application as having been prepared in his office. Another lawyer had to be engaged to represent the respondent and Mr. Brij Kishore Prasad a practising Vakil of this Court is alleged to have been engaged on behalf of the respondent and to have signed the affidavit which was to be sworn by the karpardaz for the respondent. The two affidavits had to be sworn and it was necessary that some one should identify the persons who were to swear the affidavits before the Commissioner of Oaths. The prosecution case is that the petitioner Ganpat Lal asked Sardanand, the clerk of Mr. A. K. Gupta, another Vakil of this Court, to identify Sital Prasad as karpardaz for Pan Kuer, and he asked Ram Chander, the clerk of Mr. *X*, to identify Bihari Mahto who was to swear the affidavit as karpardaz for the appellant Ram Narain. On the assurance of the petitioner that the two individuals who were to swear the affidavits were Sital Prasad and Bihari Mahto the karpardazes of Musammat Pan Kuer and Ram Narain, the two clerks Sardanand and Ram Chander identified those two individuals before the Commissioner of Oaths, and the affidavits were duly sworn. The petition of compromise was then filed before the Registrar of this Court; but subsequently it transpired that the whole affair was a fraud and that no compromise had in fact been effected between the parties to the litigation and that the persons who swore the affidavits were not the real Sital Prasad and the real Bihari Mahto the karpardazes of the parties to the appeals. The matter was enquired into by the Registrar of this Court and it was found that the compromise was not entered into by the parties and that the affidavits had not been sworn by the real Sital Prasad and the real Bihari Mahto, and that the

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signature of Mr. Brij Kishore Prasad on the affidavit was a forgery. Proceedings were then taken under section 476 of the Criminal Procedure Code against the petitioner and the Registrar ultimately lodged a complaint against the present petitioner, and the petitioner was accordingly placed on his trial charged with an offence punishable under section 205/109 of the Indian Penal Code.

Both the Courts below have found that there was a false personation in connection with the affidavits sworn before the Commissioner of Oaths in this Court; that the individuals who swore the affidavits were not the real Sital Prasad and the real Bihari Mahto and that the petitioner, Ganpat Lal, did ask the two clerks, Sardanand and Ram Chander, to identify the two individuals as Sital Prasad and Bihari Mahto, and that on the assurance of the petitioner the said two clerks identified them before the Commissioner of Oaths.

Upon the facts found there can be no doubt that an offence punishable under section 205 had been committed and that the petitioner did abet the commission of that offence. It is contended on behalf of the petitioner that like the two clerks who identified the two individuals, he was himself deceived and that he did not know that those two individuals were not the real Sital Prasad and the real Bihari Mahto. The Courts below have considered the circumstances of the case and have come to the finding that the petitioner knew that those two individuals were not the real Sital Prasad and the real Bihari Mahto and that knowing this he did ask the clerks to identify them before the Commissioner of Oaths. Mr. *X* who drafted the petition of compromise and did actually sign the petition of compromise and the affidavits as having been prepared in his office was not a counsel in the appeals from before. The appeals had been filed by a different lawyer and Mr. *X* had nothing to do with the appeals before the petitioner took the two individuals to him and asked him to draft the

petition of compromise. The fact that the petitioner did not take those two individuals to the lawyers who were engaged in the appeals from before is significant; and it is certainly regrettable that a counsel of the position of Mr. *X* should draft and sign a petition of compromise and an affidavit in a case in which he was not engaged from before and in which he must have known that other lawyers were engaged, on certain individuals being introduced to him by a tout (1) and without a Vakalatnama from the party concerned. However, the findings are that the petitioner did know that the two individuals were not the real karpardazes of the parties.

It is contended on behalf of the petitioner that the learned Sessions Judge has relied upon the statement of the petitioner before the Registrar of this Court made in connection with the proceedings under section 476 of the Criminal Procedure Code, and that this statement was not evidence in the case. In my opinion the whole proceeding under section 476 being before the Court, it was open to the learned Sessions Judge to refer to the statement of the petitioner made in the course of the proceeding.

It is next contended that the conviction of the petitioner under section 205/109 having been set aside and the petitioner having been acquitted of the offence under that section, the learned Sessions Judge was wrong in law in convicting the petitioner under

(1) Mr. *X* subsequently moved for deletion from the judgment of the words " on certain individuals being introduced to him as a tout ". The Court passed the following order: This is an application on behalf of Mr. *X* praying that certain passages quoted in the application should be expunged from the judgment of the Criminal Revision Case no. 438 of 1926. Objection is taken to the passage contained in paragraph 2 of the petition. I can only say that I never intended to convey any impression that Mr. *X* knew that Ganpat Lall was a tout and that he received instructions from Ganpat Lall knowing him to be a tout. We only expressed our regret that he should have accepted the brief simply for the purpose of filing a petition of compromise in a case in which other lawyers had been engaged from before without any reference to those lawyers and from a person who subsequently turned out to be a tout on his own admission although this was not known to Mr. *X* at the time.

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section 419 Penal Code. I am of opinion that it was open to the learned Sessions Judge under the provisions of section 423(1)(b), Criminal Procedure Code, to alter the finding of the Magistrate from an offence under section 205/109 to one under section 419, Penal Code, while maintaining the sentence passed by the learned Magistrate. The learned Sessions Judge no doubt used the expression that the conviction of the petitioner under section 205/109, Penal Code, " must be set aside "; but that does not amount to an acquittal of the petitioner. In the very next sentence he expressly states that the point for consideration for him was whether he should alter the finding and convict the petitioner of an offence punishable under any other section of the Indian Penal Code. The facts found were not upset by the learned Sessions Judge. He agreed with the Magistrate as regards his findings upon the evidence and the only question for consideration before him then was whether upon those findings the petitioner was punishable under section 205/109 or any other section of the Indian Penal Code. He came to the conclusion that the facts found did not constitute an offence under section 205/109 but one under section 419 and he accordingly altered the finding upon the facts as found by the learned Magistrate and convicted the petitioner under section 419 maintaining the sentence passed by the Magistrate. I am, however, of opinion that the facts found did constitute an offence under section 205/109. There was a false personation and an admission or statement was made by the two individuals who swore the affidavits in an assumed character and the presentation of the petition before the Registrar did constitute an act in a suit and, therefore, all the ingredients necessary to constitute an offence punishable under section 205 were established. The learned Sessions Judge was of opinion that the false personation was not in respect of some act in a suit: it was in his opinion

" no doubt in respect of an act for the purposes of a suit, but it could not be said to have been in a suit."

I confess I am unable to follow the reasoning of the learned Judge. The presentation of the petition of compromise before the Registrar was clearly an act in a suit and the affidavits were sworn for the purpose of being presented in the appeals pending in this Court and purported to be an act in the suit. I am, therefore, of opinion that the original conviction of the petitioner under section 205/109 was correct, and it was not necessary for the learned Sessions Judge to alter the finding and to convert the conviction from one under section 205/109 to one under section 419. I therefore hold that the petitioner was rightly convicted by the trying Magistrate under section 205/109.

It is contended that this Court cannot in revision convert a finding of acquittal into one of conviction, and reliance has been placed upon section 439(4) of the Criminal Procedure Code. It is clear that this contention has no substance. There was no acquittal by the learned Sessions Judge of the offence under section 205/109, Penal Code. The learned Sessions Judge, as I have already observed, did not acquit the petitioner but he merely altered the finding of the Magistrate, and such alteration had not the effect of acquittal of the accused of the offence under section 205/109, Penal Code. Clause (4) of section 439 of the Criminal Procedure Code, therefore, does not prevent this Court from re-altering the conviction of the petitioner from one under section 419 to one under section 205/109, Penal Code.

The result is that the conviction of the petitioner is altered to one under section 205/109 and the sentence of six months' rigorous imprisonment is maintained. The offence is a serious one and the sentence passed is not severe.

ROSS, J.—I agree.

Order varied.

REVISIONAL CRIMINAL.

Before Ross and Kulwant Sahay, JJ.

1926.

August, 10, 12.

NIRSU NARAYAN SINGH

v.

KING-EMPEROR.*

Penal Code, 1860, (*Act XLV of* 1860), *section* 499 *and* 500—*defamation—Advocate—privilege of, whether absolute or qualified—Crown, onus on, to prove malice—inference as to malice, whether question of law.*

The liability of an advocate charged with defamation in respect of words spoken or written in the performance of his professional duty depends on the provisions of section 499, Penal Code, 1860; the court will presume good faith unless there is cogent proof to the contrary.

The privilege is not absolute but qualified, but the burden is cast upon the prosecution to prove absence of good faith.

Satish Chandra Chakravarty v. *Ram Dayal De* (1), followed. In re. *Nagarji Trikamji* (2), *Upendra Nath Bagchi* v. *Emperor* (3), *Emperor* v. *Purshottamdas Ranchhoddas* (4), and *Nikunja Behari Sen* v. *Harendra Chandra Sinha* (5), referred to.

Per *Kulwant Sahay, J.*—The common law of England, under which an Advocate can claim absolute privilege for words uttered in the course of his professional duty, is not applicable to India.

An Advocate in this country, therefore, is not entitled to claim absolute privilege, and, in cases of prosecution for defamation, his liability must be determined on reference to the provisions of section 499, Penal Code, 1860.

* Criminal Revision no. 505 of 1926, from an order of Ananta Nath Mitter, Esq., Sessions Judge of Saran, dated the 30th of July, 1926, dismissing an appeal against the order of Babu Pushkar Thakur, Deputy Magistrate of Chapra, dated the 29th of June, 1926.

(1) (1921) I. L. R. 48 Cal. 388, S. B. (3) (1909) I. L. R. 36 Cal. 375.
(2) (1895) I. L. R. 19 Bom. 340. (4) (1907) 9 Bom. L. R. 1287.
(5) (1914) I. L. R. 41 Cal. 514.

Satish Chandra Chakravarty v. *Ram Doyal De* (1), followed. *Sullivan* v. *Norton* (2) and In re. *P. Venkata Reddy* (3), not followed.

The question whether upon the facts found or proved malice has been established is a question of law.

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

S. Sinha (with him *S. K. Banerji* and *S. M. Mullick*), for the petitioner.

Sultan Ahmed, Government Advocate for the Crown.

August, 12.

ROSS, J.—In 1923 there was an election for the Bihar Legislative Council. Two of the rival candidates were Nirsu Narayan Singh, the petitioner, and Rai Bahadur Chandraketu Narayan Singh. The latter was successful; and the former disputed the validity of the election on various grounds. One of these grounds was that Zainuddin Khan, the Sub-Inspector of Police of Masrakh thana, had used undue influence in procuring the votes of the chowkidari presidents of his thana for Chandraketu Narayan Singh. An enquiry was held by commissioners; and, in that enquiry, one Radhakant Prasad, a president, gave evidence for the petitioner to the effect that at the thana the head constable gave them a message from the Sub-Inspector to say that they were to support the candidature of Chandraketu Narayan Singh. The commissioners found that the charge of undue influence was untrue.

In December 1925, Zainuddin Khan prosecuted one Sheomangal Bari, a servant of Beni Prasad, a brother of Radhakant Prasad, for an offence under the Arms Act. The petitioner, who is an Advocate of this Court, defended the accused in that case. Part

(1) (1921) I. L. R. 48 Cal. 338, S. B. (2) (1887) I. L. R. 10 Mad. 28.
(3) (1913) I. L. R. 36 Mad. 216.

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of the defence was that the Sub-Inspector had an old grudge against Radhakant Prasad and, therefore, had concocted a false case against his brother's servant. Zainuddin Khan was cross-examined on the subject of the election; and Radhakant Prasad gave evidence for the defence stating that he gave his vote as desired by the Daroga to Chandraketu Narayan Singh, but that he advised his tenants to vote for the petitioner. He also said that he had given evidence for the petitioner in the case about the election. During his argument in that case, the petitioner said that

> "The Sub-Inspector might have been given silver tonic in the matter of election between him and Rai Bahadur Chandraketu Narayan Singh to side [sic] the latter."

The Sub-Inspector then laid a complaint of defamation against the petitioner on these words. The petitioner was convicted by the Deputy Magistrate of Chapra and sentenced to one week's simple imprisonment and a fine of Rs. 1,000 under section 500 of the Indian Penal Code. An appeal against the conviction was dismissed by the Sessions Judge of Saran. The present application in revision is directed against that conviction.

The law on the subject has been full discussed by a special Bench of the Calcutta High Court in *Satish Chandra Chakravarty* v. *Ram Doyal De* (1). That was not a case about the position of an Advocate in defending a client; but all the cases on this subject were referred to. It was held that, if a party to a judicial proceeding is prosecuted for defamation in respect of statements made therein on oath or otherwise, his liability must be determined by a reference to the provisions of section 499 of the Indian Penal Code; that the question must be solved by the application of the provisions of the Indian Penal Code and not otherwise; that the Court cannot engraft thereupon exceptions derived from the common law of

(1) (1921) I. L. R. 48 Cal. 388, S. B.

England or based on grounds of public policy. Consequently a person in such a position is entitled to the benefit of the qualified privilege mentioned in section 499 of the Indian Penal Code. The cases dealing with Advocates were also referred to as ruling that the liability of a pleader charged with defamation in respect of words spoken or written in the performance of his professional duty depends on the provisions of section 499 of the Indian Penal Code; and that the Court would presume good faith unless there is cogent proof to the contrary. The privilege is not absolute, but qualified; no doubt the burden is cast upon the prosecution to prove absence of good faith. In re *Nagarji Trikamji* (1), which was followed in *Upendra Nath Bagchi* v. *Emperor* (2) their Lordships, without deciding whether Advocates have or have not an unqualified privilege from criminal prosecution, said: "In considering whether there was good faith, that is under section 52, due care and attention of the person making the imputation must be taken into consideration. That of an Advocate is well expressed by the Master of the Rolls in the passage cited above [i.e., *Munster* v. *Lamb* (3)]. He speaks from instructions; he reasons from facts sometimes true sometimes false. He draws inferences from these facts sometimes correct sometimes fallacious. He does not express his own inferences, his own opinions or his own sentiments, but those which he desires the Tribunal, before which he appears, to adopt. This duty the law allows, almost compels him to perform. Such being his duty it seems to us that where express malice is absent (and it ought not be presumed) the Court having due regard to public policy would be extremely cautious before it deprived the Advocate of the protection of exception 9". In *Upendra Nath Bagchi's* case (2) their Lordships referred to *Emperor* v. *Purshottamdas Ranchhoddas* (4) where it was said that "when a

(1) (1895) I. L. R. 19 Bom. 340.
(2) (1909) I. L. R. 36 Cal. 375.
(3) (1882) 11 Q. B. D. 588.
(4) (1907) 9 Bom. L. R. 1287.

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pleader is charged with defamation in respect of words spoken or written while performing his duty as a pleader, the Court ought to presume good faith and not hold him criminally liable unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as pleader for an indirect purpose". This decision was followed in *Nikunja Behari Sen* v. *Harendra Chandra Sinha* (1) where it was held that a pleader is entitled to the presumption of good faith and that, to rebut that presumption there must be convincing evidence that the pleader was actuated by improper motives personal to himself, and not by a desire to protect or further the interests of his client's case. These cases were referred to without being dissented from in the decision of the Special Bench. The law therefore is this that while a case of defamation against an Advocate is governed by section 499 of the Indian Penal Code, good faith has to be presumed in his favour; and it is for the prosecution to prove that he was actuated by malice and by indirect motives personal to himself.

That the words which form the subject of the charge were used by the petitioner is not disputed. It was argued on his behalf that the prosecution ought to have shown the context in which the words were used. It seems to me that if the defence relied upon the context as minimising the effect of the words, that ought to have been established by the defence. The first question for decision is whether the words are defamatory. The meaning of the words is plain although it is not expressed grammatically. The words mean that the Sub-Inspector actively supported the candidature of Chandraketu Narayan Singh and that he might have been doing this for money. Both the Courts below have interpreted this as meaning that the Sub-Inspector was bribed. If this means the sense of section 161 of the Indian Penal Code,

(1) (1914) I. L. R. 41 Cal. 514.

then the construction is certainly wrong, because it is not suggested that anything that he did in the matter of the election was doing or forbearing to do an official act or in the exercise of official functions. On the contrary, as the Magistrate has pointed out, Government servants are strictly prohibited under their rules from helping candidates in elections. The words therefore come to this that the Sub-Inspector was acting as an election agent for Chandraketu Narayan Singh and might have been paid for his work. Used of a private person, such language would not be defamatory; but, it is said that, inasmuch as Government servants are prohibited from taking an active part in elections, these statements would have got the Sub-Inspector into trouble with his superiors. But the mere statement that he canvassed for a candidate would also have had this effect; and, as has been shown above, there was evidence on the record to justify the Advocate in making that statement at all events. The argument of the petitioner in the case under the Arms Act appears to have been this that the Sub-Inspector was acting on behalf of Chandraketu Narayan Singh in the election and that Radhakant Prasad had not carried out his directions; and, therefore, the Sub-Inspector had got up a false case against a servant of his brother; and, to strengthen the argument, it was suggested as a link in the chain of reasoning that the Sub-Inspector might have had a pecuniary interest in the matter.

This leads to the consideration of the main question in the case, viz., whether the petitioner in advancing this argument was actuated by malice and indirect motives of his own. His own statement was that whatever he suggested in cross-examination of the prosecution witnesses and commented in argument was based upon instructions he received from his client and on the record of the case; and that statement is supported by the evidence of one of his colleagues, Rai Bahadur Birendra Chandra Chakravarti, an Advocate, who was examined in the trial as a prosecution witness. It was objected that no suggestion

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was made to the Sub-Inspector either in the trial of the case under the Arms Act or in the present trial, or to Radhakant Prasad, that the Sub-Inspector had been paid and that no such suggestion was made before the commissioners in the election case. As the Sub-Inspector denied throughout that he had acted at all for Chandraketu Narayan Singh, it is not clear that anything would have been gained by putting any further question. Neither side thought fit to put the question to Mr. Chakravarti. But it is not clear that it was for the petitioner to put the question when he made the statement that the petitioner acted and said everything on instructions; while it was for the prosecution to establish malice by positive evidence. The prosecution mainly relies on the relations between the Sub-Inspector and the petitioner arising out of the election. The Sub-Inspector says that the petitioner's impression was that Rai Bahadur Chandraketu Narayan Singh had succeeded through his efforts and hence the malice of the accused against him. It is not clear from what his knowledge of this impression was derived and it seems in the last degree improbable that the petitioner should have thought anything of the kind: he himself denies that this was his impression. It is also said that, after the decision of the commissioners, this statement must have been malicious; and that is the ground upon which both the Courts below have proceeded. But the question before the commissioners was as to the exercise of undue influence over the chowkidari presidents by the Sub-Inspector in his official position. The present statement has no connection with any such idea. In fact the trial Court based its finding entirely on the result of the election petition. The learned Sessions Judge seems to have deduced malice from the absence of instruction on this particular point and from the fact that the commissioners had decided in favour of the Sub-Inspector. But even if it be true that, in making his comments on the evidence the petitioner went beyond his instructions, this would not in itself amount to

proof of malice; and the decision on the election petition is wholly immaterial. Consequently I am unable to find any evidence that the petitioner was actuated by malice or indirect motives of his own in arguing as he did; and would therefore hold that he is entitled to the benefit of the ninth exception. It follows that the conviction and the sentence must be set aside and the petitioner must be acquitted and released from bail.

KULWANT SAHAY, J.—I agree. Learned Counsel for the petitioner commenced his argument by referring to the common law of England that no action, civil or criminal, lies against Judges, counsel, witnesses, or parties, for words spoken in the ordinary course of any proceeding before any court or tribunal recognized by law, and a reference was made to *Munster* v. *Lamb* (1).

Now, under the common law of England, an Advocate can claim an absolute privilege for words uttered in the course of his duty as an Advocate. But this law is not applicable to this country. The question was considered at great length by a Special Bench of the Calcutta High Court in *Satish Chandra Chakravarti* v. *Ram Doyal De* (2) where it was held that if a party to a judicial proceeding is prosecuted for defamation in respect of a statement made therein, on oath or otherwise, his liability must be determined by reference to the provisions of section 499 of the Indian Penal Code. The Court cannot engraft thereupon exceptions derived from the common law of England, or based upon grounds of public policy. Consequently, a person in such a position is entitled only to the benefit of the qualified privilege mentioned in section 499 of the Indian Penal Code. This was a case of a party to a judicial proceeding and not of an Advocate. But the case of an Advocate does not stand on a different footing, and all the authorities bearing on the subject were cited in the decision of the

(1) (1882) 11 Q. B. D. 588. (2) (1921) I. L. R. 48 Cal. 388, S. B.

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Special Bench referred to above. We must, therefore, accept the proposition that an Advocate in this country is not entitled to an absolute privilege and in cases of prosecution for defamation his liability must be determined on reference to the provisions of section 499 of the Indian Penal Code. The Madras High Court has taken a different view. In *Sullivan* v. *Norton* (1) a Full Bench of that Court held that an Advocate in India cannot be proceeded against civilly or criminally for words uttered in his office as Advocate. In re: *P. Venkata Reddy* (2) a similar view was expressed as regards the common law doctrine of absolute privilege. But all the other Courts are agreed in holding that this doctrine is not applicable to this country. Mr. Sinha, although he began by a reference to this doctrine of the common law of England, subsequently accepted that the law laid down by the Special Bench of the Calcutta High Court was the correct law. We have, therefore, to consider whether the petitioner is entitled to take protection under the ninth exception to section 499 of the Indian Penal Code.

Mr. Sinha has raised four points in defence of his client: First, that the petitioner was acting on instructions; secondly, that the words uttered by the petitioner and forming the subject matter of the charge, detached from the context do not convey any adequate idea of the meaning of the expression used by the petitioner, and they are not in themselves such as to make the petitioner liable on a charge of defamation; thirdly, the meaning to be attached to the words used by the petitioner does not necessarily amount to defamation; and lastly, that there was a presumption of bonafides in favour of the petitioner, and it was for the prosecution to prove malice, and that they have failed to do so.

It has been held by the learned Sessions Judge that in using the expression forming the subject

(1) (1887) I. L. R. 10 Mad. 28. (2) (1913) I. L. R. 36 Mad. 216.

matter of the charge, the petitioner was not acting on instructions. Learned Counsel for the petitioner draws our attention to the deposition of Rai Bahadur Birendra Chandra Chakravarti, an Advocate of this Court, practising in the Courts at Chapra, who was examined as prosecution witness no. 4. This witness was the colleague of the petitioner in the case against Sheomangal Bari, and he stated in his deposition

"My colleague Nirsu Babu acted and said everything on instruction."

The petitioner when examined under section 342 of the Criminal Procedure Code stated that whatever comment he made in the course of the argument was based upon instructions received from his client. It is contended by the learned Government Advocate that if the petitioner wanted to escape liability on the ground of his uttering the words forming the subject matter of the charge upon instructions received from his client, it was incumbent upon him to prove such instructions. The learned Sessions Judge observes that the prosecution witness no. 4 was not specifically asked whether Nirsu Narayan Singh had instructions regarding the "silver tonic". It is contended by Mr. Sinha that it was not for the petitioner to cross-examine the witness upon this point, but it was for the prosecution to do so, and he refers to section 126 of the Indian Evidence Act. I am of opinion that, having regard to the nature of the charge against the petitioner, the answer elicited from the prosecution witness no. 4 in cross-examination, as quoted above, discharged the onus that lay upon the accused, and the evidence of the prosecution witness no. 4 that the petitioner said everything on instruction must be held to refer to the charge brought against the petitioner. It is contended that there was no suggestion in the examination of the Sub-Inspector as a witness in the Arms Act case as regards his taking any remuneration for his taking the side of Rai Bahadur Chandraketu Narayan Singh in the election matter and, therefore,

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the petitioner could have no instruction upon the point. The mere fact that no question was put to the effect would not necessarily lead to the conclusion that the petitioner had no instruction. The petitioner had elicited the point in the cross-examination of the prosecution witnesses, and it was not necessary for him to adduce any further evidence upon the point. The question, however, as to whether he was acting under instructions or not is of importance in connection with the question as to whether the petitioner was actuated by malice, and this is the really important question to be decided in this case.

It is conceded by the learned Government Advocate that the onus lies on the prosecution to prove malice in the case of Advocates. The learned Magistrate also placed the onus upon the prosecution. He, however, found that malice had been proved. It is contended that this is a finding of fact, which cannot be interfered with in revision. I am of opinion that the question whether upon the facts found or proved malice has been established is a question of law. The only evidence of malice consists of the deposition of the Sub-Inspector Zainuddin Khan. He stated: "Babu Nirsu Narayan Singh's impression was that Rai Bahadur Chandraketu Narayan had succeeded through my efforts and hence the accused's malice against me". I fail to see how he could speak of what the impression of the accused was. The evidence is that he never met the accused after the election dispute. The election dispute had ended about 18 months previously. I am of opinion that the prosecution have failed to prove malice, and the petitioner is entitled to acquittal. I would, however, desire to observe that Advocates in discharge of their onerous and sacred duties must be very careful not to give rise to the faintest suspicion of a personal element in their speech or action as Advocates.

APPELLATE CIVIL.

Before Adami and Macpherson, JJ.

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Bengal Tenancy Act, 1885, (*Bengal Act VIII of* 1885), *sections* 161(*a*) *and* 167—*non-transferable occupancy holding, mortgage of, whether is an incumbrance—auction-purchaser, whether bound to annul the mortgage—section* 167, *scope of—landlord purchaser, position of, whether different from that of tenant purchaser— mortgagee, whether entitled to redeem auction purchaser.*

An usufructuary mortgage of a non-transferable occupancy holding is an incumbrance within the meaning of section 161(*a*), Bengal Tenancy Act, 1885. A purchaser of the holding at a rent sale must annul such incumbrance within one year, as required by section 167 of the Act, or he loses all right to annul it. *Chaudhry Mahadeo Prasad* v. *Sheikh Azmat* (1), followed.

Lala Murlidhar v. *Surat Lal Chowdhary*, (2), *Jognarain Singh* v. *Badri Das* (3), *Sital Chandra Majhi* v. *Parbati Charan Chakrabarti* (4), and *Bidhumukhi Dasi* v. *Bhaba Sundari Dasi* (5), distinguished.

The position of a landlord purchasing a holding at a rent sale is different from that of an ordinary purchaser, who in fact steps into the shoes of the original tenant and becomes a tenant of the landlord. A tenant-purchaser of a non-transferable occupancy holding cannot, on the ground of non-transferability, eject a mortgagee whose incumbrance has not been annulled under section 167.

A purchaser at a rent sale who has not, under section 167, annulled a mortgage of the holding is, however, entitled to

* Appeal from Appellate Decree no. 333 of 1924, from a decision of Ashutosh Chattarji, Esq., District Judge of Darbhanga, dated the 5th July, 1923, affirming the decision of Babu Satyaranjan Prasad Sinha, Munsif of Darbhanga, dated the 24th March, 1923.

(1) (1920) 1 Pat. L. T. 108.
(2) (1922) 3 Pat. L. T. 362.
(3) (1912) 16 Cal. L. J. 156.
(4) (1922) 35 Cal. L. J. 1.
(5) (1919-20) 24 Cal. W. N. 961.

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redeem the mortgage; but the mortgagee cannot redeem or otherwise exercise his right of redemption as against the auction-purchaser. *Bidhumukhi Dasi* v. *Bhaba Sundari Dasi* (1) and *Sital Chandra Majhi* v. *Parbati Charan Chakravarti* (2), followed.

S. M. Meherunnessa v. *Sham Sundar Bhuiya* (3), not followed.

A. B. Chiodetti v. *Quadress* (4) and *Surat Lal Chowdhury* v. *Lala Murlidhar* (5) distinguished.

Appeal by the plaintiffs.

This appeal arose out of a suit for a declaration that the sale of the properties in suit was brought about by fraud and without the knowledge and information of the plaintiffs who claimed, as mortgagees, the right of redemption as against the purchaser at an auction sale in execution of a rent decree.

Defendant no. 3 held under defendant no. 2 a holding of 6 bighas odd and he mortgaged to the plaintiffs 4 bighas odd with possession. The arrangement was that the mortgagor was to pay the rent to the landlord. The mortgagor, defendant no. 3, however, defaulted in paying the rent to the landlord with the result that the latter obtained two rent decrees against him, and, in execution of those decrees, the holdings were sold and were purchased at the auction sale by defendant no. 1. The plaintiffs, as mortgagees, were in possession but defendant no. 1 sought to obtain possession under his purchase and the result was that the present suit was brought.

The purchaser, defendant no. 1, did not take any steps to annul the incumbrance of the mortgage, and, therefore, the plaintiffs contended that they were entitled, as second mortgagees, to redeem the purchase by paying to defendant no. 1 the purchase money.

Though there was no allegation in the pleadings that the holding was transferable or non-transferable,

(1) (1919-20) 24 Cal. W. N. 961.
(2) (1922) 35 Cal. L. J. 1.
(3) (1901-02) 6 Cal. W. N. 834.
(4) (1916) 1 Pat. L. J. 161.
(5) (1919) 4 Pat. L. J. 362.

the learned Munsif held that in the absence of any evidence as to transferability without the consent of the landlord, the holding must be considered to be a non-transferable holding, since unless there is proof of a custom of transferability it will be taken that a holding is not transferable without the consent of the landlord. Finding then that the holding was not transferable, the learned Munsif held that the mortgage of the plaintiffs was not binding or valid against the landlord, and therefore the mortgage was invalid, and the plaintiff could not claim to redeem under it. He also found that the plaintiffs had failed to show that the sales in execution of the rent decrees had been brought about by fraud or surreptitiously. He therefore dismissed the plaintiffs' suit.

Before the learned District Judge in appeal the only question argued was that the Munsif was wrong in holding that the mortgage of the plaintiffs was not an incumbrance and was of no validity since the holding was a non-transferable holding. The learned District Judge thought that the question depended upon a finding whether the plaintiffs' mortgage was an incumbrance which it would be necessary for the purchaser to annul. He considered the cases of *Surat Lal Chowdhury* v. *Lala Murlidhar* (1) and *Lala Murlidhar* v. *Surat Lal Chowdhury* (2) and, coming to the finding that it was settled that the mortgagee can under the circumstances fall back upon his mortgage as a shield, considered the question whether the mortgage can be relied upon as a shield as against the claim of the auction-purchaser in a rent sale. He noticed that in *Ch. Mahadeo Prasad* v. *Sheikh Azmat* (3) it was found that the interest of the plaintiffs in the present case would be an incumbrance which the auction purchaser would have to avoid under section 167 of the Bengal Tenancy Act. But he followed the decision of Ross, J., in *Lala Murlidhar* v. *Surat Lal Chowdhury* (2) to the effect that the

(1) (1919) 4 Pat. L. J. 362. (2) (1922) 3 Pat. L. T. 362.
(3) (1920) 1 Pat. L. T. 108.

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mortgage of a non-transferable occupancy holding cannot effectively create a lien in limitation of the interest of the original tenant. He then considered the position where a tenant mortgages the entire holding with possession and then the landlord himself purchases the holding at a rent sale but fails to give notice under section 167: and he said

> "If the interest of the mortgagee be held to be an incumbrance he will be entitled to redeem the landlord by paying the decretal amount and will thereby be entitled to get possession. But the old tenant having already ceased to have any connection with the holding the landlord can at once treat the holding as abandoned and sue the mortgagee for khas possession without paying up his mortgage"; and he remarked that the result would be that the mortgagee would not only lose the land but also lose the money paid to the landlord for redemption of the mortgage. He then said: "The fact that in the present case the auction purchaser is not the landlord can make no difference as he by his auction purchase stands in the shoes of the landlord and also because the landlord himself also is a party to this suit."

L. K. Jha, for the appellants.

R. K. Jha, for the respondents.

ADAMI, J. (after stating the facts set out above, proceeded as follows): In my opinion the decision of the lower Courts is wrong. The lower Courts have held that, because the holding was a non-transferable one or was presumed to be such, the mortgage of a portion of the holding could not be held to be an incumbrance, as a mortgage of a non-transferable holding is invalid, and, since the mortgage of the non-transferable holding was invalid there could be no incumbrance which the auction purchaser at the rent sale would be bound to annul under section 167 of the Bengal Tenancy Act. My views on the questions raised in this second appeal have been given in the judgment in the case of *Ch. Mahadeo Prasad* v. *Sheikh Azmat* (1). There it was held that a usufructuary mortgagee of a non-transferable occupancy holding has an incumbrance under section 161(*a*) of the Bengal Tenancy Act which is an interest voidable on sale under section 170(*3*). It was

(1) (1920) 1 Pat. L. T. 108.

shown there, too, that there is nothing to show that section 161(*a*) of the Bengal Tenancy Act relates to transferable holdings only, and that the cases of a mortgagee and a purchaser are clearly distinguishable for a sale is not in limitation of, but is a destruction of, the interest of the tenant. The decisions of the lower Courts and the cases on which they have relied turn on the point that a holding being non-transferable, there can be no incumbrance. But taking it for granted that the general rule is that an occupancy holding is non-transferable and it is only in exceptional cases where a custom is proved, that the holding will be held to be transferable, it is strange that sections 161 and 167 make no exception in the case of non-transferable holdings, and in fact in those sections there is no mention of a transferable or non-transferable holding at all. Plainly the Legislature intended those sections to apply to all holdings and did not confine them to those that are transferable.

In the case of *Lala Murlidhar* v. *Surat Lal Chowdhury* (1) Ross, J., remarks—

"This holding is non-transferable. The mortgage was a transfer and was, therefore, of no effect as against the holding or the person who purchases the holding in a rent execution. Such a mortgage cannot effectively create a lien in limitation of the interest of the original tenant. It would operate not by force of any title to the holding created thereby but by way of estoppel. In my opinion, therefore, the holding stands free of encumbrance and the plaintiff is not entitled to redeem ".

The facts in that case were distinguishable from the present one inasmuch as the mortgagee had already sued upon his mortgage and obtained a decree before the landlord instituted a suit against the mortgagor for rent, while in the present case the mortgagee has not yet sued upon his mortgage. In that case it would appear that the Court was influenced by the

(1) (1922) 3 Pat. L. T. 362.

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fact that the landlord himself purchased the holding in execution of his rent decree and the transfer of a non-transferable holding would not be valid as against the landlord. Here the defendant auction purchaser is not the landlord and it has to be borne in mind that where a landlord purchases in execution of a rent decree, all the conditions applying to an ordinary purchaser apply to him and his position as landlord has to be considered separately. In that case it may have been true that the transfer by mortgage was not valid against the purchaser qua the landlord. The fact of the matter is that it would be valid against the purchaser qua the purchaser, and he would be required to do all that a purchaser is required to do; if he wanted to annul an incumbrance only, as landlord, he would be able to treat the mortgage of the non-transferable holding as not binding upon him.

The learned District Judge has stated in his judgment that the purchaser at the auction sale steps into the landlord's shoes, but I cannot hold that this is a fact. The purchaser becomes a tenant of the landlord and does not step into the landlord's shoes.

In the present case the purchaser defendant is not the landlord, and it would fall upon him, if he wanted to get rid of the incumbrance, to annul the incumbrance as required by section 167 of the Bengal Tenancy Act. The mortgagee, plaintiff, is still in possession, and the landlord, if he likes, can take action to dispossess him if he has not given consent to the transfer, but the tenant purchaser, the defendant, could not so eject him on the ground of non-transferability.

I have not repeated the arguments used by this Court in *Ch. Mahadeo Prasad* v. *Sheikh Azmat* (1), but I adhere to them, and am of the opinion that the mortgage of the plaintiff was an incumbrance which, under section 167, the purchaser at the rent sale must annul within one year or lose all right to annul the incumbrance.

(1) (1920) 1 Pat. L. T. 108.

The appellant has relied on the cases of *Jognarain Singh* v. *Badri Das* (1) and *Sital Chandra Majhi* v. *Parbati Charan Chakrabarti* (2), but in those cases the question as to transferability was not raised. Similarly the cases of *Bidhumukhi Dasi* v. *Bhaba Sundari Dasi* (3) and *Sital Chandra Majhi* v. Parbati *Charan Chakrabarti* (2) are strongly in favour of the view I have taken, but in those cases, too, the question of transferability was not raised. The fact is that probably in these cases it was taken that sections 167 and 161 relate to non-transferable holdings as well as transferable holdings. In the latter case it was held that a sale for arrears of rent does not ipso facto cancel a mortgage on the holding, being an incumbrance. The procedure provided by section 167 of the Bengal Tenancy Act is the only mode of annulling the incumbrance, and the purchaser must have recourse to the prescribed mode within the specified period, if he desires to annul the incumbrance, and a landlord purchaser in a rent sale is, like any other purchaser, bound to follow the provisions of section 167. A mortgage of a non-transferable holding without the consent of the landlord may make the incumbrance invalid so far as the landlord is concerned but it cannot be said that the mortgage is altogether invalid, for it will be valid against the tenant who created it, and in the same way it will be valid against the person who purchases at a sale in execution of a rent decree obtained against the tenant. The defendant in this case failed to annul the incumbrance within one year and therefore the holding remained subject to the mortgage.

I must hold, therefore, that in the present case the plaintiff, since the incumbrance has not been annulled, is entitled to remain in possession until the mortgage be redeemed.

(1) (1912) 16 Cal. L. J. 156. (2) (1922) 35 Cal. L. J. 1.

(3) (1919-20) 24 Cal. W. N. 961.

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The question then arises whether the plaintiff can redeem the mortgage as he has claimed to do in the plaint. I am of opinion that he cannot redeem as against the defendant.

It is argued that rent being a first charge on the holding, the defendant, as purchaser at the rent sale, has a first charge and has priority over the charge of the mortgagee.

In the case of *Surat Lal Chowdhury* v. *Lala Murlidhar* (1) Roe and Coutts, J.J., holding that a purchaser under a rent decree is not liable to be ousted by a person who purchases the same property in execution of a mortgage decree, stated

" It is settled law so far as this Court is concerned, by the decision in *A. B. Chiodetti* v. *Quadress* (2) by Mr. Justice Mullick, upheld in Letters Patent by Chief Justice Chamier and Mr. Justice Sharfuddin, that in a suit to recover possession he (the mortgagee) could not possibly have succeeded though he might have succeeded in a suit to redeem the mortgage by payment of the amount due under the rent decree This decision is in accordance with the decision in *Meherunnissa* v. *Sham Sundar Bhuiya* (3). The purchaser under the mortgage decree could not oust the purchaser under the rent decree even though there had been no notice under section 167. He might be regarded as a second mortgagee ".

As a matter of fact while Roe and Coutts, JJ. state only that the mortgagee might be regarded as a second mortgagee, in the Letters Patent decision the point was left open and there was no specific statement that as a matter of fact the mortgagee might be regarded as a second mortgagee; and in *A. B. Chiodetti* v. *Quadress* (2) there was no actual decision that the mortgagee could have a right to redeem as against

(1) (1919) 4 Pat. L. J. 362. (2) (1916) 1 Pat. L. J. 161.

(3) (1901-02) 6 Cal. W. N. 834.

the auction purchaser. In *Bidhumukhi Dassi* v. *Bhaba Sundari Dassi* (1) it was held that the purchaser at a rent sale was entitled to redeem the mortgagee purchaser, and that a purchaser at a rent sale who does not annul a subsisting mortgage incumbrance upon the holding, does not acquire priority over the purchaser at a subsequent sale in execution of a decree obtained on a mortgage by reason of the rent being a first charge upon the holding under section 65 of the Bengal Tenancy Act. In that case Chatterjea and Newbould, JJ. stated—

"No doubt section 65 of the Bengal Tenancy Act lays down that rent shall be a first charge. But the analogy does not go further than that. In the first place, in ordinary mortgage transactions, a prior mortgagee must make the puisne mortgagees parties to a suit on the mortgage in order that the sale held in execution of the decree might be binding upon them; but the mortgagee of a holding or tenure is not made a party to a suit for rent by the landlord, and he is not bound to do so, although the rent is a first charge; and the mortgagee cannot bring a suit for redemption or otherwise exercise his right of redemption after the rent sale, on the ground that he was not a party to the rent decree and was not bound by the sale".

The learned Judges in that case pointed to sections 159, 161 and 167 and proceeded:—

"So that notwithstanding that section 65 provides that 'rent shall be a first charge' on a tenure or holding, the purchaser must take steps as laid down in section 167 for annulling the mortgage. If he does not do so within the time specified in section 167, the mortgage remains an incumbrance even though the purchaser at the rent sale may be in the position of a first mortgagee".

The defendant was in fact the purchaser of the equity of redemption and it was, therefore, open to him to redeem the mortgage.

(1) (1919-20) 24 Cal. W. N. 961.

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Similarly in the present case I am of opinion that the defendant would be in a posiiton to redeem the mortgage of the plaintiff, and that the reverse position cannot be held by the plaintiff.

In *Sital Chandra Majhi* v. *Parbati Charan Chakrabarti* (1), Sir Asutosh Mookerjee and Panton, JJ., held that relative rights of the purchaser at a rent sale and the mortgagee should be determined with reference to their position at the time of the rent sale; and if the purchaser at the rent sale has not availed himself of the privilege of annulling the mortgage within his prescribed period he holds the property subject to the mortgage and is entitled to redeem. It is true that in the case of *S. M. Meherunnessa* v. *Sham Sundar Bhuiya* (2) it was held that where in execution of a decree for arrears of rent a raiyati holding was sold and purchased by the landlord, and the plaintiff, a mortgagee of the raiyati holding, whose mortgage was not annulled, brought a suit to enforce the mortgage, the mortgagee was entitled to enforce the mortgage on payment of the money due under the rent decree and that the mortgagee might be regarded as a second mortgagee. But I am inclined to follow the decisions of the Calcutta High Court which I have mentioned above and cannot agree with this latter decision or follow the reasons given therein.

The result is that the claim in this suit being for redemption by the plaintiff, the plaintiff must fail, for he has not the right of redemption. He is in possession and will be entitled to remain in possession until he is redeemed by the defendant auction purchaser.

I think that each party should pay his own costs in this appeal.

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

(1) (1922) 35 Cal. L. J. 1.

(2) (1901-02) 6 Cal. W. N. 834.

APPELLATE CIVIL.

Before Adami and Macpherson, JJ.

JAGDEO SINGH

v.

RAM SARAN PANDE.*

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August, 18.

Pujapat, partibility of right to perform—custom, existence of—transfer in favour of non-Brahman—validity of—turn of worship, sale of, whether must be by registered instrument.

A transfer or partition of the right to perform pujapat and take the offerings may be made where there is a custom of transferability and partibility provided the transferee belongs to the class to which the custom applies.

Mahamaya Debi v. Haridas Haldar (1), followed.

Srimati Mallika Dasi v. Ratanmani Chackervarty (2), not followed.

Where, by custom, the right of performing pujapat and receiving the offerings was shared by a number of Brahman Pandas only, *held*, that a transfer of the office in favour of a non-Brahman was invalid, and that, the transferee being incompetent by reason of his caste to share in the performance of the pujapat, he could not claim a share in the offering.

Mahamaya Debi v. *Haridas Haldar* (1), relied on.

A turn of worship not being an interest in immoveable property, it is not necessary that a sale of the right should be by a registered instrument. A purchaser, therefore, is not debarred from adducing oral evidence of the sale alleged by him.

Eshan Chunder Roy v. *Mon Mohini Dassi* (3), and *Jati Kar* v. *Mukunda Deb* (4), followed.

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* Appeals from Appellate Decrees nos. 754 and 758 of 1924, from a decision of Ashutosh Chatterjee, Esq., Additional District Judge of Patna, dated the 17th March, 1924, modifying a decision of Maulavi Saiyid Ghalib Hasnain, Subordinate Judge, Second Court, of Patna, dated the 5th June, 1923.

(1) (1915) I. L. R. 42 Cal. 455.

(2) (1896-97) 1 Cal. W. N. 493.

(3) (1879) I. L. R. 4 Cal. 683.

(4) (1912) I. L. R. 39 Cal. 227.

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The appellant in second appeal no. 754 of 1924, was defendant no. 1. In second appeal no. 758 of 1924, the appellant was defendant no. 3.

These two appeals arose out of a suit in which the plaintiff sought for the partition of the right to do worship and take the offerings in the Sital Asthan in village Maghra. The right of performing the pujapath and receiving the offerings was shared between a number of Brahman Pandas who performed the worship and took the offerings in turns varying according to extent of their share. These turns were called palas. The right had been divided into 96 kauris. One Jhandu Pandey had a 12 kauris share and had certain days and parts of days allotted to him according to this share. On his death his palas descended to his son Shiv Charan Pandey, who sold a 2 kauris odd share to the ancestors of defendant nos. 1 and 2, and gave an ijara of the remaining 9 kauris odd share to one Mahabir Pandey. This ijara was redeemed by Shiv Charan in 1320. The plaintiff claimed to be the son of Shiv Charan, and it was his case that, as Shiv Charan died when he was only 8 or 9 years old, defendant no. 1, who also owned a share in the palas, was appointed as gomashta to look after the plaintiff's interest. When the plaintiff reached majority he called for an account from defendant no. 1, and then dismissed him from his service. In 1921 the plaintiff sold a 5 kauris share to defendant no. 3 who was not a Brahman. Having sold the 5 kauris share the plaintiff had only 4 kauris share left, and he sought in the suit to have this share partitioned, that is to say, to have a certain number of days allotted to him for his performance of the pujapath and his receipt of the offerings. He joined as parties defendants nos. 2 and 3. Defendants 2 and 3 did not oppose the partition, but defendant no. 1 denied, in the first place, that the plaintiff was the son of Shiv Charan, and also alleged that there could be no partition of the rights to do worship and take the offerings. Furthermore he asserted that Shiv

Charan had sold his 9 kauris odd share to defendant no 1, and, therefore, the plaintiff could have no claim to have the right partitioned.

The Subordinate Judge held that the right was partible, heritable and transferable, and also that the plaintiff was the son of Shiv Charan Pandey. He found that the plaintiff was entitled to a 9 kauris odd share and that defendant no. 1 had failed to prove that Shiv Charan had sold in 1899 the 9 kauris share to him.

On the question of possession, the Subordinate Judge held that the plaintiff was in possession of the share he claimed and was entitled to maintain the suit for possession. Defendant no. 2 was found to have no title as he did not join with defendant no. 1 in the purchase of the 2 kauris odd share from Shiv Charan. It having been objected that defendant no 3, not being a Brahman, could have no share in the right, the Subordinate Judge found that there were instances of transfer of shares to non-Brahmans, and that defendant no. 1 himself admitted that, in cases where the holder of the share could not himself perform the pujapath he could employ a competent person to carry out the duties and could get the offerings. On the findings a preliminary decree for partition was passed in the plaintiff's favour, and it was directed that a commissioner should be appointed to allot days and parts of days to each of the three cosharers interested in proportion to their shares.

On appeal, the additional District Judge found that plaintiff was the son of Shiv Charan and was entitled to succeed to Shiv Charan's rights. As there had been many instances of partition of the rights, the lower Appellate Court held that the right was partible and transferable.

With regard to the objection of defendant no. 1, that Shiv Charan had sold 9 kauris odd share to defendant no. 1, the District Judge held that any such alienation would be invalid as it could only be made

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by a registered instrument, and in this case there was no registered instrument to prove it. He therefore found that there was no proof of the alleged alienation, and, therefore, defendant no. 1 could not succeed in his plea. He also held that defendant no 1 had not been in adverse possession of the 9 kauris share. But with regard to defendant no. 3 the learned District Judge was of opinion that, as a non-Brahman could not perform the worship, there could be no valid transfer to defendant no. 3 and so he could not claim any share. He awarded the entire 9 kauris share to the plaintiff and modified the decree of the trial Court accordingly.

G. B. Prasad and *A. Prasad*, for the appellant in Appeal no 754 of 1924, and for the respondent in Appeal no 758 of 1924.

S. M. Mullick and *Sant Prasad*, for the respondent in Appeal no. 754 of 1924 and for the appellant in Appeal no. 758 of 1924.

ADAMI, J. (after stating the facts set out above, proceeded as follows): The first question which arises is whether the right to do the pujapath and receive the offerings is partible or not. Though in the case of *Srimati Mallika Dasi* v. *Ratanmani Chakervarty* (1) it was held that a pala or turn of worship of an idol was inalienable and that it would be contrary to public policy to allow offices like this to be transferred either by private sale or sale in execution of a decree, in the case of *Mahamaya Debi* v. *Haridas Haldar* (2) Mookerjee, J., considered the whole question, and, after the examination of a great many previous decisions, held that there was no question that, though probably religious offices were originally indivisible they are now deemed partible and in fact the very existence of palas or turns of worship shows that the right is partible. In that case there was evidence to show that a pala had not only been deemed heritable and partible, but it had also been treated

(1) (1896-97) 1 Cal. W. N. 498. (2) (1915) I. L. R. 42 Cal. 455.

as being divisible. He pointed out that a custom of this description could not be characterised on any rational ground as unreasonable or opposed to public policy.

In the present case both parties have shown by the evidence they produced that there have been numerous instances in which the right has been transferred and the defendant no. 1 himself can hardly urge that the right is inalienable, since it is his own case that Shiv Charan transferred the 9 kauris share to him. Mookerjee, J., in his judgment showed that the custom of transferability and partibility can be shown and acted on where the transfers relied on are transfers to persons who are eligible to perform the religious offices required.

From the judgments of the lower Courts it is clear that there have been many cases of transferability but there is no distinct finding that all the elements necessary for the proof of custom existed in the present case. But considering that defendant no. 1 himself claims under a transfer, I do not think that the Courts were wrong in coming to a finding that on the instances given by the parties there was sufficient basis for a finding that the rights of pala in the case of the Sital Asthan could be transferred and could be partitioned.

Defendant no. 1, as I have stated, claimed that he had purchased the rights which the plaintiff seeks to partition from Shiv Charan, and both the Courts have found that, as there is no registered deed, they could not take notice of any allegation of a verbal sale such as defendant no. 1 asserted had taken place between himself and Shiv Charan. The Courts below, however, are mistaken in thinking that a registered document was necessary. In the case of *Jati Kar* v. *Mukunda Deb* (1) it was held that a turn of worship is not an interest in immoveable property, and, therefore, attestation by witnesses to a mortgage

(1) (1913) I. L. R. 39 Cal. 227.

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bond would not be necessary under section 59 of the Transfer of Property Act. The decision in *Eshan Chunder Roy* v. *Mon Mohini Dassi* (1) is to the same effect: so that it was open to defendant no. 1 to produce oral evidence of the sale alleged by him. As the lower Appellate Court has not considered such evidence as defendant no. 1 may have adduced it is clear that the case will have to go back to the lower Court for examination of the evidence and a decision whether defendant no. 1 did in fact purchase the 9 kauris share from Shiv Charan.

The second appeal by defendant no. 3 is directed against the finding of the learned District Judge that, being a non-Brahman, he had not acquired any interest under his kabala. Defendant no. 3 is a Bhumihar Brahmin and as such it is contended by defendant no. 1 that he has no right to perform the worship in the Sital Asthan. There is nothing on the record to show us whether a Bhumihar Brahman is a Brahman for the purposes of performing the worship of the idol. If he is not a Brahman and cannot perform the worship in the temple, it is clear to my mind that he is not competent to share in the palas. The case of the plaintiff and of defendant no 3 is that though defendant no. 3 does not himself perform the pujapath he employs the plaintiff who is competent, being a Brahman, to do worship for him, and himself takes the offerings, giving the plaintiff a small remuneration. It is quite true that the offerings could be shared between the parties, but it certainly is equally true that defendant no. 3 if he is not a Brahman could not share in the performance of the pujapath, and this being so, as the right to perform the religious duty is bound up with the right to receive the offerings, defendant no. 3 could not claim to share in the right. The plaintiff has been performing the worship himself, and after he had received the offerings it was open to him to arrange

(1) (1870) I. L. R. 4 Cal. 683.

with defendant no. 3 that defendant no. 3 should get those offerings, but defendant no. 3 cannot claim a share in the right to worship, and therefore cannot claim any share in the partition of that right. Mookerjee, J. in *Mahamaya Debi* v. *Haridas Haldar* (1) has shown that where there is a custom of transferability or partibility, a transfer or partition can be made among a limited class who are covered by the custom, and it is clear that in the present case the custom, if any, is confined to the Brahmans and a custom of extending it to non-Brahmans is not established by the few instances given in evidence and it would not cover defendant no. 3 if he is a non-Brahman. Therefore I am of opinion that second appeal no. 754 of 1924 of Jagdeo Singh cannot succeed and should be dismissed with costs, but the defendant no. 3 is entitled to receive from the plaintiff his purchase money with interest from the date of delivery of possession after partition if the appeal of defendant no. 1 is eventually dismissed.

With regard to the second appeal of defendant no 1 as I have shown above the matter must go back to the lower Appellate Court for a consideration of the evidence produced by defendant no. 3 to prove an oral sale by Shiv Charan to him of the 9 kauris pala. After considering that evidence the learned District Judge will decide the case. If it is shown that there was a sale as alleged, the plaintiff's suit must be dismissed in toto, for he would then have no share with regard to which he could claim partition. If on the other hand the evidence does not prove such a sale, the decrees of the lower Courts so far as they affect the plaintiff and defendant no. 1 will be upheld. The costs of this second appeal will abide the result.

MACPHERSON, J.—I agree.

Appeal no. 754 *of* 1924 *dismissed.*

Appeal no. 758 *of* 1924 *remanded.*

(1) (1915) I. L. R. 42 Cal. 455.

APPELLATE CIVIL.

Before Das and Adami, J. J.

JUGAL KISHORE MARWARI

v.

HOMESHWAR SINGH*

1926.

Oct., 28.

Code of Civil Procedure, 1908, (*Act V of* 1908), *section* 144 *and order XLV, rule* 15, *whether applies to an application for restitution—Order-in-Council, copy of, filed subsequently but before order is passed—irregularity.*

Order XLV, rule 15, does not apply to an application for restitution.

Balmakund Marwari v. *Basanta Kumari Dasi* (1), followed.

Where an applicant for restitution was unable to put before the trial court a copy of the Order-in-Council in his favour, but, before the order for restitution was passed, the trial Court had been furnished with a copy of the Order, *held*, that there was no irregularity.

Appeal by the plaintiffs.

The appellants instituted a suit for damages for breach of contract against the respondents claiming six lakhs, before the Subordinate Judge. This suit was dismissed and an appeal was made to the High Court where the appellants were successful in obtaining a decree for two lakhs. As soon as the decree in this appeal was passed the appellants sought execution of their decree. Meanwhile the respondents appealed to the Privy Council with the result that the judgment and decree of the Subordinate Judge were upheld and the appellants' suit was dismissed. The respondents, when the appellants sought execution of the decree, deposited two lakhs due under the decree of the High Court and the appellants immediately withdrew this sum. When the respondents heard by telegram of their success in the Privy

* Appeal from original Order no. 274 of 1925, from an order of Maulavi Najabat Husain, Subordinate Judge of Bhagalpur, dated the 26th October, 1925.

(1) (1924) I. L. R. 3 Pat. 371, F. B.

Council, they applied at once to the Subordinate Judge for restitution in regard to the two lakhs which the appellants had withdrawn. The Subordinate Judge granted the application and awarded the respondents the two lakhs of rupees in restitution. Against this order the present appeal was presented.

C. C. Das (with him *N. C. Sinha* and *S. N. Bose*), *for* the appellants.

Hasan Imam (with him *L. K. Jha* and *N. C. Ghosh*), for the respondents.

ADAMI, J.—It is argued that the procedure followed in this case was wrong inasmuch as under Order XLV, rule 15, the respondents were bound to make the application to this Court as directed in that rule. In this point there is no merit. It is merely a technical point and is met by the decision of the Full Bench of this Court in *Balmakund Marwari* v. *Basanta Kumari Dasi* (1), where it is held that proceedings for restitution are not proceedings in execution. Order XLV, rule 15, will not, therefore, apply. Section 144 of the Civil Procedure Code lays down that an application must be made before the trial Court and the respondents fully complied with the directions in that section. Though the respondents were unable to put before the trial Court a copy of the decree of the Privy Council, yet before the order was passed, the trial Court had been furnished with a copy of that order and there was no irregularity.

The next point taken is that the appellants are entitled to Rs. 10,000 being five per cent. compensation payable to the auction-purchaser on the setting aside of the execution sale. In this point also there is no merit. The appellants themselves were decree-holders and auction-purchasers and having failed in their suit, they cannot deprive the respondents of any part of the two lakhs of rupees which they deposited.

The appeal is dismissed with costs.

DAS, J.—I agree.

Appeal dismissed.

(1) (1924) I. L. R. 3 Pat. 871, F. B.

APPELLATE CIVIL.

Before Ross and Kulwant Sahay, J. J.

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Oct., 29.

GANGA BISHUN RAM GAJADHAR RAM

v.

JAGMOHAN RAM.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 60(*c*)—*Agriculturist's house, whether attachment of illegal.*

The decree-holder having attached the judgment-debtor's residential house, the latter objected to the attachment on the ground that the house was protected by section 60(*c*) of the Code of Civil Procedure, 1908, which exempts from attachment and sale in execution of a decree houses and buildings belonging to an agriculturist and occupied by him. In a previous execution of the same decree the judgment-debtor had entered into an agreement with the decree-holder that he would pay the amount of the decree by instalments, and, as security, he declared that he mortgaged his residential house. No mortgage, however, was registered. *Held*, that the judgment-debtor was estopped from pleading that the house was not saleable.

Bhagwandas v. Hathibhai (1), *Bhola Nath* v. *Mussammat Kishori* (2) and *Uzir Biswas* v. *Haradeb Das Agarwala* (3), followed.

Appeal by the decree-holder.

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

Sarjoo Prasad, for the appellant.

Chandreshwari Prasad Sinha for *Sambhu Saran*, for the respondents.

Ross, J.—This is an appeal against an order of the learned Judicial Commissioner of Ranchi

* Appeal from Appellate order no. 119 of 1926, from a decision of G. Rowland, Esqr., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 19th February, 1926, confirming an order of Babu N. K. Singh, Deputy Magistrate Subordinate Judge of Palamau, dated the 21st March, 1925.

(1) (1880) I. L. R. 4 Bom. 25. (2) (1912) I. L. R. 34 All. 25, F. B. (3) (1919-20) 24 Cal. W. N. 575.

upholding an order by the Subordinate Judge of Palamau releasing from attachment the house of the judgment-debtors on the ground that it was not liable to attachment as being the house of an agriculturist.

It is not necessary to discuss all the arguments that have been urged in suport of the appeal, because there is one ground on which it is clear that the appellant is entitled to succeed. In a previous execution of this decree the jugdment-debtor entered into an agreement with the decree-holder that he should pay the amount of the decree by instalments and in security for the amount of the decree and costs and cost of execution he declared that he had mortgaged his residential house. It appears that no mortgage was actually registered and no relief is claimed by the decree-holder on the basis of the mortgage, but he contends that as the judgment-debtor had represented that the house might be taken in satisfaction of the decree and by reason of this representation had the previous execution dismissed on compromise, therefore, he is estopped from pleading now that the house is not saleable. In *Bhagvandas* v. *Hathibhai* (1), it was held that the house of an agriculturist if specifically mortgaged can be taken in execution of the mortgage decree, and the decision of the Full Bench of the Allahabad High Court in *Bhola Nath* v. *Musammat Kishori* (2), is to the same effect. It follows from these decisions that the house of an agriculturist is not absolutely unsaleable, although section 60, clause (*c*), provides that it shall not be liable to attachment or sale; but the judgment-debtor can waive this privilege and sell the house of his own free will. In the present case he has entered into an agreement to give the house in security for the amount of the decree and in my opinion this estops him from pleading that the house is not saleable The case is very similar to the case of *Uzir Biswas* v. *Haradeb Das Agarwalla* (3). In that case the plaintiff had

(1) (1880) I. L. R. 4 Bom. 25. (2) (1912) I. L. R. 34 All. 25, F. B.
(3) (1919-20) 24 Cal. W. N. 575.

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sought for attachment before judgment in a suit for money and claimed to attach an agriculturist's house among other things. There was a compromise by which the defendant undertook that his property should be sold in execution of the instalment decree thereby consented to and there it was held by the Calcutta High Court that this consent decree was binding and that the properties though not originally transferable became saleable by reason of the decree.

I would, therefore, allow this appeal and set aside the orders of the Courts below and direct that the execution do proceed against this house. In view of the fact that this point was not taken in the Court below there will be no costs of the appeal.

KULWANT SAHAY, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Das and Adami, J. J.

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Oct., 29.

RAM GOPAL MARWARI

v.

BENGAL AND NORTH-WESTERN RAILWAY COMPANY.*

Railways Act, 1890 (*Act IX of* 1890), *sections* 77 *and* 140—*posting of registered letter within time, whether proper service of notice—section* 140, *meaning of.*

Section 77, Railways Act, 1890, lays down :

"A person shall not be entitled to.....compensation for the loss.....of goods.....unless his claim to..... compensation has been preferred in writing by him or on his behalf to the Railway Administration within six months from the date of the delivery of.....goods for carriage by railway."

* Appeals from Appellate Decrees nos. 1041 and 1332 of 1924, from a decision of Babu Kamla Prasad, Subordinate Judge of Muzaffarpur, dated the 18th June, 1924, reversing a decision of Maulavi Muhammad Abul Barkat, Munsif of Muzaffarpur, dated the 29th September, 1923.

Section 140 provides that

" Any notice.....may be served—

" (c) by forwarding it by post in a prepaid letter addressed to the Manager or Agent at his office and registered..... ".

Held, that the posting of a registered letter containing a notice of claim, within six months, is a proper service of notice as contemplated by section 77 read with section 140(*c*), Railways Act, 1890, and that the fact that it is not received by the Agent until after that time has expired does not bar the institution of a suit.

Appeals by the plaintiffs.

Three bales were despatched over the defendants' Railway Company from Bombay to the appellant at Muzaffarpur. On arrival of the bales at Muzaffarpur on the 18th October, 1921, it was found that one was missing. Thereafter the appellant on the 18th April, 1922, so far as it could be ascertained, posted a registered notice to the Agent of the defendant Railway Company, claiming compensation for the loss, and thereafter he instituted a suit against two Railway Companies claiming compensation by reason of the negligence of the Railway Company, whereby the loss was caused.

The first Court decreed the suit against the present respondents Railway Companies, finding that there had been wilful neglect on the part of the Railway. On appeal the finding as to wilful neglect was upheld by the Appellate Court, but that Court, after considering sections 77 and 140 of the Railways Act, held that the notice to the Agent had not been preferred in time and, therefore, the suit was not maintainable as being beyond time.

Sultan Ahmad (with him *Janak Kishor*), for the appellants.

S. N. Bose and *A. N. Gupta*, for the respondents.

ADAMI, J.—The question that arises in this case is as to the meaning of section 77 and section 140 of

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the Railway Act. Section 77 states that a person shall not be entitled to compensation for loss of goods delivered to the Railway to be carried unless his claim to compensation has been preferred in writing by him or on his behalf to the Railway Administration within six months from the date of the delivery of the goods by the Railway. Section 140 describes how notices on Railway Administrations are to be served and clause (*c*) of the section enables such notice to be served by forwarding it by post in a prepaid letter addressed to the Manager or Agent of the Railway at his office, the letter being registered. The 18th April, 1922, was the last day of the six months allowed by the Act starting from the 18th October, 1921. The appellant did address a registered letter containing the notice to the Agent of the Railway and it is found that that letter was as a fact received by the Agent on the 20th April, 1922. It has also been found that such letter could not have been received by the Agent on the 20th April, 1922, unless it was posted from Gorakhpur on or before the 18th April. The finding then is that the letter was posted on the 18th April, 1922, that is to say within the six months allowed. The question is whether this posting complies with the terms of section 77, that is to say whether the posting of the letter containing the notice was a proper service of notice as contemplated by section 77. The lower Appellate Court has found that this was not a compliance with section 77 and that that section requires the notice to be received by the Agent within six months. Reading, however, section 140, clause (*c*), it would seem quite plain that the preferment of the claim has to be made by forwarding the letter by post that is to say by posting a registered letter. It seems clear also that when the letter was posted the claim was preferred as contemplated in section 77. If the matter be regarded from the opposite point of view, we would have to hold that where a person wishes to prefer a claim, residing at some distance from the head office of the Railway Company, the time within which he can

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ADAMI, J.

prefer a claim must be less than that allowed by the Act, for as in the present case the letter would have to be posted two days before the end of the period of limitation and thus the period of limitation would be shortened. I do not think that it was the intention of the Act that if the claim was made by posting the letter within the time allowed the fact that it was not received by the Agent till after that time expired would bar the institution of a suit. In my opinion the appellant preferred the claim within time and the suit should not have been dismissed by the lower Appellate Court on the ground that notice had not been served in time.

I would allow the appeal with costs both in this and in the lower Appellate Court. The judgment of the learned Munsif will be restored except in regard to the direction for costs against the Bombay Baroda and Central India Railway Company.

DAS, J.—I agree.

Appeals allowed.

PRIVY COUNCIL.

1926.

Nov., 1.

ABADI BEGUM

v.

KANIZ ZAINAB*

Muhammadan Law—Wakf—Shia Law—Transfer of possession—Wakif to be Mutawalli—Mutation of Names—Reservation of excessive Mutawalli Salary to Wakif.

Under Shia Mahomedan law a deed of wakf is not valid unless possession has been given under it; further, the property must be entirely taken out of the wakif.

The possession given must be such as the case admits. Thus, where the wakif is to be the first mutawalli, but there has been no mutation of the property into the name of the wakif as mutawalli, the wakf is wholly void.

Hamid Ali v. *Mujawar Hussain Khan* (1), approved.

* Present: Lord Atkinson, Lord Carson and Sir John Wallis.

(1) (1902) I. L. R. 24 All. 257, 265.

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A wakf can validly provide that the wakif while holding the office of mutawalli shall enjoy the salary which the deed properly assigns for the mutawallis generally. But a wakif cannot, under the guise of salary, reserve to himself a life-interest in a portion of the income far in excess of what is assigned to future mutawallis, and could reasonably have been assigned to them. *Semble*, that a wakf containing such a reservation is wholly void, and not void only as to the reservation. *Hajee Kalub Hossein* v. *Mehram Bebee* (2), doubted on that point.

Judgment of the High Court affirmed.

Appeal (no. 26 of 1925) from a decree of the High Court (March 13, 1923) reversing a decree of the Subordinate Judge of Bhagalpur (November 28, 1918).

The suit was instituted by the three first respondents to set aside deeds of wakf executed by one Musammat Asmatunissa on February 15, 1882, and December 7, 1897, and to recover the property thereby dealt with, on the ground that the first respondent was heir thereto; the other plaintiff-respondents were assignees from her. The parties were Shia Muhammadans.

The facts appear fully from the judgment of the Judicial Committee.

The Subordinate Judge dismissed the suit on the ground that it was barred by the Indian Limitation Act, 1908, Schedule I, Article 91, and on the ground that it was not established that the first respondent was heir.

The decision was reversed on appeal to the High Court. Das, J. (with whose judgment Adami, J. concurred) held that Article 91 did not apply as the case made was that the wakfnamas were void *ab initio*, not merely voidable; he held that the first respondent had established that she was heir and that the wakfs were invalid since they had not been perfected by possession being given.

(2) (1872) 4 N. W. Prov. 155.

1926. July 12, 13, 15, 22. *Wallach*, for the appellants.

DeGruyther, K.C., and *Dube*, for the plaintiffs-respondents.

Nov. 1. The judgment of their Lordships was delivered by SIR JOHN WALLIS.

This is an appeal from the judgment of the High Court of Patna reversing the decision of the Subordinate Judge, and giving the first plaintiff Musammat Bibi Kaniz Zainab (hereinafter referred to as the plaintiff) and the other plaintiffs her assigns a decree as sole heiress of one Musammat Asmatunnissa, who died in 1910, for possession of certain lands in respect of which that lady during her lifetime had executed three wakfnamas dated the 15th February, 1882, the 7th December, 1897, and 17th July, 1907, dedicating them to religious and charitable uses, and providing for the appointment of mutawalis. Before coming to the points on which the lower Courts have differed, it may be mentioned that the plaintiff also attacked these transactions unsuccessfully on the ground that they were brought about by fraud without the knowledge of the settlor, who was incapable of understanding them, and also on the ground that the wakfnamas were merely nominal transactions, but there are concurrent findings of both Courts against the plaintiff on these issues, and they have not been questioned before their Lordships.

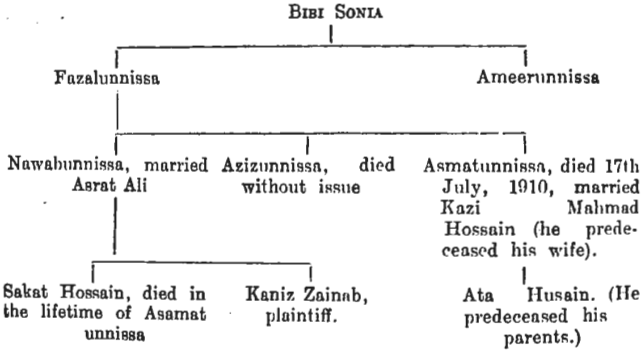
On this appeal it has been contended for the appellants that the Subordinate Judge was right in holding that the plaintiff has not established her right to sue as heiress of the deceased, and in rejecting the plaintiff's contention that the wakfs were invalid because the endowed lands had remained all along in the possession of the settlor as owner. For the respondents it was contended that the High Court was right in differing from these findings, and it was also argued that the wakfnamas were bad on the face of them, as they did not sufficiently divest the settlor of all interest in the endowed properties in accordance

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with the requirements of the Shiah law. This contention was not specifically pleaded, but was raised in the general allegation in the eleventh paragraph of the plaint, that the wakf was not valid under the British and Muhammadan law, and was covered by the concluding portion of the sixth issue.

Their Lordships will deal, in the first place, with the question of heirships and give their reasons for agreeing with the finding of the High Court that it is sufficiently proved. The following genealogical table shows how the plaintiff traces her descent from Bibi Sonia, the grandmother of the deceased.



The defendants, in answer to the averment in paragraph 2 of the plaint that the plaintiff was the daughter of Nawabunnissa, uterine sister of the deceased, pleaded in paragraph 5 of their written statement, that it was not at all true that the plaintiff was the daughter of the deceased's sitster, and again in paragraph 7 that the deceased had no sister of her own named Musammat Nawabunnissa. "She had only one sister named Azizunnissa, whose name is mentioned in all the deeds of wakf."

At the trial, however, they went further and set up that the plaintiff was not the daughter of Nawabunnissa, but was the daughter of Nawabunnissa's husband by another of his wives, Amnan Bibi. This further development may possibly have been due to the

fact that the documents produced by the plaintiff clearly established that Nawabunnissa was the daughter either of the deceased's mother Fazalunnissa or of her sister Ameerunnissa, and that in either case the plaintiff as Nawabunnissa's daughter would be entitled to succeed in default of nearer heirs. However this may be, their Lordships are of opinion that in coming to the conclusion that the plaintiff had failed to prove that she was the daughter of Nawabunnissa, the Subordinate Judge failed to attach due weight to this aspect of the case. If the plaintiff was the daughter of Amnan Bibi, the evidence suggests that that fact must have been known to the defendants from the first, and that, if not, they could easily have ascertained and pleaded it. Their Lordships agree with Das, J., who delivered the judgment of the High Court, that the fact that they failed to do so greatly impairs the effect of the purely oral evidence by which they sought to prove this part of their case.

As regards the plaintiff's wintesses, the false evidence given by them as regards the capacity of the deceased no doubt makes it unsafe to rely upon their evidence as to the pedigree without corroboration, but in their Lordships' opinion the conduct of the defence and the admissions of the defence witnesses as to this part of the case which are referred to in the Courts below go far to afford the necessary corroboration, apart altogether from the documentary evidence, which by itself, in the opinion of the learned judges of the High Court, sufficiently proves the plaintiff's heirship. With this their Lordships will now proceed to deal. Exhibit 1 of the 6th April, 1851, a registered document the genuineness of which is not now questioned, is a deed of gift by Bibi Sonia, the grandmother of the deceased Asmatunnissa, to—

> "Musammat Bibi Nawabunnissa, my daughter's eldest daughter, wife of Syed Ishrat Ali,"

who is admittedly the plaintiff's father. It is said for the defendants that Bibi Sonia's daughter here mentioned may not have been Fazalunnissa, the mother

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of the deceased, but her sister Ameerunnissa. The only daughter mentioned in the deed is Fazalunnissa, for whom a residence is reserved and by whom it was attested, and she would therefore appear to have been the daughter referred to. Further, it is not shown that her sister Ameerunnissa had daughters. Nor does the fact, relied on for the defendants, that in 1840, by Ex. L. Bibi Fazalunnissa had executed a power of attorney on behalf of herself and her two minor daughters Azizunnissa and Asmatunnissa, the deceased, at all prove that she had not an eldest daughter Nawabunnissa, who was then of age or married, and in a position to act independently.

However, as already pointed out, it is immaterial for the purposes of the case whether the plaintiff Nawabunnissa was the daughter of Fazalunnissa or of Fazalunnissa's sister.

The next document, Ex. 3 of 22nd November, 1851, executed by the plaintiff's father in favour of his wife Nawabunnissa and others, is only material for the recital that his wife Amnan Bibi, the plaintiff's suggested mother, was then dead. It is written on stamp paper of the year 1851, and comes from the same custody as Ex. 1, which is admittedly genuine and could hardly have been fabricated to meet the new case sprung upon the plaintiff at a late stage that the plaintiff was the daughter of Syed Israt Ali, not by Nawabunnissa, but by Amnan Bibi. Both the Courts below were of opinion that if Amnan Bibi was dead in 1851, as recited in the document, she could not have been the mother of the plaintiff having regard to her present age.

The next document, Ex. 2 of 12th July, 1856, a gift by Nawabunnissa of one-third of the properties given her by her grandmother under Ex 1 to the plaintiff and one-half to the plaintiff's brother, is also evidence that the plaintiff was the daughter of Nawabunnissa. The defendants impugn the document on the ground that no possession under it was ever given to

the plaintiff, but that is equally true of the land covered by Ex. 1, which has been shown to be genuine. At Bibi Sonia's death these lands were still registered in her name, and on her death they were registered in the names of her two surviving daughters, Azizunnissa and the deceased Asmatunnissa. Their Lordships agree with the learned Judges that the plaintiff cannot be expected to explain at this distance of time why no effect was given to these two documents of gift, one of which is admittedly genuine.

Ex. 1 was also attacked on the ground that the stamp endorsement shows that it was purchased for a *tammasuk* or bond, and not for a deed of gift. Their Lordships are not disposed to attach much importance to this objection, and on the whole they have come to the conclusion that the plaintiff's heirship is sufficiently established by the oral and documentary evidence in the case.

Before dealing with the plaintiff's right to recover the properties included in the wakfnamas executed by the deceased, it will be convenient to refer to the law governing the question. The Muhamadan law, which only allows a testator restricted powers of disposition over his property, contains no such restriction as regards gifts *inter vivos* but does not recognise such gifts as valid unless possession is given to the donee. This also applies to wakfs or gifts for religious or charitable purposes, at any rate among Shiahs. Further, in the case of wakfs or gifts for charitable purposes, the Shiah law imposes a further restriction that the wakif or settlor shall not retain for himself any interest in the subject of the gift. This restriction, for which reasons of a religious character are assigned, undoubtedly operates as a check on the creation of wakfs not from purely religious motives, but with a view of defeating the rights of heirs and transmitting the possession and control of the settlor's property after his death to other persons in the character of mutawalis. It is not immaterial to note in this connection that the deeds now in question

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confer the office of mutawalli on the brothers of the settlor's deceased husband and make provision for the office remaining in their families. This restriction is the last of the four conditions as to the validity of wakfs laid down in the Suraya, the leading Shiah authority, as follows: " (1) It must be perpetual; (2) absolute and unconditional; (3) possession must be given of the *mowkoof* of the thing appropriated, and (4) it must be entirely taken out of the wakif or appropriator himself " (Baillie, " Digest of Pt. II," p. 218). Elsewhere this last restriction has been expressed in direct and homely language by saying that the wakif must not eat out of the wakf. The law is laid down to the same effect in the other authorities cited textually by Mr. Ameer Ali in his valuable treatise (Vol. I, p. 218, fourth edition).

In the present case the wakfs have been attacked as failing to comply with the third and fourth of the above conditions on the ground that possession was not given and that the wakif, or settlor, did not divest herself of all interest in the subject of the gift. The Subordinate Judge disallowed both these contentions; and the High Court, holding that possession was not shown to have been given, reversed the judgment on that ground and gave the plaintiff a decree, without dealing with the further question whether the wakf was bad for failing to comply with the fourth condition, a contention which would appear not to have been argued, though raised in the grounds of appeal from the lower Court. It has, however, been strenuously argued here, and, as it may be said to arise on the face of the documents themselves and is of general importance, their Lordships will proceed to consider it.

Ex. G, the principal wakfnama of 15th February, 1882, after reciting the desire of the settlor to make a wakf of the properties specified in the deed for reward in the next world and for the maintenance of the mosque and the imambara constructed by her late

husband, for the support of fakirs and travellers and for the annual Fataha of herself and her husband, goes on to provide as follows :—

" 1. I make Wakf absolutely of the properties mentioned below in the name of God without any condition valid or invalid. I, the declarant, or my heirs and representatives have not and shall not have, from this day, any personal connection with or any rights in future to the endowed property.

" 2. For carrying out the objects of the Wakf, I, the declarant, shall remain Mutawalli of the endowed property during my lifetime and I have got the power to appoint a Mutawalli who will manage the Wakf property after my death. If I, the executant, before my death fail to execute any Tawliat in contravention of the arrangement now made, then the arrangement made under this deed shall remain intact and in force.

" 3. I, the executant, shall during my lifetime receive a monthly salary of Rs. 125 of the Company's coin in the capacity of a Mutawalli. The remaining income of the Wakf property shall after the payment of the Government revenue, other demands and the collection expenses, be applied to the expenses of the mosque and Imambara. An account of income and expenditure shall be kept in the Khankah and it shall be signed and sealed daily by the Mutawalli of the mosque for the time being. The proof, *i.e.*, voucher of the said account shall be kept and it shall be kept in a book and not in a separate piece of paper."

The document further provides that on her death there should be two mutawallis—one for the mosque, the other for the imambara—and they should each receive a salary of Rs. 15 a month. The result was that the settlor received herself a salary as mutawalli of Rs. 1,500 a year for life out of the income of the wakf properties, valued in the deed at Rs. 19,000, and that after her death each mutawalli was to receive Rs. 180 a year or Rs. 360 in all. For the respondents it was contended before the Subordinate Judge that this reservation rendered the wakf invalid, citing Mr. Tyabji's " Principles of Muhammadan law " (1913) and Mr. Ameer Ali's well-known work. On this the Subordinate Judge observed quite truly, that it did not follow that the wakif or settlor could not, when he was himself to be mutawalli, reserve any benefit out of the wakf properties for his benefit as mutawalli. On the contrary, he correctly stated, it appears that the wakif can lawfully take the allowance found for

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the mutawalli generally when he himself holds the office. This is in accordance with what is laid down in the texts cited in Mr. Ameer Ali's book in this connection. Instead, however, of adverting to the fact that in this wakf he takes, not the salary fixed for the mutawalli generally, but the bulk of the income, the Subordinate Judge goes on: "I should observe that the allowance fixed for herself by the mutawalli in this case did not only not consume the whole of the income, but left a sufficient margin for the religious and charitable uses, and thus the fixing of the allowance did not negative the object of the wakf, and was not, hence, illegal, as it was only for the lifetime of the wakif as mutawali."

These observations appear to be based on a misconception, as the condition is that the wakif shall not retain any benefit for himself, and the fact that he leaves enough for the performance of the charities appears to their Lordships to be immaterial.

It seems clear in the present case that the settlor, under colour of fixing her salary as mutawalli, was really reserving for her lifetime a portion of the income or usufruct of the property far in excess of what was assigned in the deed to future mutawallis or could reasonably have been assigned to them. It was therefore in their Lordships' opinion a clear violation of the condition.

Assuming that this is so, it has been further contended before their Lordships that the only result is that the wakf fails as to the reserved Rs. 1,500, and must be supported as to the rest of the income on the authority of *Hajee Kalub Hossein* v. *Mehrum Beebee* (1), where it was held, a wakf in which the wakif had reserved to himself two-thirds of the income of the wakf properties for life failed only as to these two-thirds, but could be supported as to the remaining third, which under the terms of the deed was to be

(1) (1872) 4 N. W. Prov. 155.

devoted from the first to religious uses. It appears to their Lordships that this ruling is not in accordance with what is stated to be "the more approved opinion" in the Suraya, on which the learned judges rely (Baillie, Part II, pp. 218, 219), or with the other authorities cited textually by Mr. Ameer Ali. As observed by that learned author, the following extract from the Jâm'aa-ush-Shittat, dealing with a case where the wakif reserved the whole income to himself for life, throws considerable light on this subject:—

"A. This wakf is void *ab initio*, for the wakif reserved to himself during his lifetime the profits of the property. It is one of the conditions for the legality of a wakf that the wakif should take out the subject of the wakf from himself. Therefore, when a wakf is made on his own nafs (self) it is batil (void), though there are others mentioned after himself as the beneficiaries thereof. With reference to the voidableness of the wakf as to himself there is consensus; as regards the voidableness of the remainder, the general opinion is that it is so, for the arguments in support of the validity of the wakf in favour of the others are weak."

With this last observation their Lordships are disposed to agree. It is an entire departure from the principle that it is a condition of the validity of the wakf that the wakif should not reserve any interest in the endowed property for himself to hold that where the wakif reserves a portion of the income for himself that wakf only fails as property sufficient to produce the reserved income and is good as to the rest.

The rule that the settlor when mutawalli can take the salary fixed for mutawallis generally is really no exception, for in that case he takes in his capacity as mutawalli and not in his capacity as settlor, just as it is laid down a little further on (Baillie, Pt. II, p. 218):

"But if one should make an appropriation for the poor and should himself become poor, or for lawyers and himself become a lawyer, there is no objection to his participating in its benefits."

that is to say, as a poor man or a lawyer, not as a settlor. There is, in fact, in all these cases no reservation at all.

As regards this part of the case, their Lordships are disposed to agree with the reasoning in the extract

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from the Jâm'aa-ush-Shittat set out above, and are not prepared, as at present advised, to hold on the authority of the decision in *Hajee Kalub Hossein* v. *Mehram Beebee* (1), that a wakif in which the wakif reserves the bulk of the income for herself as mutawalli during her own lifetime whilst fixing a modest salary for the mutawallis who succeed her can be held valid even to the extent of the unreserved income. As regards the supplementary deed of wakf of 7th December, 1897, Ex. D., in which the settlor included her remaining lands stated to be worth Rs. 1,500, and cancelled the salary she had fixed for herself for life in the former deed, adding " that is I have given up the salary and included it in the wakf," their Lordships are of opinion that if the deed had stopped there it might possibly have been treated as a fresh dedication of all the properties free from any reservation in her own favour; but after reciting her intention to go for Haj and to make Zearut (visit sacred places) the deed provides, s. 17, " That the said manager shall from time to time send money for expenses from the income of the Wakf estate to me either at Mecca or to the place to which I shall direct him to send." This, in their Lordships' opinion, amounts to a clear reservation of the right of the wakif to draw money for the expenses of her pilgrimage to Mecca and to other non-wakf purposes, and therefore, also, to involve a breach of the fourth condition. The last deed of 1907 need not be considered as it was necessitated by the death of the mutawallis, previously appointed to succeed the settlor in the office, and merely appoints other members of her husband's family in their place.

Their Lordships, as at present advised, are disposed to hold that the two principal wakfnamas were wholly invalid by reason of the reservations in the wakif's favour, but they do not propose to base their advice to His Majesty on this ground as to which they have not had the assistance of the High Court, because

(1) 4 N. W. Prov, 155.

on a careful examination of the evidence they have come to the conclusion that the learned judges of the High Court were right in holding that the defendants have failed to prove that possession of the wakf properties was ever given so as to comply with the third of the conditions set out above, and the defendants' appeal must fail on this ground.

What the very unusual terms of these wakfnamas suggest is that her husband's relations desired that this lady's property should pass to them on her death as hereditary mutawallis of the wakfs instead of to the legal heirs, and that she was willing to comply with their wishes so long as her own enjoyment was not seriously impaired. The balance left for religious and charitable purposes under the first deed probably did not differ very much from the expenditure previously incurred by her husband and herself for these purposes, and the surrender of her salary and the inclusion of all her remaining lands in the second deed leaving nothing for herself or her heirs was counterbalanced by the provision allowing her to draw freely on the income. That she did so and, indeed, made little or no distinction between the wakf monies and her own may be gathered from the fact that, according to the findings of both the lower Courts, the defendants have suppressed her accounts and put forward forged accounts in their place. In view of her determination to retain the income for herself during her lifetime, she may well have been reluctant to take the final step of parting with her possession as owner. On the other hand, it was clearly in the interests of her husband's relations and of her agent Imam Ali, in view of the annuity settled upon him and his heirs, to get her to do so in the clearest possible manner, and their failure to effect more than they did would appear to be attributable to her unwillingness rather than to any want of effort of theirs.

It was, of course, impossible for the settlor to hand over possession as malik or owner to herself as

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mutawalli or trustee of the endowment, but it was none the less incumbent on her to give such possession as the case admitted. Now the obvious and ordinary means of showing the change in the character of her possession would have been by mutation of names, that is to say, by getting her herself entered in the public registry as holding as mutawalli. That was the course adopted and held sufficient in *Hajee Kalub Hossein v. Mehrum Beebee* (1), and in *Hamid Ali* v *Mujawar Husain Khan* (2), the Court observed that, if the wakif in that case had been sincere in his desire to divest himself of his property, he would at once have obtained mutation of names and held in the absence of such mutation that possession had not been surrendered.

In the present case it is significant that between 1882 and 1907 there was no mutation of names except as to one item consisting of a share in certain lands, as to which an additional share was purchased for her in 1883, and both shares were then registered in her name as mutawalli. This isolated instance may well have been brought about without her knowledge by her husband's brother and her agent Imam Ali, who both witnessed the sale deed, and were both interested as already stated in getting the wakfs perfected by delivery of possession. It is much more significant that they did not obtain any mutation of names as to the other numerous items; and in 1907, when the public record of rights for this area was prepared by the revenue authorities, after the fullest notice and inquiry, the settlor was again registered as regards all the other items as malik or full owner, which would not have been done if it had been brought to the notice of the authorities that she was in possession as mutawalli. In these circumstances the belated registration in the same year of some five items out of more than thirty, which may well have been effected without her

(1) 4 N. W. Prov. 155.

(2) (1902) I. L. R. 24 All. 257.

knowledge by her husband's brother and Imam Ali under a general power of attorney given to them after the execution of the third wakfnama, is entitled to very little weight as evidence that there was ever any change in the character of her possession.

The defence also relied on certain kabuliats or rental agreements taken from tenants in which she is described as mutawalli, but, as has been pointed out to their Lordships, no corresponding pattas granted by her to the tenants in which she is so described have been put in evidence. On the other hand, in one patta Ex. A. of 27th November, 1898, the original patta has the word mutawalli struck out and the word malik or owner substituted; and that this was done at the time appears clearly from the fact that in the registration copy of the patta she is described simply as malik and not as mutawalli. This certainly suggests, as Das, J. has observed, that an effort had been made to get the lady to grant the patta as mutawalli and that she had refused to do so; and it is also significant, as Das, J. has pointed out, that not one single document bearing her seal has been produced in which she is described as mutawalli. On the whole their Lordships agree with the conclusion of Das, J., who has carefully examined them, that the documents in which she is described as the mutawalli are of a very inconclusive character and may well have been drawn up by her husband's brothers and her agent who were managing her affairs and interested in creating evidence of the surrender of possession.

As regards the oral evidence it is, no doubt, true that the lady incurred expendtiure for the purposes mentioned in the wakf, as her husband and she herself had done before any of the wakfs were created, but in view of the suppression of the accounts, it is impossible to say what the amount of that expenditure was, and the natural inference from the suppression is that if produced, the accounts would not have helped the defendants' case.

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On the whole, their Lordships agree with the learned judges of the High Court that possession is not shown to have been given, and are of opinion that the appeal fails on this ground and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellants:—*H. S. L. Polak.*

Solicitors for respondents:—*Walkins and Hunter.*

APPELLATE CIVIL.

Before Ross and Kulwant Sahay, J. J.

BISHUNDEO SAHU

v.

MAHADEO PRASAD SAHU.*

1926.

Nov., 1.

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *Schedule III. Article 6—Rent decree—Execution—Limitation—application dismissed—subsequent application, whether in continuation of former application.*

On the 30th May, 1924, an application was made for execution of a rent decree dated the 31st May, 1924, for less than Rs. 500. The decree-holder sought to attach and sell five plots of land. The 15th May, 1925, was fixed for the sale. On the 9th May, 1925, the claim of an auction-purchaser under a previous decree was allowed and the execution case was dismissed. On the 8th June, 1925, the decree-holder again applied for execution and prayed that the application should be treated as being in continuation of the previous application. It was sought to sell the properties specified in the previous application and also some additional properties.

Article 6 of Schedule III of the Bengal Tenancy Act, 1885, prescribes a period of limitation of three years from the

* Appeal from Appellate Order no. 94 of 1926, from a decision of Babu Suresh Chandra Sen, Subordinate Judge of Muzaffarpur, dated the 17th of March, 1926, reversing a decision of Maulavi Kabiruddin Ahmed, Additional Munsif at Muzaffarpur, dated the 21st November, 1925.

date of the decree for the execution of a decree in a suit between landlord and tenant and not being a decree for a sum of money exceeding Rs. 500.

Held, that the order dismissing the execution case being wholly illegal should not operate to the prejudice of the decree-holder; and that inasmuch as if that order had not been passed, and the decree-holder had, on or before the 15th May, 1925, applied for time to ascertain which properties other than those purchased by the auction-purchaser under the previous decree were available to satisfy his rent decree, the application would have been reasonable and time would have been granted, the present application having been made within a reasonable time from the date on which the auction-purchaser's claim was allowed, should be treated as being in continuation of the previous execution.

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

Rai Tribhuban Nath Sahay, for the appellant.

Bhagwan Prasad, for the respondent.

Ross, J.—This appeal raises a question of limitation. The decree under execution is a rent decree for less than Rs. 500 and, therefore, under clause (6) of Schedule III to the Bengal Tenancy Act it had to be executed within three years. The decree is dated the 31st May, 1921. Execution was taken out on the 7th June, 1923, but that case was dismissed. On the 30th May, 1924, a second execution was taken under which five plots of the judgment-debtor's holding were sought to be attached. This case was dismissed for default on the 23rd September, 1924, but, on an application for review, was restored on the 6th December, 1924; and the 15th May, 1925, was fixed for sale. In the meantime an auction purchaser under a previous decree had filed a claim which was allowed on the 9th May 1925; and, on that date, the execution case was dismissed. On the 8th June, 1925, the present application was made with a prayer that it should be treated as being in continuation of the previous application; and in this application the

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property specified in the previous application and some newly added properties were sought to be sold.

The question is whether the application of the 8th June, 1925, should be treated as an application in continuation of that of the 30th May, 1924. The tests have been laid down in more than one case. The previous application must have been dismissed without any default on the part of the decree-holder, and the scope and character of the two applications must be the same. It is conceded on behalf of the judgment-debtor-appellant that the first condition is fulfilled; but it is contended that the second is not, inasmuch as new properties have been now added in the application. There are cases, the authority of which is not disputed, which show that during the pendency of an execution additional properties may be entered in the application by way of amendment. Now the question is whether this addition can be made after the date of limitation where the previous execution case has been improperly dismissed. It seems to me that, while it cannot be said that the Munsif acted without jurisdiction in dismissing the execution case, yet the order was wholly illegal and should not operate to the prejudice of the decree-holder. He ought as far as possible to be put in the same position as if that order had not been made. The learned Advocate for the appellant concedes that if the application had been made on or before the 15th May, it might possibly have been treated as an application in continuation of the previous case. But as it was not made until the 8th June, he contends that there was no longer any opportunity for the decree-holder to amend his application In my opinion this is not a correct way of looking at the matter. The claim was allowed on the 9th May, that is, six days before the date for sale. Thereupon it became necessary for the decree-holder to ascertain whether the judgment-debtor had other properties to be proceeded against; and it must be taken that, if on the 15th May, he had applied to the Munsif for time

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to ascertain these properties, time would have been given, the application being of a reasonable character. The present application in execution was made on the 8th June within a reasonable time from the date on which the claim was allowed. If the decree-holder is not to be prejudiced by the illegal order dismissing the case, I think that, as the execution case was dismissed without any default on his part and the amendment (for it is virtually an amendment of the application) was made within a reasonable time from the date when amendment became necessary, the application ought to be treated as an application in continuation of the previous execution.

The appeal must be dismissed with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Ross and Kulwant Sahay, J. J.

RAJA BISWAMBHAR NATH SAHI

v.

MAHESH SAHI.*

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Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 1, *Article* 182(5)—*Step-in-aid of execution—service of notice under Order XXI, rule* 22, *Code of Civil Procedure*, 1908 (*Act V of* 1908), *and attachment of judgment-debtor's properties.*

Although the mere service on the judgment-debtor of a notice under Order XXI, rule 22, of the Code of Civil Procedure, 1908, is not sufficient to save an application for execution from the bar of limitation, yet, where, after such notice, an order is made for attachment of the properties of the

* Appeal from original order no. 48 of 1926, from an order of Mr. Nut Bihari Chatterji, Subordinate Judge of Shahabad, dated the 20th January, 1926.

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judgment-debtor and attachment is effected, a subsequent application for execution is saved thereby.

Umed Ali v. *Abdul Karim Chaprasi* (1), distinguished.

Mungul Pershad Dichit v. *Girija Kant Lahiri* (2) and *Sripati Charan Chowdhry* v. *R. Belchambers* (3), referred to.

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

S. Sinha (with him *S. Dayal* and *Sajroo Prasad*), for the appellant.

P. Dayal and *Rai Tribhuan Nath Sahay*, for the respondent.

KULWANT SAHAY, J.—The only question for decision in this appeal is whether the application for execution was barred by limitation. The decree was passed on the 18th May, 1914. The second application for execution was made on the 4th October, 1920, and in that execution case the last application to take some step in aid of execution was filed on the 15th December, 1920. That execution case was dismissed and the third application for execution was made on the 18th December, 1923. The present application was made on the 20th March, 1925. The question is whether the third application was barred by limitation. If the third application was barred, then the present application would be evidently also barred. Having regard to the fact that the last step taken in the second execution was on the 15th December, 1920, the third application filed on the 18th December, 1923, would evidently be barred. But on reference to the order sheet of that execution case it appears that notice under Order XXI, rule 22, was served on the judgment-debtor and thereafter an order was made for attachment of the properties of the judgment-debtor and attachment was effected. In

(1) (1908) I. L. R. 35 Cal. 1060. (2) (1882) I. L. R. 8 Cal. 51, P. C.
(3) (1910-11) 15 Cal. W. N. 661.

the circumstances the principle laid down by the Privy Council in *Mungul Pershad Dichit* v. *Girija Kant Lahiri* (1), would apply and the present application must be considered to be within time.

It was contended on behalf of the appellant that mere service of a notice under Order XXI, rule 22, would not save the application from the bar of limitation and reliance was placed on the case of *Umed Ali* v. *Abdul Karim Chaprashi* (2). In that case the learned Judges referred to *Mungul Pershad Dichit's* case (1) and observed that " it was only necessary to point out that in that case an order for attachment made by the Subordinate Judge on an application, which would otherwise have been time-barred, was held to operate as a decision that the execution was not barred even though that decision was erroneous; but at the same time their Lordships of the Judicial Committee declined to differ from the rule laid down by the Full Bench in *Bisseshur Mullick* v. *Maharajah Mahatab Chunder Bahadoor* (3) in which it was held that the mere service of notice on the judgment-debtor after the decree was barred was not a proceeding in execution merely because the judgment-debtor did not come in and oppose it." Now, their Lordships did not interpret the decision of the Judicial Committee in *Mungul Pershad Dichit's* case (1) in the way in which the learned Counsel asks us to interpret it in the present case. Their Lordships there held that mere service of notice on the judgment-debtor would not save the application from limitation unless there was some other proceeding in relation to the execution of the decree after the service of the notice. In *Sripati Charan Choudhry* v. *R. Belchambers* (4), Mookerjee, J., in considering a similar case observed as follows. " It is well settled that mere service of notice upon a

(1) (1882) I. L. R. 8 Cal. 51, P. C.

(2) (1908) I. L. R. 35 Cal. 1060.

(3) (1868) 10 W. R. (F. B.) 8.

(4) (1910-11) 15 Cal. W. N. 661.

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judgment-debtor under section 248, Civil Procedure Code, is not by itself sufficient to debar him from urging the objection than an application is barred by limitation, when no order for execution has been made after the service of notice under section 248." In the present case we find that an order was made for attachment of the judgment-debtor's properties after the service of notice under Order XXI, rule 22. This will bring the present case within the doctrine laid down in *Mungul Pershad Dichit's* case (1).

The present application is clearly within time. This appeal is dismissed with costs.

Let the record be sent down as soon as possible.

Ross, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Ross and Kulwant Sahay, J. J.

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Nov., 2.

BALDEO THATHWARI KONHORAI

v.

LACHMAN LAL PATHAK.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule I, Article* 182 (5)—*Step-in-aid of execution—appearance on an application under Order XXI, rule* 90, *Code of Civil Procedure*, 1908 (*Act V of* 1908).

The mere appearance of the decree-holder in a proceeding under Order XXI, rule 90 of the Code of Civil Procedure, 1908, which is dismissed for default, does not amount to an application to take a step-in-aid of execution within the meaning of Article 182 (5), Schedule I of the Limitation Act, 1908.

(1) (1882) I. L. R. 8 Cal. 51, P. C.

* Miscellaneous Appeal no. 81 of 1926, from an order of F. F. Madan, Esqr., I.C.S., District Judge of Gaya, dated the 6th March, 1926, reversing a decision of M. Ihtisham Ali Khan, Subordinate Judge of Gaya, dated the 14th November, 1925.

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

M. N. Pal, for the appellant.

Kailaspati and *Sarju Prasad*, for the respondent.

KULWANT SAHAY, J.—This is an appeal by the judgment-debtor against an order of the District Judge of Gaya overruling his objection to the execution of a decree and directing the execution to proceed.

The only objection raised was that the decree under execution was barred by limitation. It appears that before the present execution another application for execution of the same decree had been made, and some properties belonging to the judgment-debtor were sold on the 28th February, 1922. The judgment-debtor filed an application for setting aside the sale under the provisions of Order XXI, rule 90, of the Civil Procedure Code. This application was opposed by the decree-holder who was himself the auction purchaser. On the 10th June, 1922, the application for setting aside the sale was dismissed for default. On that date, however, it appears, that the decree-holder was present in Court with his witnesses. The present application for execution was filed on the 8th June, 1925. This application is evidently time-barred. But it was contended on behalf of the decree-holder that his appearance on the 10th June, 1922. amounted to a step-in-aid of execution and gave a fresh start to the period of limitation. The learned Subordinate Judge held that the decree-holder's appearance on the 10th June, 1922, did not amount to a step-in-aid of execution and that the present application was barred. The learned District Judge, on appeal, has held that the appearance of the decree-holder with his witnesses on the 10th June, 1922, amounted to a step-in-aid of execution, and that the present application was not barred by limitation. He relied upon a decision of this Court where it was held that any step by the decree-holder to remove obstacles thrown by the judgment-debtor in the way of the execution of a decree

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was a step-in-aid of execution. He was of opinion that this principle was wide enough to include a case in which the decree-holder appeared with witnesses in a proceeding under Order XXI, rule 90, which was, however, dismissed for default. I am of opinion that the view taken by the learned District Judge is erroneous. Article 182, clause (5), of the first Schedule to the Indian Limitation Act, provides that the period of limitation will begin to run from the date of an application to take some step-in-aid of execution. Here, no application was made by the decree-holder to the Court on the 10th June, 1922, the decree-holder was merely present in Court with his witnesses, but there was no occasion for him to take any step in Court inasmuch as the application under Order XXI, rule 90, was dismissed for default. The mere appearance of the decree-holder in a proceeding under Order XXI, rule 90, which was, however, dismissed for default, cannot, in my opinion, amount to an application to take some step-in-aid of execution within the meaning of clause (5) of Article 182 of the first Schedule to the Indian Limitation Act. The decision of the learned District Judge cannot be sustained. The appeal must be allowed and the application for execution dismissed as barred by limitation. The appellant is entitled to his costs in this Court as well as in the Courts below.

Ross, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

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

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F. A. SAVI
v.
SRIMATI SABITRI THAKURAIN.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 109 (*a*)—*Order setting aside compromise decree, whether is a final order.*

* Privy Council Appeal no. 28 of 1926.

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An order setting aside, for defect of procedure, a decree passed in terms of a compromise entered into between the parties to a suit, is not a final order within the meaning of section 109 (*a*) of the Code of Civil Procedure, 1908.

Shubrook v. *Tufnell* (1), *Salaman* v. *Warner* (2), *Bozson* v. *Altrincham Urban District Council* (3), *In re Croasdell and Camell Laird and Co., Ltd.* (4), *Brito* v. *Brito* (5), *Bhagwati Dayal* v. *Mussamat Dhan Kunwar* (6) and *Rai Baijnath Goenka Bahadur* v. *Sir Rameshwar Singh* (7), referred to.

Sourendra Nath Mitter v. *Srimati Tarubala Dassi* (8) and *Shri Satchidanand Vidya* v. *Shri Vadya Narsinha* (9) followed.

Lachmi Narain Marwari v. *Balmakund Marwari* (10), distinguished.

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

P. C. Manuk (with him *S. N. Palit*), for the appellant.

S. Sultan Ahmad (with him *L. K. Jha* and *H. K. Jha*), for the respondent.

DAWSON MILLER, C. J.—This is an application by the first two defendants in the suit for leave to appeal to His Majesty in Council from an order of a Division Bench of this Court passed on the 8th June last setting aside (*a*) a decree passed on the 26th November, 1924, by the Subordinate Judge of Monghyr in terms of a compromise alleged to have been made between the parties in the suit, and, (*b*) an order of the Subordinate Judge dated the 6th July, 1925, rejecting an application under section 151 of the Civil Procedure Code to set aside the said decree. The High Court further ordered that the case should be restored to the list to be taken up from the stage at which the compromise was filed.

(1) (1882) L. R. 9 Q. B. D. 621.
(2) (1891) L. R. Q. B. D. 734.
(3) (1903) L. R. 1 K. B. 547.
(4) (1906) L. R. 2 K. B. 569.
(5) (1924) 78 Ind. Cas. 938.
(6) (1926) 92 Ind. Cas. 1027.
(7) (1918) 3 Pat. L. J. 339.
(8) (1924-25) 29 Cal. W. N. 832.
(9) (1923) I. L. R. 47 Bom. 106.
(10) (1921) 6 Pat. L. J. 116.

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The questions for determination are first, whether the order of the Division Bench is a final order within the meaning of section 109(*a*) of the Civil Procedure Code and, secondly, if not, whether the case should be certified as a fit one for appeal to His Majesty in Council under section 109(*c*) of the Code.

The plaintiff is the widow of the late Babu Ugra Mohan Thakur, a rich zamindar of Bhagalpur, who died in 1914 leaving the great bulk of his estate to his nephew, the defendant No. 2 in the suit, and a small sum of Rs. 100 per month to his widow for her maintenance. His will was duly proved and probate was granted to his executor, the defendant No. 1, in spite of the strenuous opposition of the widow, the present plaintiff, who contested the case as far as the High Court and was finally refused special leave to appeal to His Majesty in Council. She also propounded an alleged will of later date and sought for letters of administration but that suit was finally disposed of by the Privy Council in 1921 her claim being rejected. The present suit in which this application arises was instituted in 1920 by the plaintiff claiming to revoke the probate on the ground that it was fraudulently obtained, and for other reasons and in the alternative she claims maintenance at a more liberal rate than that given by the will. Apart from the executor and the residuary legatee, who are the first two defendants, the other defendants have some slight interest under the will or by purchase from the executor.

In November, 1924, during the pendency of the suit negotations with a view to compromise took place between the parties and on the 25th of that month the plaintiff and the first two defendants signed a petition of compromise which provided, inter alia, that the plaintiff should be paid out of the estate a sum of Rs. 1,000 per month, instead of Rs. 100 as provided in the will, including arrears from the date of the

testator's death in 1914, such arrears to be paid as to Rs. 17,000 in cash and the balance by instalments, and the suit was to be withdrawn. The plaintiff was in fact paid the Rs. 17,000 and a further sum of Rs. 3,000 as an advance towards her future maintenance. This transaction took place in the waiting room of the Railway station at Monghyr, the plaintiff being about to proceed by train to Darbhanga. It so happened that Mr. Chakravarti, the Subordinate Judge of Monghyr, before whom the suit was pending was also at the railway station upon business of his own and the parties with their pleaders handed over the petition to him there and then. He appears to have caused it to be read over to the plaintiff and noted thereon the following words:—

"Filed before me at 5-12 p.m. and read over to the plaintiff who admitted the same."

The hearing of certain issues in the case had been fixed, by an earlier order, to take place on the 27th November. On the 26th the pleaders of the parties appeared in Court and asked that the suit should be formally disposed of in the terms of the compromise. The Subordinate Judge then recorded the following order—

"Petition of compromise filed on 25th November 1924 after Court hours put up today with the consent of the parties. Ordered..... suit be decreed in the terms of the compromise."

The rest of the order deals with certain costs. About a week later, on the 4th December, a decree embodying the terms of the compromise was prepared and signed and sealed by the Court. The order made on the 26th was presumably passed under Order XXIII, rule 3 of the Civil Procedure Code, which provides the procedure to be adopted when the Court is satisfied that a compromise has been entered into.

On the 7th April, 1925, the plaintiff filed a petition in the Court of the Subordinate Judge seeking to have the compromise decree set aside on the ground that she had not consented to the terms thereof, and material terms had been omitted of which she was not

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aware when she signed the document; that her pleader had no authority to file a compromise petition on her behalf and in her absence on the 26th November and that her signature had been obtained by fraud. The application was made under section 151 of the Civil Procedure Code which reserves to the Court power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The application was transferred to the file of another Subordinate Judge, Mr. Choudhari, and determined by him on the 6th July, 1925. He dismissed the application, without going into the merits, holding that it was not maintainable under section 151 and that the proper remedy was by suit to set aside the decree.

From this order of the Subordinate Judge refusing to set aside the decree the plaintiff applied in revision to the High Court asking that the Subordinate Judge, Mr. Choudhari, should be directed to exercise his jurisdiction under section 151 of the Code, which he had failed to do. A further application in revision was at the same time presented to the High Court asking that the order of the Subordinate Judge Mr. Chakravarti, dated the 26th November, 1924, directing a decree to be drawn up in accordance with the terms of the compromise should be set aside on the ground that it was ultra vires and without jurisdiction inasmuch as it had not complied with the conditions prescribed, by Order XXIII, rule 3, which, before a decree can be passed on compromise, requires that the compromise should be recorded, and this was not done. Had it been done an appeal would have lain from such an order but as no such order had been passed no appeal was possible. The plaintiff also complained that it did not appear from the order that the Court was satisfied that the suit had been adjusted by a lawful agreement or compromise within the terms of rule 3 of Order XXIII.

On the 8th June, 1926, these applications were heard together before Jwala Prasad and

Bucknill, J.J. (1). The Court held first, that the Subordinate Judge had jurisdiction to hear the application under section 151 and ought to have entertained it and not dismissed it without going into the merits; and, secondly, that the order of the 26th November, 1924, directing a decree to be drawn up in the terms of the compromise could not stand and that, consequently, the decree itself must also be set aside. The principal grounds upon which the Court arrived at this conclusion were (1) that the terms of Order XXIII, rule 3, were not complied with as no order had been passed that the compromise should be recorded, (2) that the Court had no jurisdiciton to take up the case on the 26th November, 1924, as there was no formal consent of the parties to do so before the date fixed for hearing on the 27th, (3) that there was no consent of any duly constituted pleader or agent to taking the case on the 26th November because the vakalatnama of the plaintiff's pleader gave him no authority to compromise or to file a petition of compromise, and (4) that the presentation of the petition of compromise by the plaintiff's pleader in the absence of any authority so to act was a fraud upon the Court. The Court further directed the suit to be restored to the file of the Subordinate Judge of Monghyr to be continued from the stage at which the compromise was filed on the 26th November. The Court further directed that the case should be disposed of in accordance with law, by which I understand from the context the intention was that the Court should first be satisfied that a lawful compromise had in fact been entered into and, if it was satisfied, should order the compromise to be recorded before passing a decree in accordance therewith.

From this order the present application is made on behalf of the first two defendants for leave to appeal to His Majesty in Council. It is contended on behalf of the applicants that the order is final as it set aside a decree already passed in their favour. It

(1) *See* p. 108, *ante*.

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is further pointed out that had the decision been the other way it would undoubtedly have been a final order determining the rights of the parties. In support of the agreement reliance is placed upon certain of the earlier English decisions in which it has been laid down that an order made upon an application which, if decided in one way, would determine the main dispute while, if decided the other way, would not, is a final order whichever way it is decided. The matter is one which has given rise to questions of some nicety and considerable difficulty, and conflicting decisions are to be found in the cases upon the subject. It is not, in my opinion, necessary to refer to many of the English cases, which are numerious, on the point. I propose, however, to refer to a few cases in their chronological order in which different tests for ascertaining the finality of a judgment or order have been laid down.

In *Shubrook* v. *Tufnell* (1) decided in 1882, an arbitrator under an order of reference stated a case for the opinion of the Court which provided that, if the opinion of the Court should be one way, the case was to be referred back to the arbitrator; if the other way, judgment was to be entered for the defendant with costs. The Court decided in favour of the plaintiffs and referred the case back to the arbitrator. The defendant appealed. It was objected that the case which had been treated as an appeal from an interlocutory order should have been entered as an appeal from a final order. The Court of appeal consisting of Jessel, M. R., and Lindley, L. J., held that the order passed was a final order and that the appeal should take its place in the general list. The Court appears to have acted upon the view that where the decision of the Court on the point submitted to it could not in any event necessitate the entering of final judgment for either party the decision was interlocutory, but that if it could enter final judgment in the

(1) (1882) L. R. 9 Q. B. D. 621.

event of coming to a different decision then the order passed whichever way it went was final.

In the later case of *Salaman* v. *Warner* (1) a different view was taken by the same Court consisting of Lord Sasher, M.R., and Fry and Lopez, L.J.J. In that case it was held that an order dismissing an action made upon the hearing of a point of law raised by the pleadings before the trial is not a final order within the meaning of Order 58, rule 3 of the Annual Practice. It was there laid down that a final order is one made on such an application or proceeding that for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. The case had been set down for argument before the trial upon a point of law, that the statement of claim did not disclose any cause of action. A Divisional Court dismissed the action after argument upon this point. Had the decision been the other way the suit would have proceeded in the ordinary course upon the merits. The Court of appeal held that the order appealed from was interlocutory and not final. "If their decision" said Lord Esher, M.R., "whichever way it is given will if it stands finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final but interlocutory." Fry, L.J., who concureed stated the rule thus: "I think the true definition is this, I conceive that an order is final only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is interlocutory where it cannot be affirmed that in either event the action will be determined."

Each of these cases appears to have laid down a test based not upon a consideration of the actual deci-

(1) (1891) L. R. 1 Q. B. D. 734.

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sion appealed from but upon a consideration of the decision which might, in one event, have been given, and the tests formulated in the two cases are in direct conflict.

In the case of *Bozson* v. *Altrincham Urban District Council* (1) an order was made in an action brought to recover damages for breach of contract that the questions of liability and breach of contract only were to be tried, and that the rest of the case, if any, was to go to an Official Referee. At the trial the Judge held that there was no binding contract between the parties and made an order dismissing the action from which order the plaintiff appealed. The Court consisting of Lord Halsbury, L. C., Lord Elverstone, C.J., and Sir Francis Jeune, P., held that the appeal was from a final order. The Lord Chancellor refused to follow the decision in *Salaman* v. *Warner* (2), preferring to follow the earlier decision. Lord Alverstone, C.J., laid down what appears to me, with great respect, to be the real test in such cases. He says:— "It seems to me that the real test for determining this question ought to be this; Does the judgment or order, as made, finally dispose of the rights of the parties. If it does then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order." Judged by that test the order dismissing the action was held to be a final order.

The only other English case which I think it necessary to refer to is *In he Croasdell and Camell Laird and Co., Ltd.* (3). In that case an arbitrator made his award in the form of a special case but a Divisional Court subsequently made an order setting aside the award on the ground of misconduct on the part of the arbitrator. On appeal to the Court of Appeal it was held by Collins, M.R., and five Lords Justices that the decision appealed from was an interlocutory order.

(1) (1903) L. R. 1 K. B. 547. (2) (1891) L. R. 1 Q. B. D. 734.
(3) (1906) L. R. 2 K. B. 569.

The Court thought it unnecessary to enunciate any general rule on the question what orders are final and what interlocutory but arrived at their decision in the case before them on the ground that the order which did not determine any of the matters in dispute but left them where they were, merely asserting an informality in the award which had been made, and setting it aside, was interlocutory. It will be observed that although the decision of the arbitrator was set aside the order was held to be interlocutory, as the effect of it was not to determine the rights of the parties at issue in the litigation but to leave matters where they were before the arbitration took place.

In the present case, if the test applied by Lord Alverstone, C. J., in the case cited above, is the proper test to apply, then it cannot be said that the order which the petitioners now seek to appeal from is a final order. The effect of the order is merely this, that owing to defects of procedure in the Subordinate Court no proper decree has been passed and that the rights of the parties still have to be determined according to law. There is nothing in the order which, in my opinion, can even remotely be said to determine any of the rights in dispute between the parties and were it necessary to arrive at a conclusion in the light of the English cases only, I should hold that the order now sought to be appealed from is interlocutory and not final. It seems to me that the real test must be based upon a consideration of the actual order made.

The Indian cases, however, in which there appears to be a singular unanimity on the particular point raised, also go to shew that where a decree is set aside on the ground of irregularity or want of jurisdiction the order is not final but interlocutory. In Calcutta, Madras, Bombay and Allahabad the same view appears to have been taken, as a short reference to the cases recently decided in those Courts will shew. In *Sourendra Nath Mitter* v. *Srimati Tarubala Dassi* (1)

(1) (1924-25) 29 Cal. W. N. 882.

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the trial Court had recorded a compromise and passed a preliminary decree in accordance therewith as in the present case. On appeal a Division Bench of the High Court held that the compromise had not been made out, set aside the order recording the compromise and the decree based thereon, and remanded the case to the lower Court for trial. Against this decision an application was made for leave to appeal to His Majesty in Council. The Court held that the order of the Division Bench remanding the case to the lower Court for trial must be regarded as an interlocutory order, and that it was not a decree or final order passed on appeal within section 109(*a*) of the Code. One distinction between that case and the present is that there the order and decree were set aside on appeal, whereas in the present case the decree was set aside under the Court's revisional jurisdiction. The distinction, if any, is in favour of the respondent for section 109(*a*) of the Civil Procedure Code speaks only of a decree or final order passed on appeal. I will assume, however, for the purposes of this case, without deciding the point, that no distinction is to be drawn between an order passed on appeal and one passed in revision. A further distinction lies in this, that in the order there sought to be appealed from it was in fact found that no compromise had been entered into, whereas in the present case it is still left for the trial Court to determine that question. Rankin, J., after pointing out in his judgment that an adjustment under Order XXIII, rule 3, was in some ways a very special matter whereby a party was allowed to stand upon and enforce an agreement which was not in existence at the date of the suit, and that it was a method whereby a party was allowed to enforce what is really a new cause of action in order to avoid abandoning one suit and starting another, says " In my judgment the mere dismissal of an application for recording an adjustment coupled with an order that it is therefore necessary for the case to be tried in the ordinary way does not stand in such a relation to the

proceeding before the Court as to entitle it to be regarded as something which conclusively adjudicates upon the rights of the parties which were really the subject matter of the litigation. It merely negatives one of the several ways in which it may be contended that the rights of the parties should be disposed of." Still less can it be said that there is any finality in an order which determines neither the rights of the parties in the suit nor the question whether a valid compromise has been come to but leaves all these questions to be determined hereafter.

In *Brito* v. *Brito* (1), a decision of the Madras High Court, it was held that an order passed in revision refusing to interfere with an order of the Subordinate Judge passed under section 151 of the Code restoring to the file a suit which had been disposed of upon an alleged compromise between the parties was not a final order within the meaning of section 109, and that leave could not therefore be granted to appeal to His Majesty in Council against such an order.

Again the Bombay High Court in *Shri Satchidanand Vidya* v. *Shri Vidya Narsinha* (2) decided that an order of the High Court setting aside a decree of the trial Court based upon an alleged compromise between the parties and directing the trial Court to proceed with the suit in the ordinary course was not a final order appealable under the Code to His Majesty in Council.

Lastly it was decided by the Allahabad High Court in the case of *Bhagwati Dayal* v. *Musammat Dhan Kunwar* (3) that the words "final order" in section 109 of the Code mean an order which puts an end to the litigation between the parties or, at all events, disposes so substantially of the matters in issue between them as to leave only subordinate or ancillary matters for decision, and that an order by which a Court set aside a compromise of a suit is an interlocutory order and not a final order.

(1) (1924) 78 Ind. Cas. 938. (2) (1923) I. L. R. 47 Bom. 106.
(3) (1926) 92 Ind. Cas. 1027.

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All these cases are of recent date having been decided between the years 1922 and the present year. No decision of any of the High Courts in India has been drawn to our attention in which an order such as that passed in the present case has been held to be a final order.

The case of *Lachmi Narain Marwari* v. *Balmakund Marwari* (1) to which I was a party was referred to by the learned Counsel for the applicants in support of his argument. In that case a preliminary decree obtained in a partition suit had been set aside by the trial Court for want of prosecution in the subsequent proceedings. The preliminary decree had finally decided in favour of the plaintiff's right to partition. In carrying out the terms of the decree the plaintiff defaulted in appearance. The trial Court thereupon, exercising a jurisdiction which it did not possess, set aside the preliminary decree and dismissed the suit. The High Court decided that that order could not stand as the trial Court had no power to set aside the decree previously obtained merely on the ground of non-appearance in the subsequent proceedings. The decree was subsequently restored but no further question remained to be decided with regard to the plaintiff's right to that decree. It was there held that the order of the High Court was a final order and the case went on appeal to His Majesty in Council. The difference between that case and the present is this. The order in that case finally determined that the plaintiff was entitled to partition. The order in the present case decides nothing as to the rights of the parties in the suit and merely directs the Judge to re-hear the application for recording the compromise and to proceed thereafter according to law.

The case of *Rai Baij Nath Goenka Bahadur* v. *Sir Hameshwar Singh* (2) was also referred to, but I can find nothing in the judgment in that case which conflicts with the view I have already expressed. In

(1) (1921) 6 Pat. L. J. 116. (2) (1918) 3 Pat. L. J. 339.

my opinion the order which it is sought to appeal from is not a final order.

It was further argued on behalf of the applicants that the order should in any event be certified as a fit one for appeal to His Majesty in Council under clause (*c*) of section 109. The argument under this head consists mainly in pointing out that the plaintiff, as appears from the various unsuccessful attempts she has made to contest the validity of her husband's will, is a lady of pronounced litigious tendencies, and that if this case were allowed to go before a higher tribunal that tribunal would have no difficulty in overruling the decision and putting an end once and for all to this unfortunate litigation. I am not prepared to enter into a discussion of the merits of the decision from which it is sought to appeal. It must be assumed that the decision is right until it is overruled or varied by a higher tribunal; nor am I satisfied that the course suggested would bring about a more speedy termination of the litigation than if the case proceeds as directed by the order. The powers granted under section 109(*c*) should, in my opinion, be sparingly used and, although I do not consider it desirable to lay down the principles which should guide the Court in acting on it, I consider that the present case is not one in which the powers granted under clause (*c*) of the section can properly be invoked. This application should, in my opinion, be dismissed with costs.

Ordinarily the hearing fee would be assessed at five gold mohurs but on the 5th July last, before the vacation, an application was made asking, amongst other things, to expedite the hearing of the present application without serving some of the respondents in the suit. That application was refused but the costs were reserved to be taken into account when the application for leave to appeal should come before us.

FOSTER, J.—I agree.

Application dismissed.

LETTERS PATENT.

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

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Nov., 15.

CHAUDHRY GURSARAN DAS

v.

AKHOURI PARMESHWARI CHARAN.*

Chota Nagpur Tenancy Act, 1908 (*Ben. Act VI of* 1908), *sections* 68, 71, 139 (*5*) *and* 139*A*—*dispossession of tenants by landlord— application for restoration dismissed—suit for declaration of title and possession, whether barred.*

In 1916 the defendants, the landlords, forcibly dispossessed the plaintiffs, their tenants. The latter then applied to the Deputy Commissioner under section 71, Chota Nagpur Tenancy Act, 1908, for restoration of possession. The application was rejected on the 24th January, 1918. The tenants instituted the present suit on the 11th January, 1924, for a declaration that they were occupancy raiyats of the land in suit and for recovery of possession. The suit was decreed by the Munsif and his decision was upheld in appeal by the Subordinate Judge.

The defendants appealed to the High Court and Adami J., reversed the decision of the lower Courts and dismissed the suit on the ground that the Civil Court had no jurisdiction to try the suit. The plaintiffs appealed under the Letters Patent.

Sections 68 and 71 of the Chota Nagpur Tenancy Act, 1908, enact that—

68. No tenant shall be ejected from his tenancy or any portion thereof, except in execution of a decree or an order of the Deputy Commissioner passed under this Act.

71. Any tenant ejected otherwise than as aforesaid may present an application to the Deputy Commissioner praying to be replaced in possession of his tenancy and the Deputy Commissioner may..... replace him in possession.

Section 139 (*5*), before its amendment in 1920, provided :

(*5*) All applications to recover the occupancy or possession of any land from which a tenant has been unlawfully ejected by the landlord or any person claiming under or through the landlord.....

* Letters Patent Appeal no. 38 of 1926, from a decision of Adami, J., dated the 16th April, 1926, setting aside the decision of B. Amrita Nath Mitra, Subordinate Judge of Ranchi, dated the 13th January, 1923, affirming the decision of Babu Narendra Lal Bose, Munsif of Palamau, dated the 21st September, 1921.

shall be cognizable by the Deputy Commissioner and shall be instituted and tried under the provisions of this Act and shall not be cognizable in any other Court except as otherwise provided in this Act.

By section 36 of the amending Act of 1920 the words " all suits and applications " were substituted for the words " all applications " in clause (5). The amendment came into operation on the 1st March, 1924.

The amending Act also introduced into the Act section 139A which came into operation on the 5th November, 1920, and provides :

139A.....no Court shall entertain any suit concerning any matter in respect of which an application is cognizable by the Deputy Commissioner under section 139.....

Held, agreeing with Adami, J., that the present suit was not barred by section 139(5) as the amendment of that section did not become operative until after the present suit had been instituted.

Held, further, disagreeing with Adami, J., that the suit was not barred by section 139A, inasmuch as (*i*) section 139A and section 139(5) as amended, bar the jurisdiction of the Civil Courts only in summary suits for possession and not in title suits in which possession is claimed as a consequential relief; *Khetra Nath Ghatak* v. *Piru Bamri* (1), *Gooroo Das Roy* v. *Ramnarain Mitter* (2), *Jonardan Acharjee* v. *Haradhan Acharjee* (3) and *Asman Singh* v. *Shaikh Obeedooddeen* (4), referred to.

(*ii*) at the time when section 139A came into operation the plaintiff's cause of action had already accrued and there is nothing in the amending Act of 1920 to show that the Legislature intended to give retrospective effect to the new section. *Colonial Sugar Refining Company, Limited* v. *Irving* (5), *Manjhoori Bibi* v. *Akel Mahamud* (6) and *Gopeshwar Pal* v. *Jiban Chandra* (7), applied.

Bhuplal Sahu v. *Bhekha Mahto* (8), dissented from.

Chote Lal Nand Kishore Nath Shah Deo v. *Tula Singh* (9), followed.

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(1) (1911) 13 Cal. L. J. 251.
(2) (1867) 7 W. R. 186, F. B.
(3) (1867) 9 W. R. 513, F. B.
(4) (1875) 23 W. R. 460.
(5) (1905) L. R. Ap. Cas. 369.
(6) (1913) 17 Cal. W. N. 889.
(7) (1924) 18 Cal. W. N. 804, Sp. B.
(8) *Ante*, p. 64.
(9) (1926) C. W. N. (Pat.) 293.

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Appeal by the plaintiffs.

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

S. M. Mullick and *B. C. De*, for the appellants.

Sambhu Saran and *D. P. Sinha*, for the respondents.

JWALA PRASAD, J.—This is an appeal under the Letters Patent against the decision of Adami, J., dated the 16th April, 1926. The plaintiffs who are appellants before us brought a suit in the Court of the Munsif of Palamau for a declaration that they are ocupancy raiyats of the lands in suit and also for recovery of possession of the same on the allegation that the defendants 1-4, their landlords, had possessed them.

The lands in suit are situate in mauza Genda appertaining to the estate of the defendants in Palamau district. The estate had been under management under the Chota Nagpur Encumbered Estates Act and was released in 1913. The plaintiffs' case is that after the release of the estate the defendants tried to dispossess them claiming the lands as their zirait and actually succeeded in forcibly dispossessing them in 1323 Fasli (1916). The plaintiffs made an application to the Deputy Commissioner under section 71 of the Chota Nagpur Tenancy Act for restoring possession of the lands to them. On the 24th January, 1918, the Deputy Commissioner disagreeing with the view of the Deputy Collector refused their application. The plaintiffs thereupon instituted the present suit on the 11th January, 1921.

The defendants resisted the claim of the plaintiffs claiming the lands as their zerait, stating that the plaintiffs never acquired occupancy rights in the lands and had no right to possession. They also pleaded limitation and took objection to the suit being cognizable by the Civil Court.

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The Munsif overruled the objections of the defendants and decreed the plaintiffs' suit. On appeal the Subordinate Judge upheld the decision of the Munsif. The defendants came to this Court in second appeal. The appeal was heard by Mr. Justice Adami, and the only question raised before him was whether the Civil Court has jurisdiction to receive and try the plaintiffs' suit. The learned Judge answered this question in the negative holding that the suit was not cognizable by the Civil Court. Accordingly, he allowed the second appeal, set aside the decrees of the lower Courts and dismissd the plaintiffs' suit.

The learned Judge has held that the suit is barred by section 139A of the Chota Nagpur Tenancy Act (Bengal Act VI of 1908). This section was inserted into the Act by section 39 of the Bihar and Orissa Act VI of 1920 and it came into force on the 5th November, 1920, by notification published in the Bihar and Orissa Gazette of the 10th November, 1920. His Lordship's view is that the suit having been instituted on the 11th January, 1921, after the new provision contained in section 139A came into operation, is barred and the Civil Court had no jurisdiction to entertain it. By the Amending Act section 139, clause (5), was also amended.

The section has 8 clauses. Whereas clauses (1), (3), (4), (6) and (7) all refer to suits and clauses (2) and (8) refer only to suits and applications, clause (5) refers to applications alone. A distinction has been drawn in the section between suits and applications which distinction is recognized over and over again in the Act itself. Hence the words "suits" and "applications" are not interchangeable terms. Clause (5) of the section expressly bars "applications" only, and not "suits".

Now section 68 of the Act enacts that—

"No tenant shall be ejected from his tenancy or any portion thereof, except in execution of a decree or an order of the Deputy Commissioner passed under this Act."

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Under section 71—

"Any tenant ejected otherwise than as aforesaid may present an application to the Deputy Commissioner praying to be replaced in possession of his tenancy and the Deputy Commissioner may, if he thinks fit, after making a summary inquiry, replace him in possession in the manner prescribed by the rules made under section 262, sub-section (2), clause (*b*) of the Act."

Therefore, section 139, clause (5), of the amended Act VIII of 1908, relates only to an "application" under section 71 of the Act, by a tenant to be replaced in possession of the land from which he has been unlawfully ejected by the landlord, that is, in contravention of section 68 of the Act. It did not bar "suits" by tenants in the Civil Court for the same relief. Thus possessory suits under the Specific Relief Act (section 9, Act I of 1877) were held not to be barred under clause (5) of section 139 of the Act. [*Khetra nath Ghatak* v. *Piru Bamri* (1)]. The corresponding sections of the former Acts, clause (6) of section 23 of the Bengal Rent Act X of 1859, section 37B of the Chota Nagpur Landlord and Tenant Procedure Act (Bengal Act I of 1879) contained the words "suits and applications." It was held that only possessory suits under the Specific Relief Act were covered by those provisions, and not suits for possession based upon title. [*Gooroo Doss Roy* v. *Ramnarain Mitter* (2). *Jonardan Acharjee* v. *Haradhan Acharjee* (3) and *Asman Singh* v. *Shaikh Obeedooddeen* (4)].

By section 38 of the Amending Act VI of 1920 the words "All suits and applications" were substituted for the words "All applications" in clause (5) of section 139. But the amendment came into operation on the 1st of March, 1924 (Vide Government Notification of the 22nd February, 1924, published in the *Bihar and Orissa Gazette* of the 27th February, 1924), and, therefore, it does not affect the present suit instituted on the 11th January, 1921, and hence the learned Judge Mr. Justice Adami rightly held that the suit

(1) (1911) 13 Cal. L. J. 251. (2) (1867) 7 W. R. 186, F. B.
(3) (1867) 9 W. R. 513, F. B. (4) (1875) 23 W. R. 460.

is not barred by clause (5) of section 139 as amended by Act VI of 1920.

The new section 139A, which came into force on the 5th November, 1920, is thus the only provision which can apply. It bars a Court from entertaining a suit concerning any matter in respect of which an application is cognizable by the Deputy Commissioner under section 139; in other words, a suit for recovery of possession for which an application is cognizable by the Deputy Commissioner under section 71 read with section 139, clause (5), cannot be entertained by any Court. The object of the new section 139A as well as of adding the word "suit" to clause (5) of section 139 is to bar the cognizance of purely possessory suits under the Specific Relief Act by Civil Courts and to restore the law as it stood prior to 1908. These new provisions in the Act do not in any way take away the jurisdiction of the Civil Courts to entertain suits for possession based upon the determination of title. Only summary suits for possession, and not title suits with consequential relief for possession, are barred by these provisions. The present suit, however, is saved from the operation of section 139A on still firmer ground.

No doubt, the suit was instituted after section 139A came into force, but the cause of action accrued to the plaintiffs in 1916 when they were dispossessed by the landlord. They had recourse to the summary procedure of recovering possession of the property available to them under section 71 of the Act and applied to the Deputy Commissioner to be replaced in possession of the land in dispute. The Deputy Commissioner by his order of the 24th January, 1918 refused to restore them to possession. The fact that they had made such an application to the Deputy Commissioner did not affect their right to seek a remedy by a regular suit. So at the time when the new section 139A was inserted in the Act their right to bring an action in the Civil Court for a declaration that they are the occupancy raiyats of the land and

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for recovery of possession had already accrued. There is nothing in the Amending Act VI of 1920 to show that the Legislature intended to give the new section 139A retrospective effect and to destroy the right which had already accrued prior to the section coming into force. The plaintiffs had a vested right to institute the present suit in a Civil Court and they had acquired this right before the amendment came into force. The right was not affected by the Chota Nagpur Tenancy Act, 1908, as it stood prior to the amendment of 1920 under which they merely had an additional remedy to recover possession by a summary proceeding before the Deputy Commissioner (Revenue Court) under section 71 of the Act. Section 8 of the Bihar and Orissa General Clauses Act, 1917, says that the "repeal of section 9 of the Code of Civil Procedure as aforesaid will not affect the plaintiff's right, privilege or remedy." It runs--

"Where any Bihar and Orissa Act repeals an enactment hitherto made.....

"Unless a different intention appears, the repeal shall not.....

"(b) affect the previous operation of any enactment so repealed,

"(c) affect any right, privilege.....accrued or incurred under any enactment so repealed,

"(e) affect any.....remedy in respect of any such right, privilege.....as aforesaid."

To the same effect are the provisions of section 6 of the General Clauses Act X of 1897 which apply to the Acts of the Governor General in Council and section 8 of the Bengal General Clauses Act I of 1899. These provisions embody the general principle that the repeal or amendment of an Act does not affect a right already in existence unless a contrary intention is made out expressly or by implication. If it were only a matter of procedure, the amendment might have retrospective effect, but the amendment in the present case does not relate merely to matters of procedure. The principle enunciated by Lord Macnaghten in the case of the *Colonial Sugar Refining Company, Limited* v. *Irwing* (1) fully applies to the

(1) (1905) L. R. Ap. Cas. 369, P. C.

present case. That was a case whereby the Australian Commonwealth Judiciary Act, 1903, section 39, sub-section (2), a right of appeal from the Supreme Court of Queensland to His Majesty in Council given by the order in Council of the 30th June, 1860, was taken away, and the only appeal therefrom under the Judiciary Act lay to the High Court of Australia. The plaintiffs' action against the Collector of Customs to recover a sum of money paid by them as excise duty was lodged on the 25th October, 1902, and was dismissed on the 4th September, 1903, by the Supreme Court of Queensland. In the meantime on the 25th August, 1903, the Judiciary Act passed in 1903 received the Royal assent. Under its provisions an appeal from the decision of the Supreme Court would lie to the High Court and not to His Majesty in Council. The Supreme Court granted leave to the plaintiffs to appeal to His Majesty in Council. The respondent filed a petition in the Privy Council disputing the right of the plaintiffs to appeal to His Majesty. It was contended on his behalf that the appeal was barred by the Judiciary Act of 1903. The appellants, on the other hand, contended that the Act could not have retrospective effect so as to defeat their right in existence at the time when the Act received the Royal assent. The contention of the appellants prevailed and the petition of the respondent was dismissed. Lord Macnaghten in delivering the judgment of the Judicial Committee observed as follows—

"As regards the general principles applicable to the case there was no controversy. On the other hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well-founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judi-

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ciary Act is not retrospective by express enactment or by necessary intendment. And, therefore, the only question is: Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

These observations apply to the present case. In the present case the plaintiffs' right to seek their remedy in a Civil Court is taken away and such a suit by the new section 139A is to be instituted before the Deputy Commissioner of Chota Nagpur. The right having accrued before the new provision came into force is not destroyed by it. The case is governed by the principle laid down by Lord Macnaghten. The Indian decisions also support this view [*Manjhoori Bibi* v. *Akel Mahamud* (1), and *Gopeshwar Pal* v. *Jiban Chandra* (2)]. Adami, J., therefore, took a wrong view in holding that the present suit is barred by section 139A of the Chota Nagpur Tenancy Act. This decision was delivered on the 16th April, 1926. The learned Judge took a similar view in *Bhuplal Sahu* v. *Bhekha Mahto* (3). But on the 13th July, 1926, in *Chote Lal Nand Kishore Nath Shah Deo* v. *Tula Singh* (4) in delivering the judgment of the Division Bench in which Bucknill, J., concurred, Adami, J., took a different view and held that an

(1) (1913) 17 Cal. W. N. 889. (2) (1914) 18 Cal. W. N. 804, S.B.
(3) *Ante*, p. 64. (4) (1926) Cal. W. N. (Pat.) 293.

action in a Civil Court such as the present one is not barred by section 139A. I am in full accord with his Lordship's view expressed in that case.

On behalf of the respondent it was contended that the present suit is barred by section 258 of the Chota Nagpur Tenancy Act. That section has no application to the present case. It does not relate to an application under section 71 of the Act nor does the present suit seek to vary, modify or set aside any decision, order or decree of the Deputy Commissioner. The reliefs sought in the present suit are a declaration of the plaintiffs' right in the properties in dispute and for recovery of possession of the same not on the ground of illegal dispossession but on the ground of title. The scope of the suit is outside an application for recovering possession in a summary proceeding by an application under section 71 of the Act.

For these reasons I respectfully differ from the view taken by his Lordship Adami, J., in the case and would set aside his decision. I will, therefore, allow the appeal with costs and restore the decree passed by the Court below.

DAWSON MILLER, C. J.—I agree.

REVISIONAL CRIMINAL.

Before Jwala Prasad and Macpherson, J. J.

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v.

KING-EMPEROR.*

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Dec., 12.

Identification of Prisoner's Act, 1920 (*Act XXXIII of* 1920), *section 5—Thumb impression of accused person, whether may be taken in Court for purposes of comparison—Registration Act*, 1908 (*Act XVI of* 1908), *section* 82(*c*)—*Charge*

* Criminal Revision no. 699 of 1926, from an order of F. F Madan, Esqr., I.C.S., Sessions Judge of Shahabad, dated the 22nd September, 1926, confirming an order of Babu S. P. Sahai, Magistrate, 1st class, Arrah, dated the 11th September, 1926.

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of false personation—conviction for doing "any other Act in any proceeding under the Act."

Where the accused was charged under section 82(*c*) of the Registration Act, 1908, with having falsely personated another and, in such assumed character, with having presented a document purporting to have been executed by that other for registration,

Held, that in view of the provisions of the Identification of Prisoners Act, 1920, it is not improper for the court to take finger-prints of the accused in its presence and to have them compared by an expert with the disputed finger-prints.

Superintendent and Remembrancer of Legal Affairs of Bengal v. *Kiran Bala Dassi* (1), followed.

Bazari Hajam v. *King-Emperor*, (2), *King-Emperor* v. *Cirammal* (3) and *Emperor* v. *Abdul Hamid* (4), referred to.

Probative value of the evidence of finger-print experts discussed.

In the present case the High Court held that the evidence was insufficient to prove that the accused was guilty of personation, but found that he had, in column 1 of the Thumb-impression Register kept under rule 53 of the Registration Rules, put his own thumb-impression as that of another and, therefore, that he was guilty under the latter part of section 82(*c*) of the Registration Act, of doing "any other act in any proceeding or inquiry under this Act."

The registration of a document is a proceeding under the Act and the giving of a thumb-impression under rule 53 in the case of an illiterate is an act in a proceeding under the Act.

The petitioner Basgit Singh was convicted under section 82(*c*) of the Indian Registration Act, the charge being that on or about the 29th day of September, 1902, at Koilwar Registration office he falsely personated one Sidhu Mahto and in such assumed character presented a document, namely, a mortgage deed, dated the 20th September ,1902, for Rs. 400,

(1) (1925) 30 Cal. W. N. 875.
(2) (1922) I. L. R. 1 Pat. 242.
(3) (1923) I. L. R. 46 Mad. 715.
(4) (1905) I. L. R. 32 Cal. 759.

purporting to have been executed by Sidhu Mahto and others in favour of Chamru Singh, for registration.

Chamru Singh was father of the petitioner Basgit Singh. Sidhu was son of Tengar Mahto. He had two brothers Ramnandan and Subedar. Tengar Mahto executed four documents in favour of Chamru Singh: (1) a usufructuary mortgage deed for Rs. 500, dated the 27th May, 1897, (2) a mortgage deed for Rs. 95 (Exhibit 13), dated the 5th August, 1899, (3) a mortgage bond for Rs. 141 (Exhibit 14), dated the 3rd September, 1899, and (4) a simple mortgage deed for Rs. 197-13-6. All these bonds were rehan deeds except the last one which was a simple mortgage. After the death of Tengar Mahto, on the 9th November, 1901, his sons Sidhu Mahto, Ramnandan Mahto and Subedar Mahto executed another mortgage bond for Rs. 300 (Exhibit 15) in favour of the petitioner's father Chamru Singh. On the 27th October, 1903, Sidhu Mahto and Ramnandan Mahto executed a sale deed (Exhibit 17), for Rs. 1,000 in favour of Chamru Singh. The case of the prosecution was that the three mortgage bonds were satisfied: (1) of Rs. 500, (2) of Rs. 197-13-6 and (3) of Rs. 300. In 1921 Sidhu Mahto and Ramnandan Mahto executed another sale deed (Exhibit 1) in favour of one Akbar Ali for Rs. 1,500. By the consideration of this sale Akbar Ali was to pay off the two mortgage bonds of Rs. 95 and Rs. 141 respectively. Akbar Ali accordingly tendered to petitioner Basgit Singh and his brother Basawan Singh the said sum of Rs. 236 towards the satisfaction of the aforesaid bonds. They refused to accept the payment, contending that they had another mortgage bond of Rs. 300, dated the 9th November, 1901 (Exhibit 15), which remained unsatisfied. Akbar Ali instituted a civil suit for redemption and recovery of possession. In the civil suit the sale deed (Exhibit 17), dated the 27th October, 1903, which was executed by Tengar Mahto in favour of Chamru Singh was produced. It showed that two bonds were mentioned therein to be satisfied out of the consideration

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money, namely, the rehan bond of Rs. 500, dated the 27th May, 1897, and the bond, dated the 20th September, 1902, for Rs. 400. There was no mention in the sale deed of the mortgage deeds of Rs. 197 odd and Rs. 300. The contention of Akbar Ali, the plaintiff in that case, and of Sidhu Mahto and Ramnandan Mahto, the alleged executants of the bond of the 20th September, 1902, was that that bond was a forgery and that Sidhu and Ramnandan never executed it. The Munsif held that it was not a forgery and did not allow redemption to the plaintiff unless he paid the bond of Rs. 300 which remained unsatisfied. On appeal the Subordinate Judge hold that the bond set up was a forged one and that Sidhu and Ramnandan never executed it. This view was taken upon a consideration of the evidence of an expert on finger prints. The Subordinate Judge referred the matter to the Criminal Investigation Department for inquiry with the result that Ramlagan Chamar, a servant of the petitioner, was convicted for having given a thumb impression for Ramnandan Mahto. Upon further inquiry the present petitioner was put upon his trial along with one Daroga Singh who was supposed to have identified the executants Sidhu Mahto and Ramanandan Mahto before the Sub-Registrar of Koilwar. Daroga Singh was acquitted, and petitioner Basgit Singh was convicted.

The lower Courts held that the peitioner put his thumb impression in a register of thumb impressions of executants kept under rule 53 framed under the Registration Act. The form for this register was No. 8, and provided for the following columns :—

(1) Impression of left thumb or other digit,

(2) Name and signature of executant,

(3) Date of impression,

(4) Book number and document number, and

(5) Serial number of impression.

In column (2) of this register it was stated—

"Sahi Sidhu Mahto bakalam Daroga Singh"

as being the executant of document No. 924 copied in book No. 1. In column (1) of this register was the thumb impression supposed to be of the executant Sidhu Mahto mentioned in column (2). The clerk Deoki Lal, who was examined in the case on behalf of the prosecution, wrote the name of Sidhu Mahto in column (2) indicating that this was the name given to him by the person who was said to have executed the document in question and affixed his thumb impression in column (1). The date of taking the thumb impression as mentioned in column (3) was the 29th September, 1902. The entries in question in the register referred to above were, therefore, in respect of the document in question. The original document was not produced, and the Court was not informed where it was. A copy of that document was made in the register of documents provided for by the Registration Act and that register was produced before the High Court. It showed that the document in question was presented before the Sub-Registrar on the 29th September, 1902, at the Koilwar Sub-registry office by Sidhu Mahto who was said to have signed the endorsement of presentation by the pen of Daroga Singh. The Courts below found that the thumb impression in column (1) of the register of thumb impressions referred to above was that of the petitioner. This finding was based upon the evidence of an expert on finger prints who arrived at the conclusion by comparing the thumb impression in question in the register with the thumb impressions Exhibits 2, 3, 4, 5 and 6. There was direct evidence given with respect to the thumb impression (Exhibit 3) as being that of the petitioner Basgit Singh. That was a thumb impression given by him upon a registered bond of 1906. Witness Badruduza said that the thumb impression was given by accused Basgit Singh in his presence upon that document. The thumb impressions (Exhibits 4, 5 and 6) also appeared to be of

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Basgit Singh, though there was no direct evidence of his having given those thumb impressions.

Sir Ali Imam (with him *B. P. Sinha*), for the petitioner.

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

JWALA PRASAD J., (after stating the facts set out above, proceeded as follows:)

Sir Ali Imam on behalf of the petitioner contends that the evidence of the expert is insufficient to prove the identity of the petitioner with the man who gave the thumb impression in column (1) of the register, and he has referred to the decision in the case of *Bazuri Hajjam* v. *King-Emperor* (1). In that case the accused was convicted under section 82(*c*) and (*d*) of the Registration Act. The charge against him was that a document registered by the Sub-Registrar of Koilwar was not in fact executed by Ram Prasad but was executed by the accused Bazari Hajjam who represented the alleged executant Ram Prasad who placed his thumb impression upon the document. In that case the thumb impression of the accused was taken in the Magistrate's Court as well as in the Court of Sessions by a finger print expert who upon a comparison of those thumb impressions with the one on the document in question found that the three impressions were identical. The conviction of the accused was based upon the evidence of the expert. Their Lordships (Das and Bucknill, JJ.), deprecated the practice of obtaining thumb impression of an accused person in the manner set forth and held that it was improper to convict an accused person on the sole testimony of a finger print expert.

Recently, in the case of *Superintendent and Remembrancer of Legal Affairs of Bengal* v. *Kiran Bala Dassi* (2), Ghose and Duval, JJ., referred to

(1) (1922) I. L. R. 1 Pat. 242. (2) (1925) 30 Cal. W. N. 873.

section 5 of Act XXXIII of 1920 and to section 45 of the Evidence Act and held that the taking of a thumb impression of an accused person in the manner that was done in the present case was permitted by section 5 of Act XXXIII of 1920 and that the opinion of the expert formed by a comparison of such thumb impressions is admissible in evidence. Their Lordships observed: "It would therefore follow that the procedure which was adopted by the Magistrate was one in strict accordance with the provisions of the law and that the learned Sessions Judge was not correct in saying that the thumb impression of Kiran Bala Dassi which had been taken in Court was one which had been taken illegally and against a fundamental principle of law. That being so, it is impossible to resist the conviction that the thumb impression which had been put on the deed at the time of the registration of the document was one which had been put not by Sindhu Bala Dassi but by Kiran Bala Dassi; in other words, we are satisfied on the evidence that it was Kiran Bala Dassi who had personated Sindhu Bala Dassi at the time of the registration of the document." With this observation their Lordships convicted the accused in that case.

Similar was the view taken in the case of *King-Emperor* v. *Virammal* (1). In that case the decision by this Court in the case of *Bazari Hajjam* v. *King-Emperor* (2) as well as of the Calcutta High Court in *Emperor* v. *Abdul Hamid* (3) were considered. In that case, *King-Emperor* v. *Virammal* (1), their Lordships observed that a Court cannot refuse to convict a person on the evidence of a finger print expert, merely on the ground that it is unsafe to base a conviction upon such evidence. If the finger prints are clear enough, the Court must verify the evidence of the expert by examining them with a

(1) (1923) I. L. R. 46 Mad. 715. (2) (1922) I. L. R. 1 Pat. 242.
(3) (1905) I. L. R. 32 Cal. 755.

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magnifying glass if necessary, and applying its own mind to the similarities and dissimilarities afforded by the finger prints, before coming to a conclusion one way or the other. In that case the finger prints or the thumb impressions were in the light of the aforesaid remarks examined by their Lordships and they differed from the opinion of the expert and did not consider it safe to convict the accused.

It seems to me that it is not now open to contend that it is wrong on the part of the Court to take finger prints of the accused in its presence and to have them compared by an expert with the disputed finger prints. The question has been solved by legislation (Act XXXII of 1920).

As to the probative value of the opinion of an expert on finger prints, it must have the same value as the opinion of any other expert, such as a medical officer, etc. In each case the evidence is only a guide to the Court to direct its attention to judge of its value. The Court is at liberty to use its own discretion and to come to a conclusion either in affirmance or differing from the view taken by the expert. In this view it may be said that, as has been held repeatedly in a number of cases, that it is not safe to convict an accused upon the sole testimony of an expert. The danger of such a conviction has also been indicated in the decision of the Madras High Court referred to above. Each case, however, must depend on its own circumstances.

The question, therefore, at issue in the present case is whether there is sufficient evidence direct or circumstantial to enable us to say with reasonable certainty that Basgit Singh accused is the person who put his thumb impression in column (1) of the register in question.

I have considered the case very carefully and in the circumstances of the present case I do not think

that we can reject the evidence of the expert. The circumstances afford ample corroboration of the expert's opinion. Sidhu and Ramnandan have not been shown to have borne any grudge or enmity against the petitioner before us. All that we know is that the family of the accused and of Sidhu Mahto were on amicable terms and they had monetary transactions between them. The accused's father and after him he himself seemed to be always ready to help Sidhu and his family in times of pecuniary needs. No less than five mortgage bonds were executed by Tengar Mahto, father of Sidhu Mahto and Ramnandan Mahto in favour of Chamru Singh. They executed sale deeds, one in favour of Chamru in 1903 and another in favour of Akbar Ali in 1921 in order to pay off the debts covered by the mortgage bonds. There is nothing to indicate why having admitted five of the bonds they would refuse payment of the bond in question, dated the 20th September, 1902, and deny the execution thereof altogether. On the other hand, accused Basgit and his brother Basawan might have apprehended that the land which was in their possession under a usufructuary mortgage from 1897 might slip out of their hands. There might thus be pecuniary object in their minds in forging the document in question in order to augment the liability of Sidhu and Ramnandan and thus to prevent redemption of the lands in their possession.

Thus, whereas on one side, that is, on the side of the accused we find a motive for fabricating the bond in question, on the side of Sidhu and Ramnandan there is absence of any motive for denying the bond if it were genuine. It is but natural that the persons in whose favour the document in question was executed would be the persons in the Koilwar registry office, particularly when Sidhu and Ramnandan, the executants of the bond, were not there, and that fraud and forgery in their names had to be committed in order to pass successfully through the registration of

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this document. Therefore, Basgit Singh and Basawan Singh who were the beneficiaries under the bond in question would naturally be the persons in the registry office and without their participation it was not possible to consummate the forgery of the document. One of them, therefore, either Basgit Singh or Basawan Singh must have presented the document in question and also put the thumb impression in column (1) of the register. The question is which of them did so? The thumb impression has been proved to be not similar to the thumb impression of Sidhu Mahto. The opinion of the expert is that it is similar to the thumb impression of Basgit.

The case of the accused is that the bond in question was satisfied by means of the consideration of the kabala (Exhibit 17), dated the 27th October, 1903. Along with it the bond of Rs. 500, dated the 27th May, 1897, must also have been satisfied and, in fact, it is case of both sides that it was satisfied. That bond is not produced. The complainant would have produced it if he had been in possession of it. As it was a usufructuary mortgage and as the consideration was paid out of it, it seems that this bond must be in the possession of the accused. In order to keep his lien alive it may have contained endorsement of payment or a mark of payment by tearing it off; but the document returned and paid off out of the consideration money remains in the hands of the creditor who pays the money as a proof of such payment. The document for Rs. 197-13-6 has also not been produced.

Therefore, the case of the prosecution that the document in question was with the accused and that he has withheld its production in order to prevent the detection of forgery must be held to be true.

I, therefore, in concurrence with the view of the Courts below hold that the thumb impression in column (1) of the register is that of the petitioner. This proves that he gave the thumb impression in that register calling himself Sidhu Mahto as witness Deoki

Lal says who write it in column (2). Whether he presented the document or not, I am not sure that the evidence necessarily connects him with it. It is highly probable that he did so, but the presentation of a document is an incident quite apart from putting a thumb impression of the executant in column (1) of the register. The two take place at different places though in near proximity. A number of persons were present who were interested in the passing through of the document in question and Daroga Singh is said to have signed for Sidhu Mahto in column (2). There is, to my mind, a link missing which would necessarily connect the petitioner with the presentor of the document.

The charge in the present case is that the petitioner personated Sidhu Mahto and in that assumed character he presented the document in question for registration. That charge to my mind is not proved inasmuch as the evidence is not conclusive as to his having presented it.

This brings up to the consideration whether the petitioner committed any offence under section 82, clause (*c*), of the Registration Act by having personated Sidhu Mahto before the clerk Deoki Lal and putting his own thumb impression for Sidhu Mahto in column (1) of the register. The learned Assistant Government Advocate contends that this would bring him under the latter provision of the section which runs as follows :—

> "Falsely personates another, and in such assumed character presents any document, or makes any.....statement..... .....or does any other act in any proceeding or enquiry under this Act."

I have quoted only as many words of the section as are necessary for the purpose of this contention. Sir Ali Imam also agrees with this contention. It seems, therefore, that the registration of a document is a proceeding under the Act and the giving of a

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thumb impression under rule 53 in the case of an illiterate person forms an act in a proceeding under the Act. Therefore, that fact alone, namely, the putting of the thumb impression by the accused in column (1) in order to facilitate registration of the document will be an offence committed under section 82, clause (*c*) of the Act.

The question then is whether the accused will be prejudiced by his conviction for it instead of for presenting the document in an assumed character as is set forth in the charge. The whole case of the prosecution from the beginning is based upon the putting of the thumb impression in column (1) of the register and the accused had, therefore, full notice of the charge against him and the evidence that was given in support of that charge. Therefore the accused will not in any way be prejudiced by his conviction under the latter portion of clause (*c*) of section 82 of the Registration Act.

I would, therefore, uphold the conviction of the petitioner and reduce the sentence to six months' rigorous imprisonment.

The Court would like to place on record its appreciation of the work done by the Criminal Investigation Department in detecting the offence.

MACPHERSON, J.—I agree to the order proposed. No point of law arises. It is also not shown that the findings on the facts of the appellate Court are wrong. Indeed the examination of the facts before us has served to show that the conclusions thereon of the learned Sessisons Judge are entirely correct. I should myself have had no serious difficulty in holding that it is a legitimate inference from the facts proved in the case that the petitioner presented the mortgage deed in question for registration. But in all the circumstances I am not prepared to say that the order proposed does not adequately meet the case.

APPELLATE CIVIL.

Before Das and Adami, JJ.

SRIMATI TULSI MAHATANI

v.

GAJADHAR MARWARI.*

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Nov., 18, 22.

Chota Nagpur Tenancy Act, 1908 (*Bengal Act VI of* 1908), *sections* 3(*23*), 20, 139 *and* 208—*cess, suit for the recovery of, whether cognizable by Deputy Commissioner—section* 139*A*, *clause* (*3*), *scope of—decree for cess, when operates as a rent decree—tenure or holding, sale of, in execution of a decree for cess, effect of—Bengal Rent Recovery Act*, 1865 (*Bengal Act VIII of* 1865), *section* 16, *applicability of.*

Under section 3(*xxiii*) of the Chota Nagpur Tenancy Act, 1908, " rent " includes cess. Therefore a suit for the recovery of cess is a suit for rent within the meaning of section 139(*3*) (*a*) and is cognizable by the Deputy Commissioner.

Provided certain formalities are adopted, the decree in a suit for cess operates as a decree for rent.

Pitambar Chowdhury v. *Shaikh Rahmat Ali* (1), followed.

Mahanand Chuckerbutty v. *Banimadhab Chatterjee* (2), not followed.

By reason of section 208 of the Chota Nagpur Tenancy Act, section 16 of the Bengal Rent Recovery Act, 1865, applies to a sale of a tenure or holding held under the former Act in execution of a decree for arrears of cess, and the purchaser acquires the property free from all encumbrances subject to the proviso to that section.

Appeal by the plaintiffs.

This appeal arose out of a suit instituted by the appellants to set aside the sale of Mauza Raherdih in which they were interested. The Raja of Panchakoti was the superior landlord. It was not disputed that he granted certain brahmottar rights in the village to one Ramsatya Goswami. The predecessor in title of the present plaintiffs took a lease from the

* Appeal from Original Decree no. 194 of 1922, from a decision of Maulavi Najabat Husain, Subordinate Judge of Purulia, dated the 17th June, 1922.

(1) (1922) 8 Pat. L. T. 282. (2) (1897) I. L. R. 24 Cal. 27.

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successors in interest of Ramsatya Goswami. The plaintiffs also purchased a certain share of the interest of the brahmottardar. On the 8th April, 1916, the Raja of Panchakoti instituted a suit for the recovery of cess as against the plaintiffs and recovered an ex-parte decree on the 28th June, 1916. On the 2nd April, 1912, the mauza was sold in execution of the decree and was purchased by defendant no. 1 for Rs. 1,000. It appeared that one Babu Bhupati Mazumdar obtained a money decree as against plaintiffs 1 and 4, and on the 15th September, 1916, the share of plaintiffs 1 and 4 in the village and in a certain tank were put up for sale and was purchased by defendant no. 2. The plaintiffs sought in this suit to set aside the sale of the 2nd April, 1917, and that of the 15th September, 1916.

It was the case of the plaintiffs in the Court below that defendant no. 2 was the benamidar of defendant no. 1 and it was in that view that one suit was allowed to be instituted in respect of the two sales.

The Subordinate Judge found that defendant no. 2 was not the benamidar of defendant no. 1; he also held on the merits that the sale of the 15th September, 1916, could not be set aside. The decision of the Subordinate Judge on these points was accepted by the plaintiffs, who were the appellants in the High Court. In regard to the sale of the 2nd April, 1917, the Subordinate Judge came to the conclusion that the plaintiffs had no merit and did not deserve any success in this suit. In that view the Subordinate Judge dismissed the plaintiffs' suit.

A. K. Roy, *S. C. Mazumdar* and *Janak Kishore*, for the plaintiffs.

P. K. Sen (with him *A. Sen*, *A. R. Mukherji* and *B. B. Mukherji*), for the respondents.

22nd Dec. 1926.

DAS, J.—We entirely agree with the view which has been taken by the learned Subordinate Judge. He has taken a great deal of trouble with the evidence

and his judgment shows much industry and ability, and as we entirely agree with his conclusion it will not be necessary for us to deal in detail with the various questions which have been raised before us.

The first question argued before us on behalf of the appellants is that the suit being a suit for recovery of cess was not triable by the Revenue Court; but it is obvious that under section 3, clause (23), of the Chota Nagpur Tenancy Act rent includes cess. Section 139 deals with the jurisdiction of the Revenue Court to take cognizance of suits and it provides inter alia that

> "all suits for arrears of rent on account of agricultural land, whether subject to the payment of rent or only to the payment of dues which are recoverable as if they were rent shall be cognizable by the Deputy Commissioner",

and shall be instituted and tried or heard under the provisions of the Chota Nagpur Tenancy Act and shall not be cognizable in any other Court except as otherwise provided in the Act.

Now, as I have said, rent includes cess, and it is obvious to my mind that section 139, clause (3), paragraph (*a*), clearly provides that a suit for recovery of cess shall be cognizable by the Deputy Commissioner.

It was argued on behalf of the appellants that there is no evidence that the land in respect of which the suit for cess was brought was agricultural land. In my opinion the argument is an idle one and is not deserving of any success. I hold that the Revenue Court had jurisdiction to try the suit.

It was next contended that although the suit may be regarded as a rent suit, still as certain persons interested in the tenure were not made parties to the suit, the decree for cess operated not as a rent decree but as a money decree.

[After discussing the evidence on this point his Lordship proceeded as follows:]

The result is that the decree obtained by the landlord must be regarded as a rent decree.

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DAS, J.

It was next argued that although the decree may be regarded as a rent decree, it has still to be considered what property passed under the sale.

Now section 208 of the Chota Nagpur Tenancy Act provides as follows:—

"When a decree passed by the Deputy Commissioner under this Act is for an arrear of rent due in respect of a tenure or holding, the decree-holder may apply for the sale of such tenure or holding, and the tenure or holding may thereupon be brought to sale, in execution of the decree, according to the provisions for the sale of under-tenures contained in the Bengal Rent Recovery (Under-tenures) Act, 1865, and all the provisions of that Act, except sections 12, 13, 14 and 15 thereof, shall, as far as may be, apply to such sale: Provided that the purchaser of a tenure at any such sale shall not be entitled to annul any lease, right or tenancy referred to in clauses (*a*) to (*e*) of section 14 of this Act."

It is not necessary to cite the other provisos contained in section 208 as no reliance is placed on them by Mr. Atul Krishna Ray It is obvious, therefore, that section 16 of the Bengal Rent Recovery Act of 1865 does apply to the sale in this case. Now that section provides as follows:—

"The purchaser of an under-tenure sold under this Act shall acquire it free from all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement under which the under-tenure was created or by the subsequent written authority of the person who created it, his representatives or assignees."

It follows, therefore, that the purchaser has acquired the property free from all incumbrances unless the present case comes within the proviso to section 16 which is as follows:—

"Provided that nothing herein contained shall be held to entitle the purchaser to eject khudkast raiyats or resident and hereditary cultivators, nor to cancel bona fide engagements made with such class of raiyats or cultivators aforesaid by the late incumbent of the under-tenure or his representatives except it be proved, in a regular suit, to be brought by such purchaser for the adjustment of his rent that a higher rent would have been demandable at the time such engagements were contracted by his predecessor."

A faint attempt was made by Mr. Atul Krishna Ray to bring his case within the proviso to section 16 of the Bengal Rent Recovery Act, 1865; but there is

no proof whatever that his clients are khudkast raiyats or resident and hereditary cultivators or that they hold under bona fide engagements as such raiyats.

The next point is, whether the case has been brought within the proviso to section 14 of the Chota Nagpur Tenancy Act. That section undoubtedly protects any right of a raiyat or cultivator in his holding or land, as conferred by the Chota Nagpur Tenancy Act or by any local custom or usage. It was strongly contended that at any rate in respect of one rekha of land known as Tharna Rekha and two tanks, the plaintiffs appellants have the rights of raiyats and that therefore this rekha of land and those two tanks are protected from the sale.

The question of fact raised in this argument has been discussed very fully and elaborately by the learned Subordinate Judge, and I see no good reason for differing from the learned Subordinate Judge in the conclusion at which he has arrived. It is sufficient to say that one of the documents in the record (Exhibit M) completely disposes of the case.

So far as the two tanks are concerned, the judgment itself shows that the plaintiffs have no raiyati interest in those two tanks. So far as the one rekha of land known as the Tharna Rekha is concerned Exhibit M shows that Boul Das purchased that land as a co-sharer proprietor from an occupancy tenant. Boul Das represented the whole body of the Mahathas in the transaction and he had co-sharer landlords, and Exhibit M shows that upon such purchase Boul Das held the land paying proportionate rent to his co-sharers and that this land was allotted to Boul Das in the partition which was effected by the judgment in the partition suit. That judgment in the partition suit shows that this land was allotted to Boul Das in the partition.

Now it is obvious that a co-sharer landlord purchasing a holding in execution of a rent decree does not acquire the right of an occupancy tenant. It is

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quite true that he has to pay a proportionate share of rent to his co-sharer landlords, but his interest is not that of a tenant. Section 20 of the Chota Nagpur Tenancy Act makes this position perfectly clear; but whatever the position may have been at the date when Boul Das purchased the occupancy holding, his position was entirely different when this land was allotted to him in the partition which took place thereafter. The whole interest of the tenant and the whole interest of the landlord merged in Boul Das, and, in my opinion, it is impossible to take the view that after the partition Boul Das continued to hold the land as his under-tenant. In my opinion, the plaintiffs have not established that they have any jamai rights or occupancy rights in the village.

It was lastly contended that the sale held in pursuance of the decree for cess operated to transfer only the right, title and interest of the judgment debtors, and a decision of the Calcutta High Court in *Mahanand Chuckerbutty* v. *Banimadhab Chatterjee* (1) was relied upon in support of this proposition. But the Cess Act itself provides that provided certain formalities are adopted the decree in a suit for cess operates as a rent decree. A decision of this Court in *Pitambar Chowdhury* v. *Shaikh Rahmat Ali* (2) is a clear authority for this proposition. Now this point was not raised in the Court below and the appellants could not complain if there are no materials in the record to enable us to decide whether these necessary formalities were or were not taken; but fortunately the materials in the record establish that these essential formalities were in fact adopted in the rent suit. That being so, the decision of this Court in the case just cited is a clear authority in support of the view that that decree must be regarded as a rent decree.

I would dismiss this appeal with costs.

ADAMI, J.—I agree.

Appeal dismissed.

(1) (1897) I. L. R. 24 Cal. 27. (2) (1923) 3 Pat. L. T. 282.

PRIVY COUNCIL.

RAMSARAN MANDAR

v.

MAHABIR SAHU.*

1926.

Nov., 29.

Amendment of plaint—change in nature of suit—suit for specific performance or damages—claim against heirs to recover earnest money—liability of Hindu son and grandson.

A suit was brought against the members of a Hindu joint family for specific performance of a written agreement for the sale of family property alleged to have been made by the karta, or for damages, namely, the earnest money with interest. The plaint did not allege, nor did the evidence show that the sale was for necessity. The trial judge found that the agreement was a forgery and dismissed the suit. Pending an appeal the karta died, and the cause title was amended by adding as his heirs, his son and grandsons, who were already parties. Upon the appeal the plaintiff, who abandoned his claim for specific performance, was given a decree for the earnest money with interest. It was contended on appeal to the Privy Council that the decree could be supported having regard to the liability of the son and grandsons for the debt of the deceased karta, the question whether they had assets of his being determined in execution proceedings.

Held that the decree should be set aside, as it was not permissible by amendment to change the suit into one for money had and received or to recover a debt.

Decree of the High Court reversed.

Appeal from a decree of the High Court (February 22, 1924) reversing a decree of the District Judge of Darbhanga (March 9, 1921).

The suit was brought by the respondent against the appellants, members of a joint Hindu family, including the karta, Ramsaran Mandar, who died pending the appeal to the High Court. The claim

*Present: Lord Sinha, Lord Blanesburgh, Mr. Ameer Ali and Lord Salvesen.

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was for the specific performance of an agreement alleged to have been made by the karta for the sale of certain family property, or for damages, namely the return of earnest money with interest.

The trial judge found that the alleged agreement was not proved. The High Court (Das and Ross, JJ.) found to the contrary and made a decree against the surviving members of the family for the return of the earnest money with interest.

The facts relevant to the present decision appear from the judgment of the Judicial Committee.

1926 Nov. 1, 2, 4. *Sir George Lowndes, K. C.* and *Abdul Majid* for the appellants.

DeGruyther, K. C. and *Dube* for the respondents.

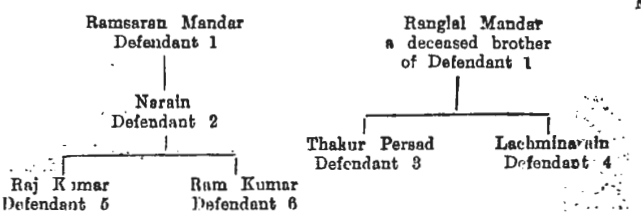
The arguments were to a great extent devoted to the question of fact whether execution of the alleged agreement by thumb-mark was proved, also to the question of law whether the document required registration, which questions their Lordships found it unnecessary to decide. As to the liability of the son and grandsons of the karta, reference was made for the respondent to Mayne, paragraph 327 and *Masit Ullah* v. *Damodar Prashad* (1). For the appellant reference was made to *Ma Shwe Mya* v. *Maung Ho Hnaung* (2) it being contended that the nature of the suit could not be altered by amendment.

Nov. 29. The judgment of their Lordships was delivered by—

LORD SINHA.—This is an appeal from a judgment and decree dated the 22nd February, 1924, of the High Court of Judicature at Patna, which reversed a judgment and decree, dated 9th March, 1921, of the District Judge of Darbhanga and made in suit no. 835 of 1919.

(1) (1926) L. R. 53 I. A. 204; I. L. R. 48 All. 518.
(2) (1921) L. R. 48 I. A. 214; I. L. R. 48 Cal. 882.

That suit was instituted by the plaintiff, Mahabir Sahu, against six defendants, all members of a joint Hindu family, constituted as shown in the pedigree below :—



Defendants 4, 5 and 6 were all minors at the time the suit was filed, but defendant 4 attained majority before judgment. Defendant 3 died before filing any written statement.

The plaint alleged that Ramsaran (defendant 1), as head and karta of the above joint family, entered into an agreement with the plaintiff to sell certain houses and lands belonging to the said family for Rs. 11,000, and on the 20th August, 1919, executed an agreement for such sale (Exhibit 5 in the case) on receipt of Rs. 9,000 as earnest money,

" affixing a stamp with his signature and thumb impression thereon,"

and stipulating to execute and register a regular conveyance within three weeks on receipt of the balance of the consideration. Ramsaran failed to execute the conveyance though called upon to do so, and the plaintiff prayed for specific performance of that agreement on payment of Rs. 2,000, or

" if for any reason a decree for specific performance be not possible in the opinion of the Court, Rs. 9,000, the principal amount of the earnest money, with interest thereon, at Rs. 2 per month by way of damages may be awarded to the plaintiff against the defendants."

By his written statement Ramsaran denied that he entered into any such agreement, or that he executed the document (Exhibit 5) as alleged or " received a single farthing as earnest money ". He asserted that

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it was a false case altogether, put forward by one Kisorilal, in the name of his father-in-law, the nominal plaintiff, with a view wrongfully to obtain the properties in suit which he had unsuccessfully claimed in previous litigation; that the value of the properties was at least Rs. 21,000, and the story of an agreement to sell them for Rs. 11,000 was false and fraudulent.

Written statements were put in, on behalf of the defendants 2 and 4, and of the minor defendants 5 and 6, by which they also denied the truth of the plaintiff's story, and further pleaded that even if defendant 1 entered into any such transaction, "he had no right to make any contract to execute a sale deed in respect of the said properties, nor were these defendants at all benefited by the said Act".

The two chief issues raised on these pleadings were numbered 4 and 6 respectively in the trial court, and were as follows:—

Issue 4.—Is the letter of agreement dated 20th August, 1919, genuine and for consideration? Did the defendant (1) enter into any agreement for the sale of the properties in suit and receive Rs. 9,000 as earnest money as alleged in the plaint?

Issue 6.—Are the other defendants bound by the agreement entered into by defendant no. 1?

On the fourth issue the District Judge held that the agreement (Exhibit 5) was not proved to be genuine, and that even if genuine there was no consideration for the same.

On the sixth issue he held that the contract was not binding on the other defendants, as the plaint did not allege, nor was any evidence adduced by the plaintiff, to show that the contract was entered into for the benefit of the defendant's family, or that it was necessary as an act of prudent management.

The District Judge accordingly dismissed the suit with costs.

The plaintiff appealed to the High Court of Patna. Pending appeal Ramsaran (defendant 1)

died, and by an order dated 19th December, 1922, the cause title was amended as follows:—

Mahabir Sahu—Plaintiff appellant,

versus

Ramsaran Mandar and, after his death, respondents 2, 4 and 5 are his heirs (*vide* Order dated 19th December, 1922)—2, Narayan Mandar; 3, Lachminarain Mandar; 4, Raj Kumar Mandar; 5, Ram Kumar Mandar (nos. 4 and 5 minors), through Babu Soney Lal Choudhury, defendants respondents.

At the hearing of the appeal in the High Court, counsel on behalf of the plaintiff (appellant) gave up his claim for specific performance, but contended that plaintiff was entitled to recover the earnest money paid (Rs. 9,000), with reasonable interest.

The learned judges of the High Court proceeded upon the view that the only issue which the Court below had to try was forgery or no forgery. They were of opinion that the expert evidence to the effect that the thumb-mark on Exhibit 5 was identical with the thumb-mark of defendant 1 taken in Court was conclusive as to the genuineness of the mark, and so strongly supported the plaintiff's case that the improbabilities, contradictions and suspicious circumstances relied upon by the District Judge were not sufficient to displace the evidence on the plaintiff's side with regard to the execution of the agreement and the receipt of Rs. 9,000 by the defendant Ramsaran. On this basis the High Court set aside the decree of the lower Court and decreed that the plaintiff was entitled to Rs. 9,000 with interest at 1 per cent. per year from 20th August, 1919, to date of decree, and at 6 per cent. on decree, as against all the defendants.

The learned judges do not appear to have considered either issue no. 6 or the District Judge's finding thereupon.

At the hearing of the appeal before this Board there was considerable argument at the Bar on the question of the genuineness of the agreement Exhibit 5

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and the receipt of the Rs. 9,000, as to which the two Courts in India have differed. Their Lordships are, however, relieved from the necessity of pronouncing any opinion on these questions of fact, inasmuch as the decree of the High Court cannot be sustained *in law*, even if their conclusions of fact were well founded.

The suit was framed as an ordinary suit for specific performance of an agreement, with an alternative claim for damages for breach thereof, such damages being assessed at Rs. 9,000 (the earnest money paid), with interest at 2 per cent. from date of agreement to date of realisation. The amendment of the cause title in the appeal before the High Court on the death of defendant 1, above referred to, did not alter the nature of the suit. Nor did the abandonment of the claim for specific performance at the hearing of that appeal alter the suit as framed into an action for money had and received, or for the recovery of a debt. Even so the suit was bound to be dismissed as against Lachminarain, defendant 3, who was not an heir of Ramsaran, defendant 1, and against whom the liability of sons and grandsons to pay their ancestor's debts under the doctrines of Hindu law could not be invoked. Mr. De Gruyther, on behalf of the plaintiff respondent, conceded that point, but relied on that very doctrine in order to support the decree as against defendants 2, 5 and 6, the son and grandsons of defendant 1, who are now on the record in a dual capacity. It was urged by Mr. De Gruyther that the decree of the High Court should stand, as against defendants 2, 5 and 6, and the question whether they had in their hands any assets of Ramsaran against which such decree could be enforced might be left to be determined in proceedings for execution of that decree; and that, if necessary, the plaint might be amended even at this stage, under the wide discretionary powers of this Board and the somewhat elastic provisions of the Code of Civil Procedure in that behalf.

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Their Lordships cannot accede to these arguments. It is not permissible by amendment to change the nature of the suit as framed; and even if it were, the defendants affected by such amendment must have an opportunity to rebut such new cause of action, a course which would involve fresh written statements and a fresh trial. Their Lordships are unable to permit such a course at this stage.

The result is that no decree can be made against the surviving defendants in this suit. The decree of the High Court must be set aside and the suit dismissed, with costs in all Courts, including the costs of this appeal, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Chapman, Walker and Shephard.*

Solicitors for respondents: *Pugh and Co.*

REVISIONAL CRIMINAL.

Before Jwala Prasad and Macpherson, JJ.

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Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 162, 208 *and* 215—*Magistrate, order of, to furnish copies of statements to accused—Section* 162(1), *meaning of—Enquiry prior to commitment—Right of accused to cross-examine after copies of statements are furnished—section* 208 (2), *failure to comply with, whether vitiates commitment—Section* 215—*Magistrate, refusal of, to issue process on defence witness—Legality of—Section* 208(3) *scope of.*

In an inquiry into an offence triable by a Court of Session, the accused has no right to reserve cross-examination.

Re Mohamed Kasim (1), followed.

*Criminal Revision no. 671 of 1926, from an order of Lala Ashutosh, Magistrate, 1st Class, Arrah, dated the 2nd October, 1926.

(1) (1914) 22 Ind. Cas. 29.

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But where the accused applied for copies of statements made by the prosecution witnesses to the police during the investigation, and, the magistrate having ordered such copies to be furnished to him under the proviso to section 162(1), the accused declined to cross-examine the prosecution witnesses until such copies should be handed over to him, *held*, that the Magistrate was bound to postpone the cross-examination and to afford the accused an opportunity to cross- examine the witnesses under section 208(2) after he had received copies of their statements.

Where, therefore, the Magistrate had omitted to afford such an opportunity, the High Court quashed the commitment under section 215, Code of Criminal Procedure, 1898.

In an enquiry prior to commitment the refusal of the Magistrate to issue process on the defence witnesses, his reasons for the refusal being recorded, is not an illegality as the case is covered by section 208(3).

Emperor v. *Surath* (1), followed.

Per MACPHERSON, J.—The question of furnishing to the accused a copy of the statement of a witness recorded by the police in the course of the investigation into an offence does not arise until the witness is called for the prosecution at the inquiry or trial in respect of the offence.

The court is not competent to direct that the accused be furnished with a copy of such statement unless it contains something which constitutes a contradiction of a statement made by the witness in his deposition at such inquiry or trial.

These two circumstances must co-exist before an accused is entitled under the proviso to section 162(1) to such a copy.

Furthermore, where, on application being made for a copy of the statement of a witness, the defence is informed forthwith that the contradictions, if any, are not material, the mere subsequent grant of a copy of the statement does not entitle the defence to cross-examine, after the copy has been supplied, a witness who might have been, but was not cross-examined at an earlier stage of the proceedings.

(1) (1915) I. L. R. 42 Cal. 608.

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

Sir Ali Imam (with him *M. Nooruddin*), for the petitioners.

H. L. Nandkeolyar (Assistant Government Advocate) for the Crown.

1st Dec. 1926.

JWALA PRASAD, J.—This is an application to quash the commitment made by the Magistrate to the Court of Session for a charge of dacoity and other offences. The application is made under section 215 of the Code of Criminal Procedure under which the High Court can quash a commitment solely on a point of law.

It is urged that the Magistrate contravened the statutory provisions set forth in Chapter XVIII of the Code of Criminal Procedure with respect to an inquiry for the purpose of committing to the Court of Sessions, inasmuch as (1) he refused the petitioners the liberty to cross-examine the witnesses for the prosecution and (2) he refused to issue processes and examine the defence witnesses.

The case was pending for sometime before the Magistrate, and on the 10th September, 1926 the accused put in a petition under section 526 of the Code of Criminal Procedure, and the case was accordingly adjourned till the 24th September, 1926. No steps, however, were taken for transfer of the case, and the enquiry commenced on the 24th September, 1926. On that day five witnesses were examined in chief on behalf of the prosecution and they were discharged with an order to appear when called. After the examination in chief of the first witness for the prosecution Gauri Shankar Prasad, the Magistrate recorded the following note underneath the deposition of that witness :—

"The defence Counsel declines to cross-examine the witness until he gets a copy of the witness's statement recorded by the police. He puts in a petition for copy. It is now 2-35 p. m.".

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As regards the other four witnesses examined on that day, the note of the Magistrate is:

"Cross-examination declined at this stage"

but at what stage it does not appear from the record. The accused put in a petition stating that the witnesses for the prosecution had made statements before the police during the investigation of the case and that the accused were entitled under the law to be supplied with copies of those statements. The Magistrate recorded the following order upon that petition:

"The Public Prosecutor and defence Counsel want to show some authorities to-morrow. Put up to-morrow."

This order was recorded on the 24th September. On the following day, the 25th September, the Magistrate passed the following order:

"Copies may be granted of the depositions of the witnesses before the police on payment of proper court-fee."

On the 25th September, the Magistrate examined six prosecution witnesses in chief and discharged them with an order to appear when called. In the depositions of those six witnesses the Magistrate recorded the following order:—

"Cross-examination declined at this stage."

It is not clear whether the order passed by the Magistrate on the petition of the accused directing copies of the statements of the witnesses examined by the police to be given to the accused referred to the six witnesses examined on the 25th September. Assuming that the order referred to those witnesses also, the accused declined to cross-examine the prosecution witnesses at the stage when their examination in chief finished until they were granted copies of the statements recorded by the police. It is with regard to these eleven witnesses, that is, five examined on the 24th and six examined on the 25th September that

it is contended that their cross-examination was kept in abeyance until the copies of their statements before the police were obtained by the accused. Further witnesses were examined on behalf of the prosecution on the 27th, 28th, 29th and 30th September and 1st October: altogether about 39 witnesses. The note of the Magistrate underneath the examination in chief of those witnesses is simply—

"Cross-examination declined."

The order of the Magistrate of the 25th September, 1926, allowing copies to be granted could not possibly apply to the cross-examinaiton of these witnesses for till then the witnesses were not called on behalf of the prosecution and the occasion for the exercise of discretion under section 162 of the Code of Criminal Procedure with respect to the granting of copies of the statements made by them before the police with a view to afford an opportunity to the accused to contradict the prosecution witnesses under section 145 of the Evidence Act had not arisen.

Sir Ali Imam who appears on behalf of the accused has abandoned his contention as to the liberty of cross-examination not being given to the accused with respect to the witnesses who were examined after the 25th September, 1926. The contention is confined only with respect to the eleven witnesses who were examined on the 24th and 25th September, as is stated above. It is said that the accused could not cross-examine the witnesses with regard to the contradictory statements made by them before the police, inasmuch as copies of those statements were not obtained until the 2nd October, 1926. It is further urged that by postponing consideration of the application made by the accused on the 24th September to obtain copies of the statements of the witnesses recorded by the police the accused were led into the belief that they would be allowed their right to cross-examine those witnesses when the Magistrate

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would finally determine the question raised by them and that by allowing their application to obtain those copies, on the 25th September, 1926, the Magistrate used his discretion vested under section 162 of the Code of Criminal Procedure, after being satisfied that the statements recorded before the police were contradictory to the statements of those witnesses made in Court. The proviso to section 162 runs as follows:—

> "Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872."

The witnesses in question were called for the prosecution and examined in Court. Their statements were recorded by the police. The acused made a request to the Court to refer to the record of the police containing those statements. The Magistrate directed that the accused be furnished with copies thereof. These requirements of the section having been complied with the accused were at liberty to use the statements of the witnesses before the police or any part thereof for the purpose of contradicting those witnesses under section 145 of the Indian Evidence Act. They could not do so just when the examination in chief of the witnesses finished for they had not till then obtained copies of the aforesaid statements. The application for copy was made on the 27th September, the 26th September being Sunday, and the requisite stamps and folios were put in on that very day and copies were obtained on the 2nd October. The order of the Magistrate of the 25th September allowed the accused an opportunity to cross-examine the witnesses with respect to the statements recorded by the police, but the accused were not in a position to avail of it not on account of any fault of theirs but on account of the time occupied in obtaining copies

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of those statements. Clause (2) of section 208 of the Code of Criminal Procedure in Chapter XVIII relating to the inquiry of cases triable by a Court of Session provides that

"The accused shall be at liberty to cross-examine the witnesses for the prosecution, and in such case the prosecutor may re-examine them."

The ordinary rule as laid down in the Evidence Act is that the witnesses will be examined in chief, cross-examined and re-examined. There is no express provision for postponing the cross-examination of witnesses till all the prosecution witnesses are examined in chief. A special provision has been made under certain circumstances with respect to trials in warrant cases (Chapter XXI), entitling the accused to postpone the cross-examination of witnesses till a certain stage. No such provision has been made with respect to an inquiry into the cases triable by a Court of Session in Chapter XVIII of the Code. The Magistrate, however, to my mind has the discretion to allow the accused to postpone the cross-examination of witnesses in suitable circumstances. He cannot of course throw any obstacle in the exercise of the liberty by an accused to cross-examine the witnesses for the prosecution. The circumstances of this case show that although the accused were at liberty to cross-examine the witnesses for the prosecution after the close of their examination in chief they were not in a position to exercise that right because they were not able to obtain copies of the statements made by the witnesses before the police which the Magistrate in the exercise of his discretion under section 162 of the Code thought they were entitled to. They made an application to the Magistrate on the 1st October, 1926, in which they stated that they had intimated their intention to cross-examine the prosecution witnesses examined in chief as soon as they had obtained copies of the statements of those witnesses recorded by the police and that without such copies they were unable to

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cross-examine the witnesses. The Magistrate thereupon passed the following order:—

"The accused were given the opportunity of cross-examining the prosecution witnesses as soon as their examination in chief was finished but the defence Counsel declined to do so at that stage.. The accused are not entitled to defer cross-examination till the examination in chief of all the prosecution witnesses was completed. The witnesses have been already discharged and there will be considerable delay in the trial of the case if the witnesses are recalled at this stage."

This is an order which would cover a case coming under clause (3) of section 208 of the Code of Criminal Procedure under which a Magistrate may refuse to issue process to compel the attendance of any witness when he thinks it unnecessary for reasons to be recorded by him. The present case does not come under that clause. Under it, both the complainant and the accused are entitled to have processes issued against their witnesses and the Magistrate can refuse it on the ground to be recorded by him that he considers the issue of processes unnecessary. The application of the accused for being given an opportunity to cross-examine the prosecution witnesses to my mind does not clearly come under clause (3) of the section. The application was under clause (2) asking the Magistrate to afford them an opportunity to exercise their liberty to cross-examine the witnesses for the prosecution. If the accused did not waive their right, which the said clause confers upon them, the Magistrate could not take it away and was bound to give them facility to exercise that liberty by producing the prosecution witnesses in the witness-box. They did not decline to cross-examine the prosecution witnesses, but they declined to do so until they were allowed copies of the statements of the witnesses recorded by the police, and the Magistrate tacitly by his note recorded under the heading of cross-examination beneath the examination of the witnesses in chief and also by his order recorded on the 25th September on the petition of the accused, dated the 24th September, only suspended the exercise of the liberty to cross-examine the prosecution witnesses until the copies

were obtained. An accused has no right to cross-examine a prosecution witness except under section 145 of the Indian Evidence Act with respect to a statement of the witness recorded by the police, for in the present case there was nothing to prevent the accused from availing themselves of the opportunity to cross-examine the prosecution witnesses on general lines or on points other than those arising out of the statements recorded by the police, just when the examination in chief of those witnesses finished. The record shows that an opportunity for general cross-examination was given to the accused by the Magistrate, but they refused to avail themselves of this opportunity, except with regard to the statements recorded by the police. The contention of the accused, therefore, only so far as it relates to the cross-examination with respect to the statements recorded by the police should prevail, and there has been a direct violation of the statutory provision contained in clause (2) of section 208 of the Code of Criminal Procedure. This is, therefore, a point of law which vitiates the commitment made by the Magistrate and such a commitment can be quashed under section 215 of the Code.

The other point of law raised by the learned Counsel on behalf of the accused is that the Magistrate erred in law in not summoning and examining the witnesses for the defence. The contention is that the application of the accused for summoning the defence witnesses was made in time, inasmuch as the case for the prosecution was not closed and no charge was framed against the accused under section 210 of Chapter XVIII of the Code of Criminal Procedure. In this way some of the authorities are sought to be distinguished.

Under section 212, clause (2), the Magistrate has a discretion to summon any witness named in any list given to him under section 211 and such a list is

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demanded by the Magistrate after the charge is framed. The accused has no right to have his witnesses summoned and examined after the charge is framed against him under section 210. The matter rests entirely upon the discretion of the Magistrate. Here, the application for examining the defence witnesses was made on the 1st October when the prosecution had not closed its case and no charge was framed. The Magistrate recorded the following order:—

"This (petition) is filed shortly before the prosecution was going to close its case. There is prima facie evidence for commitment of the accused for trial in the Court of Sessions. The case is long pending and I consider it unnecessary to examine any witness for the defence at this stage."

This order of the Magistrate is apparently under clause (3) of section 208 under which he is bound to issue process in order to compel the attendance of any witness unless

"for reasons to be recorded, he deems it unnecessary to do so."

It is undisputed that the Magistrate is bound to examine the defence witnesses if produced just after the close of the case for the prosecution under clause (1) of section 208 of the Code. That section says that:

"The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate."

Therefore, it is imperative upon the Magistrate to examine any witness produced on behalf of the accused. In order to assist the prosecution as well as the accused, clause (3) of the section provides that the Magistrate shall issue processes in order to compel the attendance of their witnesses. The Magistrate, however, can refuse it

"for reasons to be recorded"

when he considers it to be unnecessary to do so. The Magistrate has in the present case given reasons for

refusing the prayer to summon the witnesses for the defence. He has, therefore, exercised the discretion vested in him by clause (3) of the section. He has given two reasons: (1) that there is prima facie evidence for commitment of the accused for trial in the Court of Session and (2) that the summoning of the witnesses for the defence will cause inordinate delay in the trial of the case. The Magistrate justifies his reason by referring to the very long delay already caused in the disposal of the case and much on account of the laches on the part of the accused. We are not at all concerned in the present case as to whether the reasons given by him would have appealed to another person or not. We have only to see if the procedure adopted by the Magistrate has contravened any of the statutory provisions in the Code. He has recorded his reasons for rejecting the application of the accused to summon the defence witnesses. He has also expressly held that it was unnecessary to do so at that stage. Therefore, he has complied with the provisions contained in clause (3) of section 208. The order of the Magistrate cannot be held to be illegal and therefore no point of law arises out of it so as to justify the quashing of the commitment by this Court under section 215 upon that ground. It would have been quite a different thing had the witnesses for the defence been present in Court and had they been produced by the defence for examination and the Magistrate would then refuse to do so, he would then have contravened the provision contained in clause (1) of the section which expressly says that the Magistrate shall examine the witness produced by the accused. Therefore, I overrule this contention.

The following authorities were cited at the Bar in support of the respective contentions of the parties:—*Emperor* v. *Kunwar Jaswant Singh* (1), *Queen-Empress* v. *Ahmadi* (2), *Emperor* v. *Muhammad Hadi* (3), *In re Mohammed Kasim* (4), *Sessions*

(1) (1923) I. L. R. 46 All. 137.
(2) (1898) I. L. R. 20 All. 264.
(3) (1903) I. L. R. 26 All. 177.
(4) (1914) 22 Ind. Cas. 173.

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Judge of Coimbatore v. *Immudi Kumara Kangaya Mantradiyar* (1), *Phanindra Nath Mitra* v. *Emperor* (2), *Salt* v. *Emperor* (3), *Emperor* v. *Surath* (4) and *Jyotana Nath Sikdar* v. *Emperor* (5).

There seems to be some conflict of opinion with respect to the provisions relating to the cross-examination of prosecution witnesses and the right of an accused to have the defence witnesses summoned and examined and the effect of the infringement of those provisions upon the commitment made by the Court. There has also been conflict of opinion with respect to the interpretation and effect of section 347 of the Code of Criminal Procedure. This section has no application to the facts of the present case. I have carefully considered the authorities and the provisions in Chapter XVIII of the Code of Criminal Procedure relating to an inquiry into cases triable by the Court of Session. It seems to me that the view taken by me on both the points fully accords with the language, intent and scope of the relevant provisions in the chapter.

The result is that the commitment is quashed, and the case is sent back to the Court below in order to allow the accused an opportunity to cross-examine the eleven witnesses for the prosecution which were examined on the 24th and 25th September, 1926, with respect to the statements made by them before the police, in order to contradict those witnesses under section 145 of the Indian Evidence Act.

MACPHERSON, J.—I agree to the order proposed and would make a few observations.

The only question is whether there has been an illegality which would entitle this Court to quash the commitment under section 215 of the Code of Criminal Procedure. Of the two alleged illegalities it is clear

(1) (1912) I. L. R. 36M. 321. (3) (1909) I. L. R. 36 Cal. 560.
(2) (1908) I. L. R. 36 Cal. 48. (4) (1915) I. L. R. 42 Cal. 608.
(5) (1924) I. L. R. 51 Cal. 442.

that the failure of the Magistrate to issue process on the defence witnesses was in the present instance not an illegality at all. The Magistrate in his discretion deemed it unnecessary to issue process and recorded his reasons for his view. The case accordingly falls under sub-section (3) of section 208. In this connection reference may be made to *Emperor v. Surath*(1).

Again, the Magistrate did accord the accused liberty to cross-examine the prosecution witnesses. He did so just after the examination in chief of those witnesses and ordinarily that is a full compliance with the law. The accused has no right to reserve cross-examination: *In re Mohamed Kasim* (2). But in the present instance there is reason to hold that the provisions of sub-section (2) of section 208 which is mandatory were not really given effect to in the case of the eleven prosecution witnesses examined on the first two days of the inquiry, the defence being misled by the rather confused dealing of the Magistrate with their application for postponing cross-examination and with their application for copies under the proviso to section 162(1) of the Code of Criminal Procedure into the belief, during the first two days of the inquiry, that it was his intention to allow them to cross-examine at a later stage.

The Magistrate evidently misunderstood the provisions of the proviso to section 162(1). There is, however, no real obscurity in that enactment so far as the grant of copy is concerned. Two points in particular stand out, and strict adherence to them, which unfortunately is rare, will obviate much confusion. In the first place, the question of furnishing to the accused a copy of the statement of a witness recorded by the police in the course of the investigation into an offence does not at all arise until the witness is called for the prosecution at the inquiry or trial in respect of the offence and, secondly, the Court is not competent to direct that the accused be furnished with a copy of such statement unless it contains something which

(1) (1915) I. L. R. 42 Cal. 608. (2) (1914) 22 Ind. Cas. 29.

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constitutes a contradiction to a statement made by the witness in his deposition at such inquiry or trial. These two circumstances must co-exist before an accused is entitled under the proviso to section 162(1) to such a copy.

MACPHERSON, J.

Then contradictions vary so greatly in importance that it is advisable for the Magistrate holding an inquiry under Chapter XVIII to indicate when directing under the proviso that a copy of a witness's statement to the police be furnished to the accused, whether the contradictions between that statement and the deposition of the witness are or are not so important as to render it expedient to postpone the cross-examination of the witness under section 208(2). If the defence is informed forthwith that the contradictions, if any, are not material, the mere grant of a copy of the statement of the witness to the police will not be any ground for failure on the part of the accused to avail himself forthwith of the liberty to cross-examine the witness then accorded to him.

Commitment quashed.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

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Dec., 21.

ABHIRAM BEDANTA

v.

CHINTAMANI BEDANTA.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 103B—*Orissa Tenancy Act*, 1913 (*Bihar and Orissa Act II of* 1913), *section* 117—*Proviso—Record-of-Rights—Presumption as to accuracy, whether rebutted by previous Record or by repudiation by parties.*

In the Provincial Settlement plaintiff was recorded in respect of .143 acres of land including an area of .010. In

* *Circuit Court, Cuttack.* Appeal from Appellate Decree no. 39 of 1925, from a decision of Babu Jatindra Nath Ghosh, Additional Subordinate Judge of Cuttack, dated the 7th March, 1925, confirming a decision of Babu Gopal Chandra De, Munsif of Kendrapara, dated the 19th March, 1924.

the Revisional Settlement the defendant was entered in respect of this latter area and plaintiff sued for a declaration of his title and for recovery of possession.

Both settlements were made under the Bengal Tenancy Act, 1885, section 103B of which gives a statutory presumption of correctness to the entries in a Record-of-Rights. *Held*, that where there are two Record-of-Rights prepared at different times, entries in both of them will be presumed to be correct entries of facts existing at the time the entries were made, and that there is nothing in law which entitles a party to say that the entry in the subsequent record is rebutted by the entry in the previous record.

Raghunath Misra v. *Ram Behera* (1), distinguised.

The statutory presumption attaching to an entry in a Record-of-Rights is not rebutted by the mere fact that both parties to a litigation challenge its accuracy.

Murali Dhar Aditya v. *Thakur Das Mondal* (2), followed.

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

J. N. Bose and *Suba Rao*, for the appellant.

B. N. Das and *L. Mahanti*, for the respondents.

KULWANT SAHAY, J.—The dispute in this case relates to .010 acres of land recorded in the Revisional Survey in plot 96/709. In the Provincial Settlement the plaintiff was recorded in respect of .143 acres of land including the land in dispute in plot no. 96. His case is that the entry in the Revisional Settlement as regards .010 acres of land in the name of the defendant in plot 96/709 was wrong and the suit was instituted for declaration of the plaintiff's title and recovery of possession. Both the Courts below have held that the plaintiff had failed to prove his title and possession within twelve years.

In second appeal it has been contended that the presumption of correctness attached to the entry in the

(1) (1922) I. L. R. 1 Pat. 167. (2) (1919) 51 Ind. Cas. 50.

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Provincial Settlement is not rebutted by the entry in the Revisional Settlement inasmuch as the Settlements in the present case were made under the provisions of the Bengal Tenancy Act and there is, in the Bengal Tenancy Act, no provision similar to the provision contained in section 117 of the Orissa Tenancy Act. The proviso to section 117 of the Orissa Tenancy Act provides that

> " If any entry in a record-of-rights is altered in a subsequent record-of-rights, the latter entry shall be presumed to be correct until it is proved by evidence to be incorrect, but the previous entry shall be admissible as evidence of facts existing at the time such entry was made."

It is true that there is no such specific provision in the Bengal Tenancy Act, but this provision in the Orissa Tenancy Act does not in any way affect the provisions contained in the Bengal Tenancy Act. Section 103B of the Bengal Tenancy Act gives a statutory presumption of correctness to the entries in the record-of-rights. When there are two records-of-rights prepared at different times, entries in both of them will be presumed to be correct entries of facts existing at the time the entries were made. There is nothing in the law which would entitle a party to say that the entry in the subsequent record is rebutted by the entry in the previous record. Reliance has been placed upon a decision of this Court in *Raghunath Misra* v. *Ram Behera* (1). It is not clear as to whether their Lordships were considering the provisions of the Bengal Tenancy Act or of the Orissa Tenancy Act. Reference has been made to section 103B of the Bengal Tenancy Act and it has been held that where the plaintiffs were recorded as rafa tankidars in the Provincial Settlement records and as tankidars in the records of the Revisional Settlement, the entry in the Provincial Settlement records was sufficient to rebut the presumption arising from the entry in the records of the Revisional Settlement inasmuch as there was no procedure by which the status of the plaintiff could have

(1) (1922) I. L. R. 1 Pat. 167.

been changed from that of a rafa tankidar to that of a tankidar in the interval between the two settlements.

This decision, however, does not affect the question now before us. There is no question as regards an alteration of status between the time of the entry in the Provincial Settlement and that in the Revisional Settlement. The question is as to who was in occupation or in possession of the land as tenant at the time of the Provincial Settlement and at the time of the Revisional Settlement. There was no question of status involved in the case and therefore the only question is as regards possession and I, therefore, hold that the entry in the Revisional Settlement record cannot be considered to have been rebutted by the entry in the Provincial Settlement record.

The next point argued is that as both parties challenge the correctness of the entry in the Revisional Settlement the presumption of correctness is rebutted. As regards the defendant, what he alleged was that there were certain trees standing on plot 96/709 which was entered in his name, but those trees were not shown in the Revisional Settlement. From this it is argued that the defendant does not admit the correctness of the entry in the Revisional Settlement. The presumption raised by the entry in the record-of-rights is a statutory presumption and the fact that both parties alleged that the entry was incorrect in certain respects, will not take away the statutory presumption attached to it. In *Murali Dhar Aditya* v *Thakur Das Mondal* (1) an observation was made by the learned Judges of the Calcutta High Court to the effect that where both the plaintiff and the defendant in a suit repudiate an entry in the record-of-rights, the presumption arising from the record-of-rights may be held to have been rebutted. This would depend on the circumstances of each case and no hard and fast rule can be laid down. The presumption attached to the

(1) (1919) 51 Ind. Cas. 50.

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entry under the law must stand and the question as to whether the presumption had been rebutted by evidence adduced in the case must depend upon facts and circumstances in each case. We have, moreover, got the finding in the judgment of the learned Subordinate Judge to the effect that the entry in the Revisional Settlement was made on the admission of the plaintiff. There is also a finding upon the evidence that the plaintiff had failed to prove possession within twelve years of suit. On these findings this second appeal must be dismissed with costs.

MACPHERSON, J.—I agree. The findings of the first Court were that on all the evidence oral and documentary the plaintiff had failed to rebut the presumption attaching to the entry in the Revisional record-of-rights in favour of the defendant, which indeed had been made with the assent of the plaintiff and that the plaintiff had not been in possession within twelve years of the institution of the suit. These findings were affirmed on appeal. On each of these findings the suit must fail. As regards the plea advanced before us that the entry in the Revisional record-of-rights is rebutted by the entry in the Provincial record-of-rights, the position is that the former was by no means the only item of the evidence in favour of the defendant on which the Courts had to determine the facts and the appreciation of the facts by the lower appellate Court on materials proper for its consideration is binding in second appeal. But even if there had been nothing more before it than the two competing entries in the Provincial and Revisional records-of-rights with a presumption attaching to each of correctness at the date at which it was finally published, it cannot be said as a matter of law that the earlier entry is to be preferred to the later entry. The decision in *Raghunath Misra* v. *Ram Behera* (1) appears to me, with all respect, not to be correct. In the first place, the question is not one of law and in the

(1) (1922) I. L. R. 1 Pat. 167.

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second place, it cannot in the absence of other considerations (which in the ruling cited do not appear to have existed) be said to be even reasonable to prefer the earlier entry, since the presumption is that it would not have been altered by the officer revising the record-of-rights unless for good reason. Such might be either that the position had changed or that the former entry was, in spite of the presumption of correctness attaching to it, proved to his satisfaction to be erroneous.

To my mind the statutory presumption of correctness attaching to an entry in the record-of-rights is certainly not rebutted and generally is hardly even weakened by the fact that it is challenged or repudiated wholly or in part by both parties to a litigation. In law that presumption can under the amendment of 1907 only be rebutted by *evidence* that it is incorrect. And the result of experience is that an entry which both parties assail, generally represents with substantial accuracy the actual facts as an unprejudiced observer has found them on the spot.

REVISIONAL CIVIL.

Before Das and Adami, J.J.

KUMAR JOGENDRA NARAIN SINHA

v.

KALI KINKER SINHA.*

1926.

Dec., 1, 22.

Santal Parganas Settlement Regulation, 1872, (*Beng. Reg. III of* 1872), *section* 5—*civil court, whether can take cognizance of an administration suit—suit for removal of executor, whether is a suit for land—section* 5, *bar imposed by.*

Section 5, Santal Parganas Settlement Regulation, 1872, provides :

" From the date on which.....the Lieutenant-Governor declares .....that a settlement shall be made of the whole or any part of

* Civil Revision no. 517 of 1926, from an order of Babu M. R. Chaudhuri, Subordinate Judge of Pakur, dated the 31st August, 1926.

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the Santal Parganas, until the date on which such settlement is declared .....to have been completed, no suit shall lie in any civil court .....in regard to.....

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

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

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

in the area covered by such firstmentioned notification; .....".

Held, that a suit for the removal of an executor and for vesting the estate in a receiver pending the disposal of the suit is not a suit for land, and is not, therefore, barred by section 5.

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

Sir Ali Imam (with him *Manohar Lal* and *Hasan Jan*), for the applicants.

N. C. Sinha, *N. C. Ghosh* and *N. C. Roy*, for the opposite party.

Cur. adv. vult.

22nd Dec. 1926.

DAS, J.—This application is directed against the order of the learned Subordinate Judge dated the 31st August, 1926, by which he has held that his court has jurisdiction to entertain the suit. I have great objection to the court trying a case piecemeal and I should decline to interfere with the order passed by the learned Subordinate Judge on the ground that the petitioners will have ample opportunity to contest the order hereafter. But it is not necessary for me to throw out the application on this ground as I am of opinion that the order of the learned Subordinate Judge is right and that this application should fail on merits.

The contention of the learned Counsel for the petitioners is that section 5 of Regulation III of 1872 bars the jurisdiction of the civil courts inasmuch as a settlement is proceeding in regard to the disputed lands. If the suit of the plaintiff be considered as a suit for land then obviously the civil court has no jurisdiction. But in my opinion the suit is purely an

administration suit and cannot be considered a suit for land. The learned Counsel draws my attention to the allegations in the 12th, 23rd and 27th paragraphs of the plaint and also to prayer Ka. So far as the 12th paragraph of the plaint is concerned the plaintiff alleges that he has become one of the owners of the properties of the Maheshpur estate under the will of Kumar Indra Narain Singh and he claims that he is entitled to have his rights determined over them. But this allegation is followed by the allegation that

> " he has the fullest right to see whether or not the said estate is being properly looked after and managed by the defendants as executors and in case of improper management to take steps to look after and manage them properly so that his own rights may be protected and properly looked after ".

These allegations in my opinion do not raise a question of title to the property in dispute. This is an allegation necessary for him to make to enable him to maintain an administration suit. A party having no interest cannot maintain an administration suit and it is necessary for the plaintiff to show that he has sufficient interest in the estate to enable him to maintain a suit against the executors. The will of Indra Narain Singh is part of the plaint and there can be no doubt as to the interest of the plaintiff in the Maheshpur estate. There can be no dispute in regard to his interest in the estate. But there is dispute as to the right of management of the estate. In the 23rd paragraph of the plaint the plaintiff alleges that

> " the duty of managing the estate and working under the terms of the will cannot be in the hands of the defendants as executors of the same ".

It is settled law that a suit for the removal of the executors and for vesting the estate in a receiver pending the disposal of the suit is not a suit for land. In the 27th paragraph of the plaint the plaintiff states that he has a 4-annas share in the properties in suit. As I have said before this is a necessary allegation to show his interest to maintain an administration suit.

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Prayer Ka merely asks the Court to determine the rights of the parties; but considering the whole plaint it is quite clear that such determination is required for the purpose of administration. I am satisfied that the suit cannot be regarded as a suit for land and I must dismiss the application with costs.

ADAMI, J.—I agree.

Application dismissed.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, J.J.

UCHHAB JENA

v.

UPENDRA NAIK.*

1926.

Dec., 14, 15, 22.

Orissa Tenancy Act, 1913 (*Bihar and Orissa Act II of* 1913), *sections* 16, 31 *and* 250 (*e*)—*Occupancy holding, transfer of, not binding on landlord unless consent obtained —Purchaser at private sale, ejectment of by fractional co-sharer landlords.*

Under the Orissa Tenancy Act, 1913, where an occupancy holding or a portion thereof, situated outside a permanently-settled estate, is transferred by private sale, the transfer is not binding on the landlord, and the transferee is a trespasser, unless the landlord has consented, or is deemed under the statute to have consented to the sale.

Giridhari Naik v. *Kashi Tindi*, (1) distinguished.

Madhu Radhan v. *Jagu Jena* (2) and *MacPherson* v. *Debibhusun* Lal (3) distinguished and declared to be overruled quoad hoc by *Jugeshar Misra* v. *Nath Koeri* (4).

Such a transferee is liable to be ejected at the instance of some of the co-sharer landlords to the extent of their share

Circuit Court, Cuttack.—Appeal from Appellate Decree no. 85 of 1925, from a decision of Babu Jatindra Nath Ghosh, Additional Subordinate Judge of Cuttack, dated the 13th February, 1925, confirming a decision of Babu Ramesh Chandra Mitra, Munsif, 2nd Court of Puri, dated the 21st January, 1924.

(1) (1917) 2 Pat. L. J. 476.
(2) (1919) 4 Pat. L. J. 294.
(3) (1917) 2 Pat. L. J. 530.
(4) (1922) I. L. R. 1 Pat. 317.

even though he may, subsequently to his purchase of the raiyati interest, have purchased some interest of another co-sharer landlord.

Gholam Mohiuddin v. *Khairan* (1), distinguished.

Hossain Mohomed v. *Fakir Mahomed* (2) and *Kanchan Mandar* v. *Kamala Prasad* (3), followed.

Appeal by the defendants 2 and 3.

The suit out of which this second appeal arose was brought in 1923 by co-sharer landlords with an interest exceeding 14-annas to recover from defendants 1 to 4 possession, with mesne profits, of an area of a non-transferable occupancy holding proportionate to their interest, on the ground that defendants 1 to 3 and defendant 4, by separate sale-deeds, purchased in 1920 from the recorded raiyat the whole holding without the consent of the plaintiffs and, accordingly, were trespassers in possession. The defendants 1 to 3 and 4 pleaded that they had obtained the consent of the plaintiffs and the other landlords to the transfers. The other landlords, who were pro forma defendants, did not challenge the validity of the transfers. The Courts below held that the defence was not established and that the occupancy holding not being transferable without the consent of the landlords the plaintiffs were entitled to treat the defendants-appellants as trespassers and to recover possession from them. The trial Court decreed the plaintiffs' suit but the appellate court altered the decree to one for joint possession of the holding with defendants 1 to 4 in proportion to the landlord's interest of the plaintiffs.

The present appeal was preferred by defendants 2 and 3 who represent defendants 1 to 3.

On behalf of the appellants the following three points were raised—

(1) Under the Orissa Tenancy Act an occupancy holding is transferable by private sale without the consent of the landlord;

(1) (1904) I. L. R. 31 Cal. 786. (2) (1909) 10 Cal. L. J. 618.
(3) (1915) 21 Cal. L. J. 441.

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(2) Even if that be not so, the appellants having subsequently purchased a portion of the landlord's interest cannot be ejected from the holding: and

(3) A fractional landlord cannot evict a tenant.

B. N. Das, for the appellants.

Cur. adv. vult.

22nd Dec. 1926.

MACPHERSON, J. (after stating the facts, as set out above, proceeded as follows:)

Chief stress is laid upon the first plea which, though often rejected, is persistently advanced afresh. In support of it the learned vakil refers (1) to section 250(*e*) of the Orissa Tenancy Act which lays down that the registration fee prescribed in section 31 shall be recoverable by the procedure for recovery of arrears of rent and to section 31; (2) to the decision in *Giridhari Naik* v. *Kashi Tindi* (1) and (3) to section 16 of the Act, as well as to the previous history of the question. To my mind these considerations do not avail the appellants.

The position under the Orissa Tenancy Act of a purchaser by private sale of an occupancy holding or a portion thereof situated outside a permanently-settled estate, is simple. Under sub-section (4) of section 31 the transfer is not valid against the landlord of the holding unless and until he has consented thereto, save as otherwise provided in section 31. Sub-sections (1) to (3) of section 31 set out a procedure whereby the transferee can secure what may be styled a statutory consent of the landlord in certain cases. Consent is always necessary but it may be secured either without or by resort to sub-sections (1) to (3). In the former case the landlord signifies his consent by registering the transfer whereupon the transferee becomes his raiyat and also becomes liable to him for the registration fee payable on the transfer. Section 250(*e*) provides for the case in which the new raiyat fails to pay that fee—the landlord's suit for

(1) (1917) 2 Pat. L. J. 476.

recovery of it must be brought in the revenue court. There is no implication that his consent to the transfer is not required. Prior to 1913 a registration fee was payable by custom when and if the landlord registered the transfer and the provision in respect of it in section 31(1) only lays down a statutory maximum for that registration fee. If the landlord's consent is not obtained otherwise—and it has been found that it was not obtained in the present case—the transferee may resort to sub-sections (1) to (3). If, when he makes application for registration, which it is laid down he *must* make and that within one year, the landlord accepts the registration fee which he tenders and a maximum for which is prescribed, the landlord's consent to the transfer and to the requisite distribution of the rent is deemed to have been given. If the landlord does not accept the tender, the transferee may within one month of the refusal or within one year from the transfer whichever is later, deposit the fee with the Collector and apply for registration. The Collector may after inquiry declare that the transfer has been duly registered; if he does so, his declaration has the same effect as if the landlord had accepted the registration fee—that is, the landlord is deemed to have consented to the transfer. But if the landlord has not consented or is not deemed under the statute to have consented, the transfer is not valid against him and the transferee is not his raiyat but a trespasser.

Mr. B. N. Das complains that it is hard that because a transferee has not applied within one year for registration he should lose the land which he has purchased. The complaint even if it can be entertained is groundless—with full knowledge he purchases an interest which can only be perfected by securing the consent of the landlord; the procedure under sub-sections 1 to 3 is a concession designed to facilitate the securing of that consent by a diligent purchaser, and there is no hardship in requiring compliance with the comparatively easy conditions under which the concession is available. When an

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exceptional procedure is conceded to the transferee whereby he may obtain the consent of the landlord which might otherwise not have been forthcoming, he must comply strictly with the procedure.

It is convenient at this stage to refer briefly to the previous history of the matter on which the learned vakil has relied. Assuming that it may be at all taken into consideration where the statute is clear, it does not assist the appellants. In 1821 Mr. Sterling minuted that he could not discover any instance of sale or mortgage of his holding by a raiyat nor any claim to such a right. After Act X of 1859 came into operation transfers became more common and the position in Puri to which the litigation relates was, as set out by Mr. (afterwards Sir Hugh) McPherson in his Report (Maddox, Vol. II, paragraph 126) that in regard to thani lands there was always a tacit admission that the landlord's consent was legally necessary to such a transfer, and this was expressed in the shape of a fee, usually Rs. 2 per cent. (this is " 2 as. per rupee " in paragraph 321 of Vol. I) of the purchase price, paid when the new purchaser applied to have his name entered in the zamindar's rent-roll while up to a very recent date pahi raiyats had never even claimed a right of transfer. At the date of Mr. Maddox's report on the settlement of 1890—1900 the position in Orissa was, as stated by him in paragraph 321 that occupancy holdings were freely transferred but that the zamindar did not record a voluntary sale without a large premium, usually one-fourth of the price and discharge of all arrears of rent. Mr. James in his Report of the Settlement of 1908—1912 reports a great increase in transfers and gave it as his view that there should be no restriction on transfers (beyond the fee of twenty-five per cent. long paid without grumbling) except that the landlords should be able to refuse a man of known bad character. The position throughout therefore was that the consent of the landlord was still required in law and practice to make a transfer binding upon him, but that

consent was usually secured, at least in the case of private sales, without much difficulty on payment of a fee. In section 31 of the Orissa Tenancy Act, 1913, the legislature broadly accepted this position in respect of private sales and maintaining the general principle that the landlord's consent was necessary in respect of all sales except sales in execution of a decree for arrears of rent, conceded in the case of private sale a special procedure on compliance with which the consent of the landlord will in normal cases be " deemed to have been given ". I can discern no indication of any intention on the part of the legislature to make occupancy holdings transferable, even in the case of private sale, without the consent of the landlord subject only to payment of the registration fee or to recognise as valid an existing practice of that nature.

The decision in *Giridhari Naik* v. *Kashi Tindi* (1) which is relied upon on behalf of the appellants is clearly not an authority for the proposition that occupancy rights are transferable in Orissa without the consent of the landlord. What is actually decided in that case is no more than that a sale by the Court of an occupancy holding in execution of a decree upon a mortgage may proceed in spite of the objection of a co-sharer landlord that the holding is not transferable without his consent which he would not give. That was neither the time nor the forum at which a landlord who was a party in another capacity could advance the plea of non-transferability of the holding. Moreover a sale in execution of a mortgage decree such as was under discussion in that case even if it be a voluntary as opposed to an involuntary sale, is a public or Court sale and not a private sale within the meaning of section 31(*1*) to (*3*) and accordingly the only portion of section 31 applicable to that sale, is the provision in sub-section (*4*) which makes the consent of the landlord necessary to the validity

(1) (1917) 2 Pat. L. J. 476.

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of the transfer as against him. The learned vakil relies specially on the passage in the judgment in which the learned Judges say: "It is fallacious to say that occupancy rights are not transferable in Orissa without the consent of the landlords. They are transferable without the landlord's consent unless it can be shown to the satisfaction of the Collector that the landlord has good reasons for his objection." But for the reasons which I have just given, this expression of opinion was obiter and with all respect to the learned Judges, I am unable to regard it as a correct exposition of the law in respect even of a transfer of an occupancy holding by private sale in a temporarily-settled area such as is now in contest, and still less in regard to a transfer thereof by a Court sale (not being a sale in execution of a decree for arrears of rent) such as was then before the Court. Under section 31 the latter is not valid against the landlord without his consent, and that consent cannot be deemed to be given under the procedure set out in sub-sections (*1*) to (*3*).

Mr. B. N. Das in passing urges that the lower appellate Court was in error in relying upon *Madhu Padhan* v. *Jagu Jena* (*1*). The contention is sound, that ruling having no bearing on the validity, against a landlord, of a private sale made without his consent. What was decided there, following *Macpherson* v *Debibhusan Lal* (*2*) a decision under the Bengal Tenancy Act, was that an occupancy raiyat is entitled to object to the sale of his holding in execution of a money decree on the ground that the holding is not transferable. But in view of the decision of the Full Bench in *Jugeshar Misra* v. *Nath Koeri* (*3*) that a raiyat can be made to do involuntarily on behalf of his creditor what he can do voluntarily, and accordingly that a non-transferable occupancy holding may be sold in execution of a money decree whether obtained by the landlord of the holding or by a person

(1) (1919) 4 Pat. L. J. 201. (2) (1917) 2 Pat. L. J. 630.
(3) (1922) I. L. R. 1 Pat. 617.

who is not the landlord and who has not obtained the landlord's consent, both the decision relied upon and the decision on which it was based, are no longer good law. All these cases however related to public sales of the class which as already pointed out is always invalid against the landlord of the holding unless and until he gives his consent, which consent cannot be exacted from him under sub-sections (*1*) to (*3*) of section 31. All that is made out in this regard is that the lower appellate court cited in favour of its view, in itself sound, a decision which does not support that view.

Finally, the fact that in section 16, the legislature has penalised failure on the part of a purchaser of a tenure not covered by section 15 to apply for registration within the period named while there is no similar provision in section 31 as regards the purchaser of an occupancy holding, obviously does not throw any light on the subject of the transferability without restriction of the latter, since the concession available under section 31 is itself contingent upon an application for registration being made.

The first contention is therefore unsound and is negatived.

The second contention, which is now raised for the first time, is unfounded since the plaintiffs' cause of action accrued before the purchase by the appellants and the decision of a single judge in Civil Revision nos. 38 to 42 of 1924 on which alone reliance is placed on behalf of the appellants and which relates to the purchase of an occupancy holding by persons who were *at the time of purchase* co-sharer landlords is not applicable, even if that decision which is challenged before us be correct.

In support of the third point, which is feebly urged, reliance is placed on *Gholam Mohiuddin* v. *Khairan* (*1*). But that was a case where the fractional

(1) (1904) I. L. R. 31 Cal. 786.

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co-sharer sought to eject the tenant whom all the co-sharers had introduced. The decisions applicable to the present case are *Hossain Mahomed* v. *Fakir Mahomed* (1) and *Kanchan Mandar* v. *Kamala Prasad* (2). A purchaser of a non-transferable holding without the consent of the co-sharer landlords is not a tenant of the latter, any one of whom is entitled to eject him from the holding to the extent of his own share in the holding.

The appeal is accordingly without merits and I would dismiss it with costs.

KULWANT SAHAY, J.—I entirely agree.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, J.J

SECRETARY OF STATE FOR INDIA IN COUNCIL

1926.

v.

NATABAR MANGRAJ.*

Dec., 16, 22.

Orissa Tenancy Act, 1913 (*Bihar and Orissa Act II of* 1913), *sections* 11, 13 *and* 193—*Transfer of non-transferable tenure without landlord's consent—suit by landlord to eject transferee, whether maintainable in civil court—Permanent tenure-holder, transfer of part of tenure at a nominal rent, nature of transaction.*

A suit by a landlord to eject a person who has purchased a non-transferable tenure without the landlord's consent is not governed by section 193 of the Orissa Tenancy Act, 1913, and, therefore, is maintainable in the civil court.

The ancestor of defendant no. 2 obtained from Government a grant of land in perpetuity at half-rent, the grantee being entitled to hold the land during good behaviour. In the settlement khatians of 1905 and 1920 the defendant was

**Circuit Court, Cuttack.* Second Appeal nos. 25 and 26 of 1925, from a decision of Babu Jatindra Nath Ghosh, Additional Subordinate Judge of Cuttack, dated the 19th December, 1924, reversing a decision of Babu Nidheswar Chandra Chandra, Additional Munsif of Cuttack, dated the 7th September, 1923.

(1) (1904) 10 Cal. L. J. 618. (2) (1915) 21 Cal. L. J. 441.

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described as a tenure-holder. The Secretary of State sued for khas possession on the grounds, (*i*) that defendant no. 2 had forfeited the grant by his misbehaviour and (*ii*) that he had sold a part of the land to defendant no. 1 without the consent of the grantor.

Held, (*i*) that the suit as against defendant no. 1 was cognizable by the civil court; (*ii*) but that, the defendant no. 2 being a tenure-holder, the suit against him was cognizable by the Collector and not by the civil court; (*iii*) that the civil court in which the suit had been instituted should not have dismissed the suit as against defendant no. 2 on the ground of its want of jurisdiction but should have returned the plaint under Order VII, rule 10, of the Code of Civil Procedure, 1908, for presentation to the Collector.

Where a permanent tenure-holder purports to lease in perpetuity a part of his tenure in consideration of a nominal rent which in fact represents a proportionate amount of the rent which he himself pays in respect of the tenure, the transaction amounts in effect to an out and out sale although it purports to be a lease.

Appeal by the plaintiff.

These appeals arose out of a suit instituted by the plaintiff-appellant against the defendants for a declaration that the tenures forming the subject-matter of the suit be declared forfeited to Government and that he be granted a decree for recovery of khas possession of the same.

The suit related to two parsels of land, one measuring 1.68 and odd acres in mauza Sahadapada and the other measuring 1.12 acres in mauza Patpur. These mauzas were situated within the Banki estate which was originally a feudatory state but which was forfeited to Government about 1840 on account of misbehaviour of the Raja. Before the territory was annexed by the British Government certain relatives and officers of the Raja were in possession of lands granted in jagir. After annexation the question arose as to whether these jagirdars should be allowed to hold the lands rent or revenue-free. It appeared from the Settlement memorandum of

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Mr. A. M. Mills, Superintendent of the Tributary Mahals, dated the 20th September, 1844, quotations from which have been made in the Banki Settlement report of 1892, that the Deputy Collector proposed that the right to engage for the tenures held by the late Raja's relatives and officers at half rates be conceded in perpetuity to the Raja's relatives and principal officers. Mr. Mills was of opinion that this indulgence might in all justice be conceded subject to forfeiture for misbehaviour. It appeared that an ancestor of the defendant no. 2 in the present suit was one of the officers or amlas referred to in this report, and the tenures in dispute in the present suit were granted to him and had in due course devolved upon the defendant no. 2. The defendant no. 2 transferred 1.48 and odd acres in mauza Sahadapada and 1.06 acres of land in mauza Patpur to the defendant no. 1 fixing a nominal rental of Rs. 1-0-3 for the first, and Re. 0-8-4 for the second piece of land, the original rental imposed upon them and paid by the defendant no. 2 being Rs. 1-9-3 and Re. 0-10-0 respectively. These transfers were effected under four istamrari leases executed by the defendant no. 2 on the 27th of May 1919, 2nd July 1919, 13th June 1919, and 8th June 1920.

The plaintiff based his right to recover khas possession of these lands on two grounds: first, that the tenures were held on condition of the tenure-holder being of good behaviour, that the defendant no. 2 was guilty of misbehaviour by being an active non-co-operator and by giving shelter to outside agitators of the non-co-operation propaganda in Banki, and that in spite of repeated warnings he had defied the authority of Government and had rendered himself liable to forfeiture of the tenures. The second ground stated was, that the tenures were non-transferable, and that the transfer by the defendant no. 2 to the defendant no. 1 without the consent of the plaintiff or his agents entitled the plaintiff to eject the defendants.

The defence was that the tenures were permanent tenures granted in perpetuity by the plaintiff, that there was no condition of non-transferability attached to these tenures, that such tenures were freely transferred and the transferees were recognized by the plaintiff, and that the defendant no. 2 was not guilty of any misbehaviour. In the written-statement of the defendant no. 2 a question was distinctly raised as regards longstanding customs in Banki under which such tenures were transferable bl sales, mortgages and leases without the consent of the plaintiff or his agents.

The Munsif held that the tenures were half-rented-amla-jagir tenures, that under the provisions of sections 11 and 13 of the Orissa Tenancy Act the tenures could be resumed only on the ground of a breach of a condition on the breach of which under the terms of the contract between the parties they were resumable. He held that the tenures were inalienable, that the defendant no. 2 was guilty of misbehaviour, and that under the terms of the settlement he was liable to ejectment. But, so far as the defendant no. 2 was concerned, he held that the Civil Court had no jurisdiction to entertain the suit, and that under the provisions of section 193 of the Orissa Tenancy Act the suit was cognizable by the Collector and was not cognizable by any other Court. He further held that the claim of the plaintiff for ejectment of the defendant no. 2 from the non-transferred portion of the tenures which were still in the possession of the defendant no. 2 was barred by limitation under Article 1(*l*) of Schedule III of the Orissa Tenancy Act. He accordingly dismissed the suit in so far as it related to the portion of the tenures which were still in possession of the defendant no. 2. As regards the portions transferred to the defendant no. 1, he held that the suit was cognizable in the Civil Court, and that as hte tenures were non-transferable the plaintiff was entitled to possession as against the defendant no. 1. He accordingly made a decree for possession in

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favour of the plaintiff in respect of the transferred portions of the tenures.

Two appeals were preferred against this decree of the Munsif: one by the defendants, which was appeal no. 330 of 1923 and the other by the plaintiff which was appeal no. 331 of 1923. Both the appeals were heard together by the Subordinate Judge of Cuttack. He allowed the appeal of the defendants and dismissed the appeal of the plaintiff. He held that the suit as against both the defendants was cognizable by the Collector and it was not cognizable in the Civil Court. He further held that the claim of the plaintiff was barred by limitation. As regards the breach of the condition of good behaviour, the learned Subordinate Judge held that the defendant no. 2 was not guilty of misbehaviour by joining the non-co-operation movement and that the plaintiff was not entitled to possession on that ground. He further held that so far as the defendant no. 1 was concerned the leases granted to him by the defendant no. 2 did not amount to a transfer of the tenure so as to give rise to the landlords' right of re-entry, and further that the tenures were not non-transferable. He accordingly dismissed the entire suit.

The plaintiff preferred the present second appeal to the High Court against the decrees made in the two appeals by the Subordinate Judge.

Cur adv. valt.

22nd Dec. 1926.

KULWANT SAHAY, J. (after stating the facts set out above, proceeded as follows:)

The first question for determination is whether the suit was cognizable in the Civil Court. The suit really consists of two parts—one against the defendant no. 1 and the other against the defendant no. 2. In so far as the claim against the defendant no. 1 is concerned it is based on the transfer of a non-transferable tenure without the consent of the landlord. Such a claim is clearly cognizable in a Civil Court. A suit of this nature is not a suit contemplated or

provided for in the Orissa Tenancy Act, and section 193 of the Act does not apply to such a suit. I am, therefore, of opinion that the claim of the plaintiff as against the defendant no. 1 was rightly brought in the Civil Court and that the Munsif had jurisdiction to entertain it.

As regards the claim against the defendant no. 2, the question as to whether the suit was cognizable in the Civil Court would depend upon the nature of the title under which the defendant no. 2 held the lands in dispute. It appears from the Settlement memorandum of Mr. Mills of the year 1844 (referred to above) that there was a grant in perpetuity to the ancestor of the defendant no. 2 at half rent to be held during good behaviour. The Settlement khatians of 1905 and 1920 described the status of the defendant no. 2 is that of a tenure-holder. The Settlement khewat of 1920 described the tenures as non-transferable interests resumable for misbehaviour. Having regard to the findings arrived at by the Courts below, it seems clear that the status of the defendant no. 2 is that of a tenure-holder. If that is so, then the relation between the parties must be governed by the provisions of the Orissa Tenancy Act, and the suit as agains the defendant no. 2 was cognizable by the Collector and not in the Civil Court. The Subordinate Judge was therefore right in holding that the suit against the defendant no. 2 was not cognizable in the Civil Court. Having come to this finding the proper procedure to adopt in the case was to return the plaint for presentation to the proper Court. Instead of doing that he dismissed the suit. In this he was clearly wrong. The provisions of Order VII, rule 10, of the Civil Procedure Code are clear. The plaint therefore must be returned to the plaintiff under Order VII, rule 10, Civil Procedure Code. In this view of the case it is not necessary to express

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any opinion on the other issues raised in the case in so far as the defendant no. 2 is concerned.

As regards the claim against the defendant no. 1, I am of opinion that the transfers in question, although in the garb of permanent leases, are really out and out sales. The interest reserved to the defendant no. 2 is the receipt of a nominal rent which appears to be the proportionate amount of rent which the defendant no. 2 himself had to pay in respect of the tenures. I am of opinion that the Munsif was right in his view that the transfers to the defendant no. 1 were transfers which would entitle the plaintiff to eject the defendant no. 1. The learned Subordinate Judge, however, has found that the tenures were transferable. In coming to this finding the learned Subordinate Judge merely referred to the terms of the grant as evidenced by the rubakari of 1844 (Exhibit B). This rubakari makes no mention of the fact as to whether the tenures were or were not transferable. The learned Munsif, however, considered the question in his decision on issue no. 3 and he relied on the Settlement Reports of 1917—1920. He found that the transferees of tenures, like the one under consideration, were treated by the plaintiff as new tenants and only on their agreeing to give up their right as tenure-holders and accepting the status of a raiyat assessed with double the rent the transferor used to pay, that is to say, there was invariably imposition of a new status and new terms. The finding of the learned Munsif was, therefore, based on custom. The learned Subordinate Judge has not considered this aspect of the case. No doubt, under section 12 of the Orissa Tenancy Act every permanent tenure is capable of being transferred and bequeathed, subject to the provisions of the Act, in the same manner and to the same extent as other immovable property; but under section 13 the right of the landlord to resume a resumable tenure is not affected, nor

do sections 11 and 12 of the Act validate the transfer of a tenure or portion thereof which by the terms upon which they are held or by local custom are not transferable. The learned Munsif held in effect that by local custom the tenures were not transferable. If that is so, then the plaintiff was entitled to eject the defendant no. 1. The learned Subordinate Judge however, has not considered the evidence of custom of non-transferability of the tenures. The question must therefore be considered by the learned Subordinate Judge.

The result is that in so far as the defendant no. 2 is concerned the plaint must be returned for presentation to the proper Court. As regards the claim of the plaintiff against the defendant no. 1, it must be held that the transfers in question are transfers of a nature which would entitle the plaintiff to eject the defendant no. 1, provided the tenures are non-transferable, and the learned Subordinate Judge must decide the question as regards the non-transferability of the tenures on a consideration of the evidence of custom produced in the case. Appeal no. 25 of 1925 is allowed and the decree of the Subordinate Judge is set aside and the case remanded to him for decision on the question of custom of non-transferability and disposal according to law. Costs will abide the result.

Appeal no. 26 of 1925 is allowed in part. the decree of the Subordinate Judge is set aside and it is ordered that the plaint be returned under Order VII, rule 10, Civil Procedure Code. As there is only one plaint against both the defendants, a copy thereof will be retained on the record of the suit and the original will be returned with the necessary endorsement. There will be no order for costs in appeal no. 26.

MACPHERSON, J.—I agree.

Appeal no. 25 *allowed.*

Appeal no. 26 *allowed in part.*

REVISIONAL CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

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Dec., 20, 21.

ANANTA CHARAN PADHAN

v.

NIMAL BAHUBALENDRA.*

Orissa Tenancy Act, 1913 (*Bihar and Orissa Act II of* 1913), *section* 227(*3*)—*application to set aside sale—Limitation Act*, 1908 (*Act IX of* 1908), *Schedule I, Articles* 166 *and* 181.

An application under section 227(*3*) of the Orissa Tenancy Act, 1913, to set aside a sale held in execution of a decree, is not governed by Article 166 of the Limitation Act, 1908, which applies to an application

" under the Code of Civil Procedure, 1908, to set aside a sale in execution of a decree ",

but by Article 181 which applies to

" applications for which no period of limitation is provided elsewhere in this schedule (I to the Act) or by section 48 of the Code of Civil Procedure, 1908 ".

Chandrama Rai v. *Maharaja of Dumraon*(1), referred to.

An application under section 227(*3*) of the Orissa Tenancy Code, or under section 173 of the Bengal Tenancy Act, 1885, cannot be considered to be an application under section 47 of the Code of Civil Procedure.

Haripada Haldar v. *Barada Prasad Ray Chowdhury*(2), dissented from.

Petition by the applicants.

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

L. Mahanty, for the petitioners.

B. K. Ray, for the opposite party.

**Circuit Court, Cuttack.* Civil Revision no. 41 of 1926, from an order of Babu Dayanidhi Das, Collector of Puri, dated the 29th April, 1926, confirming an order of J. Das, Esq., Deputy Collector of Puri, dated the 9th February 1926.

(1) (1917) 38 Ind. Cas. 209. (2) (1924) I. L. R. 51 Cal. 1014.

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KULWANT SAHAY, J.

ec. KULWANT SAHAY, J.—The petitioners allege themselves to be the purchasers of a holding in execution of a mortgage decree. The holding was subsequently sold in execution of a rent-decree. The petitioners presented an application before the Deputy Collector purporting to be one under section 227(*3*) of the Orissa Tenancy Act for setting aside the sale on the ground that the holding had been purchased by the judgment-debtor himself through another person, viz., the purchaser in execution of the rent-decree. The application has been dismissed by the Deputy Collector on the ground that it was barred by limitation under Article 166 of Schedule I to the Indian Limitation Act. The order of the Deputy Collector has been affirmed on appeal by the Collector.

The only question for determination in this case is whether the application is governed by Article 166 or by Article 181 of the Indian Limitation Act. Article 166 provides for applications under the Code of Civil Procedure (1908) to set aside a sale in execution of a decree and the period of limitation is thirty days from the date of sale. It is contended on behalf of the petitioners that the present application was not an application under the Code of Civil Procedure, but it was an application under the special provisions of the Orissa Tenancy Act and, therefore, Article 166 has no application. He contends that the Article applicable is Article 181 which provides for applications for which no period of limitation is provided elsewhere in the Schedule I to the Indian Limitation Act. It is clear that there is no other provision in the Indian Limitation Act for an application like the one now under consideration. It would therefore follow that the Article applicable would be Article 181. In *Chandrama Rai* v. *Maharaja of Dumraon*(1) the question was considered in relation to the provisions of section 173 of the Bengal Tenancy Act which are similar to the provisions of section 227 of the Orissa Tenancy Act, and it was held that the

(1) (1917) 38 Ind. Cas. 209.

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Article applicable to an application under section 173 of the Bengal Tenancy Act was Article 181 and not Article 166. This decision therefore supports the contention of the learned Vakil for the petitioners. The learned Deputy Collector referred to the decision of the Calcutta High Court in *Haripada Haldar* v. *Barada Prasad Ray Chowdhury*(1). The decision in *Chandrama* v. *Maharaja of Dumraon*(2) was distinguished in that case, and one of the reasons given was that this decision proceeded on a construction of the old Article 166 as it stood before the amendment by the Act of 1908. In this the learned Judges were clearly under a misapprehension. The decision in *Chandrama* v. *Maharaja of Dumraon*(2) was on a construction of Article 166 as it stands at present and not as it stood before the present amendment. Another reason given was, that an application under section 173 of the Bengal Tenancy Act would be an application under section 47 of the Code of Civil Procedure. Section 47 of the Code of Civil Procedure, however, contemplates questions arising between the parties to the suit in which the decree was passed or their representatives. In the present case the petitioners were not the parties to the suit, nor were they the representatives of the parties. Therefore, an application under section 173 of the Bengal Tenancy Act or section 227 of the Orissa Tenancy Act cannot be considered to be an application under section 47 of the Code of Civil Procedure. Sections 238 and 239 of the Orissa Tenancy Act provide for special periods of limitation as regards certain suits, appeals and applications specified in Schedule III of the Act. The present application is not an application specified in Schedule III, and therefore the special rule of limitation laid down in the Orissa Tenancy Act has no application. Consequently the Limitation Act will apply and, on a consideration of the nature of the present application, I am of opinion that the proper Article applicable is Article 181 of Schedule I to the

(1) (1924) I. L. R. 51 Cal. 1014. (2) (1917) 38 Ind. Cas. 209.

Indian Limitation Act. The application was, therefore, not barred by limitation.

The order of the Courts below must be set aside and the case remanded for re-trial on merits. The petitioners are entitled to the costs of this application.

MACPHERSON, J.—I agree.

Order set aside.
Case remanded.

APPELLATE CIVIL.

Before Mullick and Kulwant Sahay, JJ.

GREAT INDIAN PENINSULA RAILWAY COMPANY

v.

FIRM GURDAYAL.*

1926-27.

Dec., 2, 3; Jan., 4.

Railway Company—Risk Note B—part of consignment lost by theft—strike of railway servants, whether amounts to wilful neglect.

Under the terms of Risk Note B a railway company is liable for wilful neglect either on their own part or on the part of their servants. A strike of the railway's employees in breach of their contract is evidence of wilful neglect on the part of such employees.

East Indian Railway Company v. *Goberdhan Das*(1), *Great Indian Peninsula Railway Company* v. *Jitan Ram Nirmal Ram*(2), *Pantland Hick v. Raymond and Reid*(3), *and Sims and Company* v. *Midland Railway Company*(4), referred to.

Such evidence, in the absence of proof that the company took adequate precautions to protect their wagons against the risks created by the strike, is sufficient to establish the liability of the company for the loss of goods consigned under Risk Note B, and stolen from the wagons.

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*Appeal from Appellate Decree no. 794 of 1924, from a decision of Babu Krishna Sahay, Additional Subordinate Judge of Bhagalpur, dated the 9th April 1924, reversing a decision of Babu Rabindra Nath Ghosh, Munsif. 1st Court, Bhagalpur, dated the 28th May 1923.

(1) (1926) 7 Pat. L. T. 140.
(2) (1923) I. L. R. 2 Pat. 442.
(3) (1893) L. R. Appeal Cases, 22.
(4) (1913) L. R. K. B. 1.

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Appeal by the defendants.

Under risk not Form B the plaintiffs, on the 24th January, 1922, booked four bales of cloth from Victoria Terminus station in Bombay to be delivered to his agents at Sultanganj in the district of Bhagalpur. Two bales were not delivered and the plaintiff sued for Rs. 1,765-3-0 as damages. The goods were carried first of all by the Great Indian Peninsula Railway Company and then by the East Indian Railway Company. The suit was brought against the former Railway Company. Two written statements were filed by the defendants. In the second written statement, which amplified the first written statement, the defendants stated that the goods reached Moghulserai, a station on the East Indian Railway Company, and that a railway strike took place and the East Indian Railway Company considered it inexpedient to allow the wagon containing the goods to proceed further, and that while they were at Moghulserai seven persons unconnected with the Railway stole the contents of the two bags and that they were subsequently convicted of the theft. The defendants pleaded that as there was no wilful neglect on their part they were protected by the risk note.

The trial Court dismissed the suit on the ground that the risk note applied and that as there was no evidence that the theft took place by reason of wilful neglect on the part of the defendants or their servants the defendants were not liable.

In appeal the Subordinate Judge found that wilful neglect was proved and decreed the suit.

This second appeal was preferred on the ground that there was no legal evidence upon which wilful neglect could be found.

N. C. Sinha and *S. N. Bose*, for the appellants.

S. S. Bose, for the respondent.

Cur. adv. vult.

4th Jan. 1927.

Mullick, J (after stating the facts set out above, proceeded as follows:) The plaintiff sued for non-delivery which is the same thing as detention. This means that the goods have been lost to him. The defendants in effect plead that they have been lost both to the plaintiff and to the defendants and that the risk note applies. In *East Indian Railway Company* v. *Goberdhan Das*(1) it was held by this Court that loss to the plaintiff by detention is loss within the meaning of the risk note. In *Great Indian Peninsula Railway Company* v. *Jitan Ram Nirmal Ram*(2) it was pointed out that risk note B contained a contract with an exception and a proviso and that the defendants who set up the exception must not only plead but prove that the exception applies and that the burden of proof will then be shifted upon the plaintiff to prove that there was wilful neglect within the terms of the proviso. If a railway company pleads the exception but does not give any proof that the goods have been lost to him, the plaintiff will be entitled to a decree on the ground that though there has been loss within the meaning of the risk note he is entitled to a finding that the goods are being wrongly withheld in the possession of the railway company and therefore there was wilful neglect in not delivering the goods to him. If the railway company gives evidence or the parties are agreed that the goods have been lost to the defendants also, the burden of proof will be shifted upon the plaintiff to prove wilful neglect. In a contract based upon risk note B a mere allegation that the cause of action is non-delivery will not suffice to take the case out of the risk note.

In the present case although the plaintiff based his claim merely upon non-delivery and although the defendants, while pleading the risk note, did not call any evidence to prove the theft by which the goods were lost to them, yet it appears that at the trial it was assumed that the goods were lost both to the plaintiff and to the defendant and that the risk note

(1) (1926) 7 Pat. L. T. 140. (2) (1923) I. L. R. 2 Pat. 442.

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applied and that the decision depended upon the plaintiff's discharging the burden of showing that there had been wilful neglect on the part of the defendants. The omission of the defendants, therefore, to prove the theft is now immaterial.

The next question is whether the Subordinate Judge's finding that there was wilful neglect is based on legal evidence. It was assumed that there was a strike at Moghulserai in consequence of which the wagon could not be forwarded to its destination. There is no evidence to show whether the strike was partial or general and how many days, if any, the wagon was detained by reason of it. The Subordinate Judge appears to have taken the view that the strike in this case was evidence of wilful neglect on the part of the railway servants concerned. He was evidently of opinion that by striking they had broken their contracts with their employers. I cannot say that he was wrong in this view, and indeed the case argued before us here is that even though the servants broke their contracts the employers cannot be held liable. That is a proposition which cannot be sustained. The risk note in terms provides that the company shall be liable for wilful neglect either on their own part or on the part of their servants. A servant's refusal to work, if in breach of his contract, is evidence of wilful neglect upon his part. *Pantland Hick* v. *Raymond and Reid*(1) and *Sims and Company* v. *Midland Railway Company*(2) have no application. Therefore the general proposition that the company is not liable for the consequences of a strike fails.

But the learned Advocate for the appellants puts an alternative argument and says that even if it is assumed that there was wilful neglect on the part of the employees there is nothing to show that the employers did not take adequate precautions to guard the wagon against the risks created by the strike, and

(1) (1893) L. R. A. P. Cas. 22. (2) (1913) L. R. K. B. 1.

that it may well be that the defendants took the precaution of engaging fresh men as watchmen or of seeking the assistance of the police. If the defendants did take any such precautions, it was easy for them to give proof; but they did not, and I think, though with some hesitation, that the evidence of wilful neglect on the part of the strikers coupled with the theft was legally sufficient in the absence of rebutting evidence, to raise the inference that the loss occurred through that wilful neglect of the servants. That, being so, the learned Subordinate Judge's finding is conclusive, and the plaintiff is entitled to succeed. He is, however, not entitled both to interest and profits and the sum of Rs. 100 under the latter head must be deducted from his claim. The decree of the Subordinate Judge will, therefore, be modified and the claim will be decreed for a sum of Rs. 1,665-3-0 with interest pendente lite and till the date of realisation at 6 per cent. per annum together with costs throughout.

KULWANT SAHAY, J.—I agree.

Decree modified.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

RAJA BRAHASUNDER DEB

v.

BHABAN SAHU.*

1926
Dec., 14.

Court of Wards Act, 1879 (*Bengal Act IX of* 1879), *sections* 3, 6(*e*) *and* 51—*loan by ward—suit for recovery against ward under guardianship of manager—whether suit properly framed—suit decreed—appeal by ward, whether competent—rules of the Patna High Court, Chapter VI, rule* 5.

* Circuit Court, Cuttack. Appeals from Original Decree nos. 9 and 10 of 1925, from a decision of Babu Brajendra Kumar Ghosh, Subordinate Judge of Cuttack, dated the 20th April, 1925.

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The Court of Wards took charge of the defendant's estate under section 6(*e*) of the Bengal Court of Wards Act, 1879. Subsequently the defendant borrowed certain sums of money from the plaintiff on bahi-khata account. The plaintiff sued the defendant for recovery of the said sums of money and described him in the plaint as a ward of the court represented by his guardian, the Court of Wards' manager. The suit was decreed but the decree stated that the decree-holder was not entitled to proceed against the properties of the defendant which were in charge of the Court of Wards. The defendant appealed to the High Court on the ground that the suit not having been instituted against him personally was not properly framed, with the result that he had had no opportunity of defending the suit inasmuch as he was represented in the suit by the manager of the Court of Wards.

Held, dismissing the appeal, that the suit was properly framed.

Dhanpat Singh v. *Shoobhudra Kumari* (1), *Collector of Benares* v. *Sheo Prasad* (2), *Mohammad Abdus Salam* v. *Rani Kamalmukhi* (3) and *Lachmi Narain Gouri Shankar* v. *Syed Mohamed Abrahim Khan* (4), distinguished.

Gobind Sahae v. *Udit Narain Singh* (5), followed.

Query, whether in view of the provisions of rule 5, Chapter VI of the Rules of the Patna High Court, the defendant was entitled to prefer the appeal to the High Court.

Appeal by the defendant.

These appeals arose out of two suits brought by the plaintiff-respondents against Raja Brajasunder Deb who was described in the plaint as a ward of the Court represented by the guardian Padma Charan Das, Court of Wards Manager of Killah Aul. The suits were for recovery of various sums of money alleged to have been advanced to the Raja under bahi-khata accounts. In the written statement filed by the manager under the Court of Wards, one of the pleas taken was that the defendent could not be sued as a

(1) (1882) I. L. R. 8 Cal. 621.
(2) (1883) I. L. R. 5 All. 487.
(3) (1918) 46 Ind. Cas. 316.
(4) (1925) I. L. R. 4 Pat. 172.
(5) (1913) 17 Cal. L. J. 601.

ward of the Court for the claim in suit; and the first issue framed in the suit was .

" Is the suit maintainable in its present form."

The Subordinate Judge found that the suit had been properly framed, and it was therefore maintainable in the form in which it had been instituted. Upon the merits he found in favour of the plaintiffs; and the decree that he made was that the plaintiffs would get a decree for the sums claimed, but that they would not be entitled to proceed against the properties of the Raja, which were under the charge of the manager of the Court of Wards, for the realisation of the decretal amounts and costs. Raja Brajasunder Deb preferred the present appeals with an application under rule 5, Chapter VI, page 60 of the High Court Rules; and a Division Bench granted him leave to appeal without the intervention of the manager.

S. B. Ray, for the appellant.

S. C. Bose for the respondents.

KULWANT SAHAY, J., (after stating the facts set out above, proceeded as follows:)

The only point argued on behalf of the Raja in these appeals is that having regard to the frame of the suits the decree as made was illegal. It is contended that before a decree could be made against the Raja for realisation of the money, an opportunity ought to have been given to him to defend the suits, and that he had no such opportunity in the present suits inasmuch as he was represented therein by the manager under the Court of Wards. In my opinion this contention is not sound and cannot prevail.

The Court of Wards took charge of the estate of the Raja under section 6(*e*) of the Court of Wards Act [IX (B.C.) of 1879]. The order of the Board of Revenue under sections 7 and 35 of the Act was made on the 4th of April, 1921, and it was declared

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by the said order that Babu Brajasunder Deb of Aul was a disqualified proprietor for a period of five years within the meaning of section 6 of the Act. The debts in question in the present suits were incurred by the Raja after the Court of Wards had assumed charge of his estate. Under section 3 of the Court of Wards Act,

"Ward" means any person who is under the charge of the Court of Wards, or whose property is under such a charge.

It is thus clear that when the property of the Raja was taken charge of by the Court of Wards, he became a "ward" of the Court of Ward. Section 51 of the Act provides that in every suit brought by or against any ward he shall be therein described as a ward of court; and the manager of such ward's property, or if there is no manager, the Collector of the district in which the greater part of such property is situated, or any other Collector whom the Court of Wards may appoint in that behalf, shall be named as next friend or guardian for the suit, and shall in such suit represent such ward, and no other person shall be ordered to sue or be sued as next friend or be named as guardian for the suit by any Civil Court in which such suit may be pending. It would thus appear that the description of the defendant as given in the plaints in the present suits was in strict conformity with the provisions of section 51 of the Court of Wards Act.

It is contended on behalf of the appellant that it is settled law that a ward of the court is entitled to enter into contracts, and that although such contracts cannot be enforced against any property of the ward in the possession of the manager under the court as provided by section 60 of the Court of Wards Act, yet such contracts can be enforced against the ward personally; and in suits to enforce contracts made by the ward without the sanction of the court, the ward should be sued personally and not as represented by the Manager as provided by section 51 of the Act. Reliance has been placed upon *Dhunpat Singh* v.

Shoobhudra Kumari (1), *Collector of Benares* v. *Sheo Prasad* (2), *Muhammad Abdus Salam* v. *Rani Kamal-mukhi* (3) and *Lachmi Narain Gouri Shankar* v. *Syed Mahomed Abrahim Hussain Khan* (4). Now, what these cases lay down is that a ward of the court of wards is not incapacitated from contracting, but that the power of the ward to contract is taken away so far as regards all property which, under the provisions of the law, comes under the charge and control of the Court of Wards. In the case of *Dhunpat Singh v. Shoobhudra Kumari* (1), the manager on behalf of the Court of Wards as well as the ward personally were made defendants in a suit to enforce a mortgage executed by the ward without the sanction of the court; and the District Judge held that the estate was not liable, but as the bond had been executed by the ward, he found that the ward was personally liable, and he gave the plaintiff a personal decree against the ward and awarded costs to the Court of Wards against the plaintiff. An appeal was filed by the plaintiff, and a cross-appeal was filed by the Court of Wards to the effect that the District Judge ought to have dismissed the entire claim, of the plaintiff and ought not to have passed a decree personally against the ward. The High Court dismissed the appeal as well as the cross-appeal. In dismissing the cross-appeal the learned Judges observed that the provision contained in section 51 of the Court of Wards Act [IX (B.C.) of 1879] was a provision of procedure, and that it was not intended to affect, and could not affect, any liability which may be incurred by a ward in so far as the ward is concerned. Their Lordships refused to interfere with the decree of the lower court declaring the ward to be personally liable. This case is not an authority for the proposition that a suit framed in accordance with the provisions of section 51 is not maintainable. In *Collector of Benares* v. *Sheo Prasad* (2) it appears that

(1) (1882) I. L. R. 8 Cal. 621.
(2) (1883) I. L. R. 5 All. 487.
(3) (1918) 46 Ind. Cas. 316.
(4) (1925) I. L. R. 4 Pat. 172.

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the Collector representing the Court of Wards was impleaded as a defendant on the ground that the property of the defendant had come under the superintendence of the Court of Wards before the execution of the bond on which the suit had been brought. The Subordinate Judge decreed the claim against the ward personally, exonerating the estate from liability; and from this decree the Collector preferred an appeal to the High Court, and it was held that the Collector was entitled to raise, on account of the ward, the question as regards the legal capacity of the ward to contract simple money debts. This case has, therefore, no application to the facts of the present case. *In Mohammad Abdus Salam* v. *Rani Kamalmukhi* (1) a Division Bench of this Court was asked to interfere in revision against an order of the Subordinate Judge, appointing a person other than the manager under the Court of Wards, as the guardian ad litem for the ward. Their Lordships considered the provisions of Order XXXII, rule 4, of the Code of Civil Procedure and of section 51 of the Court of Wards Act, and they held that where a Court of Wards is in possession of the property of a disqualified proprietor under section 6(*e*) of the Bengal Court of Wards Act, a suit brought against such a proprietor based upon contract may proceed without causing the defendant to be represented by the manager under the Court of Wards. That was a case converse to the present case. Their Lordships did not lay it down that a suit brought against the ward represented by the manager under the Court of Wards was incompetent. The decision in *Lachmi Narain Gouri Shankar* v. *Syed Mohamed Abrahim Khan* (2) followed the decision in *Mohammad Abdus Salam* v. *Rani Kamalmukhi* (1). These cases cannot be cited as authority for the proposition that a suit instituted against a ward represented by the manager under the Court of Wards is incompetent.

(1) (1918) 46 Ind. Cas. 816. (2) (1915) I. L. R., 4 Pat. 172.

In the case of *Gobind Sahae* v. *Udit Narain Singh* (1) Mookerjee, J., observed as follows: 'The plaintiff in the case before us is entitled to a personal decree against the tenant defendant for the arrears of rent of the tenancy, the term whereof has now expired. But as his estate has been placed in charge of the Court of Wards, he can be sued only as represented by the manager. In the suit thus constituted, the decree must be so framed as to be binding upon the manager as such, because otherwise no properties of the debtor can be reached for satisfaction of the decree". It would follow from this decision that a ward of the court can be sued only as represented by the manager, and this appears to be in accordance with the provisions of section 51 of the Court of Wards Act.

It is contended that the defendant in the suit was really the manager and not the ward. This contention is obviously fallacious. The defendant is the ward, but for the purposes of the suit he is represented by the manager, and in a suit so framed a decree can certainly be passed against the ward.

The learned advocate for the appellant contends that the Raja had no opportunity to contest the suit on the merits, and that the manager may never have consulted him or have taken instructions from him as regards the proper defence of the suit. This contention is not supported by any affidavit, nor is there anything on the record to support it. The learned advocate is unable to say what the proper defence in the suit should have been; and we are not prepared to say that there has been any prejudice to the defendant in the present suit on account of his being represented by the manager.

It is contended on behalf of the respondents that the present appeals are incompetent, and that the Raja personally had no right to present these appeals. He argues that rule 5 of Chapter VI of the High

(1) (1913) 17 Cal. L. J. 601.

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Court Rules has no application to the facts of the present case. I am inclined to agree with this contention. Rule 5 of Chapter VI does not seem to contemplate cases like the present: it provides for cases where a decree is made against the trustee, executor, administrator or a receiver or manager appointed by a court, who as such was a party to such decree, and where the beneficiary is affected by the decree and desires to appeal against it, he may name himself in the memorandum of appeal as an appellant. It contemplates cases where the beneficiary is not a party, but is affected by the decree. In the present case, the Raja was a party and the provisions of Rule 5 do not seem to apply. The order of this court giving him leave to appeal does not discuss the question and was passed ex parte, without notice to the Respondents. It is, however, not necessary to decide this question inasmuch as the appeals fail on the merits.

These appeals must be dismissed with costs.

MACPHERSON, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Das and Adami, JJ.

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Jan., 25.

CHAUDHARY CHANDRIKA PRASAD SINGH

v.

MITHU RAI.*

Code of Civil Procedure, 1908 (*Act V of* 1908), section 2(2), *and Order XLI, rule* 23—*Issues decided by lower court and suit dismissed—appeal to District Court—certain issues framed and case remanded—appeal to High Court, whether maintainable.*

* Appeals from Appellate Decrees nos. 590 and 638 of 1926 from a decision of J. Chatterji, Esq., Additional District Judge of Shahabad, dated the 27th March, 1926, reversing a decision of Babu Ramchandra Misra, Munsif of Arrah, dated the 12th January, 1926.

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Where the trial court decides a suit after determining all the issues, and, in appeal, the District Judge frames certain other issues and remands the case to the court of first instance for decision of those issues, the order of remand is neither an order under Order XLI, rule 23, nor a decree, but an order made under the court's inherent powers, and, therefore, is not appealable.

Appeals by the plaintiffs.

P. Dayal and *K. N. Varma*, for the appellants.

S. M. Mullick and *Ragho Saran*, for the respondents.

DAS, J.—These appeals are directed against the order of the learned Additional District Judge of Arrah, dated the 27th March 1926 by which after framing certain issues he remanded the case to the court of first instance for decision of those issues.

A preliminary point is taken that no appeal lies. I agree that the appeals are incompetent and that they should be dismissed on that ground.

The question is whether the remand made by the learned Additional District Judge is under the provision of Order XLI, rule 23 of the Code or not. It is conceded that if the remand be under rule 23, then the appeal lies to this Court. Rule 23 runs as follows:—

> "Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand."

The critical question then is whether the court of first instance disposed of the suit upon a preliminary point and the decree of the court of first instance was reversed in appeal. Now, in referring to the judgment of the first court I find that seven issues

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were drawn up by that Court and that every one of those seven issues was tried by the court. The learned Advocate for the appellant contends that in substance the court of first instance decided the suit on the 4th issue, namely, on the issue as to limitation and left the merits of the case between the parties undetermined. He argues on this footing because the learned Judge in the court below held that there were certain matters which were left undetermined. But that is not the scope of Order XLI, rule 23. Order XLI, rule 23, operates only when one of the preliminary issues is tried by the court of first instance and that Court disposes of the suit on that ground and says that he is not going to try the suit on any other issue. In this instance the court of first instance decided all the issues and in my opinion it cannot be urged that the remand by the lower Appellate Court was under the provision of Order XLI, rule 23, of the Code. It was clearly a remand in the exercise of the inherent power of the court.

Then the next question is whether an appeal lies from that order. It is conceded that the Civil Procedure Code has not given an express right of appeal from an order of remand in the exercise of the inherent powers of the court. But it is contended that although no appeal may lie from the order of remand looked upon as an order, still that order should be looked upon as a decree and in that view the appeal should be entertained. A decree is defined in the Civil Procedure Code as the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. Now, in this case the learned Judge in the court below has not determined the rights of the parties either conclusively or otherwise or at all. All that he has done is to hold that the rights of the parties cannot be decided until certain important matters are decided. He has therefore left them very

much at large. In my opinion therefore the order of the learned District Judge cannot be looked upon as a decree within the meaning of that term as used in section 2 of the Code of Civil Procedure. I am aware that other courts and other Judges have taken a different view; but I adhere to the opinion which I have frequently expressed in this court.

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I hold that these appeals are incompetent and I dismiss them with costs.

DAS, J.

ADAMI, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Das and Adami, JJ.

KHEDU NAEK

v.

RAJIB RAY.*

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Jan., 26.

Ex parte decree—decree passed in presence of defendants represented by pleader—application to set aside decree not maintainable.

On the 9th June, 1925, the order sheet in a suit recorded that the parties were ready. On the application of the parties, however, the hearing of the suit was adjourned to allow the parties to settle out of court. Subsequently the suit was compromised between the plaintiff and all the defendants except defendants 2 and 3. The pleader for defendants 2 and 3 stated that he had no power to compromise. The plaintiff thereupon led evidence as against defendants 2 and 3 and the court on the 11th in its judgment purported to decree the suit ex parte as against these defendants and in terms of the compromise as against the others. Defendants 2 and 3 applied to set aside the decree as against them.

* Appeal from Original Order no. 125 of 1926, from an order of Babu Ashutosh Mukerji, Subordinate Judge of Hazaribagh, dated the 12th April, 1926.

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Held, that as defendants 2 and 3 were represented by a pleader and the parties were ready on the 11th, the decree passed against defendants 2 and 3 was not an ex parte decree and, therefore, the application to set it aside was not maintainable.

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

S. M. Mullick (with him *Harihar Prasad Singh*) for the appellants.

B. C. De, for the respondents.

DAS, J.—This appeal is directed against the order of the 12th April, 1926, passed by the learned Subordinate Judge of Hazaribagh. The appellants were defendants 2 and 3 in a suit for recovery of possession of certain properties. The suit was fixed for hearing on the 9th June, 1925. The order-sheet of the 9th June, 1925, runs as follows—

"Parties ready. Facts of the suit stated after which both parties' pleaders request for half an hour's time to settle the matter out of Court. This allowed till 10 A.M. Documents filed by plaintiff be kept with the record. Its admissibility will be considered when tendered."

Stopping here for a moment it is quite clear that the parties were ready on the 9th June, 1925, and the question whether defendants 2 and 3 were ill or well that day did not matter at all so far as the hearing of the suit was concerned. It appears that the parties then filed a joint petition for one day's time to compromise the suit. The case was ultimately compromised as between the plaintiffs and all the defendants other than defendants 2 and 3. The pleaders for defendants 2 and 3 who were actually present in court stated that they had no power to compromise the suit on behalf of the defendants who were absent. The Court thereupon asked the plaintiff to prove the case against defendants 2 and 3; that evidence was given and the learned Subordinate Judge pronounced judgment on the 11th June 1925. In that judgment he deals with the compromise

between the parties and then his order runs in these terms—

"And I order that the suit be decreed on compromise against defendants 1, 4, 8, 10 and 12 to 14 and ex parte against the remaining defendants. The terms be all embodied in the decree."

Thereafter defendants 2 and 3 presented an application for setting aside the ex parte decree. That application failed. The present appeal is against the order refusing to set aside the ex parte decree. In my opinion the decree passed by the learned Subordinate Judge on the 11th June 1925 cannot be regarded as an ex parte decree. It is quite clear that the parties were ready that day, although defendants 2 and 3 were not actually present in court. Although defendants 2 and 3 were not present in court their pleader was present and their pleader was competent to cross-examine the plaintiff and to adduce evidence on behalf of defendants 2 and 3. There is nothing in the order-sheet to show that any application for adjournment of the suit was made on behalf of defendants 2 and 3 and nothing to suggest that the pleaders of defendants 2 and 3 retired from the suit. It is well settled that if a pleader engaged by a party be actually present in court, the decree passed in the presence of that pleader cannot be regarded as an ex parte decree, although it may be that his client may not have been present. In my opinion therefore the judgment of the 11th June as against defendants 2 and 3 cannot be regarded as an ex parte judgment. This being the position, an application for setting aside the ex parte decree did not lie and the learned Subordinate Judge was right in dismissing that application.

I would therefore dismiss this appeal with costs.

ADAMI, J.——I agree.

APPELLATE CIVIL.

Before Das and Adami, JJ.

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Jan., 26.

MUNSHI RAI

v.

RUP NARAIN.*

Code of Civil Procedure, 1908 (Act V of 1908), section 47 —joint decree—purchase of property by one of the decree-holders in execution—decretal amount and compensation deposited in court—application by purchaser to withdraw the compensation deposited opposed by the other decree-holder—application allowed—appeal, whether maintainable.

One of two joint decree-holders obtained permission to bid at the sale held in execution of their decree, and purchased the property put up to sale. Subsequently the judgment-debtor deposited the decretal amount together with 5 per cent. as compensation payable to the auction-purchaser, and the latter applied to withdraw the compensation money. The application was opposed by the other decree-holder but eventually allowed, ex parte. An appeal was then preferred to the High Court.

Held, that the question having arisen not between the parties to the suit but between two decree-holders, the order allowing withdrawal of the compensation money was not an order under section 47 and, therefore, was not appealable.

The compensation paid by a judgment-debtor under Order XXI, rule 89, is payable to the auction-purchaser for compensation for the disappointment caused to him by having the sale set aside and is not compensation paid to the decree-holders as such.

Appeal by the decree-holder.

A joint decree was obtained by Munshi Rai, the appellant and Rup Narain Kumar and others, respondents. Certain property belonging to the judgment-debtor was attached and, on the 24th October, 1925, Rup Narain Kumar applied for permission to bid through Babu D. N. Sen, pleader. That application was made on behalf of Rup Narain Kumar only and

* Appeal from Original Order no. 57 of 1926, from an order of Maulavi Najabat Husain, Subordinate Judge of Bhagalpur, dated the 12th January, 1926.

not on behalf of all the decree-holders. The Court gave Rup Narain Kumar liberty to bid and, at the sale which followed, the property was knocked down to him. The judgment-debtors subsequently paid up the decretal amount together with 5 per cent. as compensation payable to the auction-purchaser. Thereupon Rup Narain Kumar applied for leave to withdraw the compensation money. The application was opposed by Munshi Rai, who contended that he was entitled to a share of the compensation money. On the date when the matter was taken up for hearing Munshi Rai did not appear and his pleader informed the Court that his client was not present in Court. Thereupon the Subordinate Judge passed an order directing that the compensation money be paid to Rup Narain Kumar. The present appeal was against the order of the Subordinate Judge, dated the 12th January, 1926, deciding the matter in favour of Rup Narain Kumar.

J. P. Singh, for the appellant.

P. B. Ganguli, for the respondent.

DAS, J., (after stating the facts set out above, proceeded as follows :)

A preliminary point is taken that the order is not appealable. In my opinion the objection is well-founded and must prevail. The question that has now arisen is not between the parties to the suit, but it is a question between two decree-holders. The order is not an order under section 47 of the Code of Civil Procedure and therefore no appeal lies. Apart from this question, I think that the order of the learned Subordinate Judge is right on merits. The compensation under Order XXI, rule 89, of the Code is payable to a purchaser for the disappointment caused to him by having the sale set aside. It is not a compensation paid to the decree-holders as such. This being the position, the compensation money was clearly payable to Rup Narain Kumar. I must therefore dismiss this appeal with costs.

ADAMI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Adami, JJ.

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KUMAR GANGANAND SINGH

v.

Nov., 25, 26; Dec., 1, 2, 3, 6, 7, 8, 10; Feb., 1.

MAHARAJA SIR RAMESHWAR SINGH BAHADUR.*

Consent Decree—suit by minor set aside, ground of fraud—maintainability of suit—order of court discharging guardian ad litem and declaring minor as adult, whether is res-judicata—minor, whether can impeach decree on the ground of gross negligence of guardian—duties of guardian—minor, remedies of—misrepresentation by minor, effect of—fraudulent misrepresentation, what constitutes—fraud, elements of—final decree, where necessary—Code of Civil Procedure, 1908 (*Act V of* 1908), *order XXXIV, rules 4 and* 5.

In a pending suit the guardian ad litem of a minor defendant applied to the court that her name might be struck out from the records of the suit as the minor had attained his majority and asked the court to pass a formal order of discharge. The court granted the application but the minor had no notice of the application or the order.

Held, that the order did not operate as res judicata and that, therefore, the minor was entitled to show, in a subsequent suit brought for the purpose of impeaching the decree passed in the first suit, that he was in fact a minor at the date of the order.

Although a court has inherent power to correct its own proceedings when it is satisfied that in passing a particular order it was misled by one of the parties, a suit is the proper remedy where the case is one of fraud on a party to the litigation.

Held, therefore, that a suit by a minor to set aside a consent decree on the allegation that a fraud was practised not on the court but on himself is maintainable.

Sadho Saran Rai v. Anant Rai (1), distinguished.

Even where a minor was represented in the record of the suit by a guardian ad litem not disqualified from so acting,

* Appeal from Original Decree no. 42 of 1926, from a decision of Babu Krishna Sahay, Subordinate Judge of Bhagalpur, dated the 30th June, 1925.

(1) (1923) I. L. R. 2 Pat. 731.

he can in a subsequent suit, impeach the decree passed in the previous suit on the ground that there was gross negligence on the part of the guardian.

Pande Satdeo Narain v. *Ramayad Tewari* (1), distinguished.

It is the duty of a guardian ad litem to be as vigilant in guarding the interests of the minor as he would be expected to be if his own interests were involved; and the court will ordinarily relieve the minor from the effect of a consent decree and give him an opportunity to defend the suit if it is established that the guardian did no more than put his signature to a petition of compromise without considering for himself the question of benefit to the minor. But the rule being one of prudence, not one of law, the court will not allow a minor to avoid a consent decree if in the circumstances of the case it considers that the settlement was for the benefit of the minor.

A consent decree does not stand on a higher footing than a contract between the parties, and the court has jurisdiction to set aside a consent decree upon any ground which would invalidate an agreement between the parties. Therefore, a contract between a minor defendant and the plaintiff as contained in a petition of compromise is entirely void and cannot be given effect to in a court of law.

A minor is not bound in law by a contract into which he has entered even if he induced the other party to enter into the contract by a fraudulent misrepresentation that he was of age. But where an infant has obtained an advantage by falsely stating himself to be of full age, equity will restore his illgotten gains and release the party deceived from obligations or acts in law induced by the fraud.

R. Leslie, Limited v. *Sheill* (2) and *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (3), referred to.

The representation, however, must, in order to create the liability, be express and fraudulent and will not be constituted by mere inference suggested by, or drawn from the infant's conduct.

Merely allowing another person to deal with him as if he were an adult, or doing acts which only an adult can it law

(1) (1923) I. L. R. 2 Pat. 335. (2) (1914) L. R. 3 K. B. 607.
(3) (1916) L. R. 2 A. C. 575.

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properly do, is not sufficient to constitute a fraudulent misrepresentation.

Stikeman v. *Dawson* (1) and *Ex parte Jones* (2), referred to.

Fraud is proved when it is shewn that a false representation has been made (*i*) knowingly or (*ii*) without belief in its truth, or (*iii*) recklessly, careless whether it be true or false.

Derry v. *Peck* (3), followed.

Held, therefore, that where a person, who is a minor simply executes a vakalatnama and files a written statement without making any express representation that he is of age, this of itself does not amount to a fraudulent misrepresentation that he has attained majority.

A final decree under Order XXXIV, rule 5, Code of Civil Procedure, 1908, is only necessary where there is a preliminary decree in existence under Order XXXIV, rule 4, and the essence of a preliminary decree under the latter rule is that it shall contain an order for accounts to be taken between the parties as to what is due to the mortgagee for principal and interest and for his costs (if any) on the date fixed for payment, or a declaration as to the amount so due.

Where, therefore, in a mortgage suit, the court by its decree passed by consent merely declared the amount due to the decree-holder at the date of the decree, *held*, that the decree was not a preliminary decree under Order XXXIV, rule 4, but was capable of execution and that, in a subsequent suit brought for the purpose of impeaching the consent decree, the plaintiff was entitled to ignore the final decree (if any, and even if he was aware of it) and to ask the court to relieve him from the effect of the decree passed by consent.

Query.—Whether the doctrine of estoppel as embodied in section 115, Evidence Act, 1872, applies to infants.

Dhurmo Das Ghose v. *Brahmo Dutt* (4), referred to.

Appeal by the plaintiffs.

On the 7th May, 1900, Kumar Kamalanand and Kumar Kalikanand, proprietors of the Srinagar Raj,

(1) (1847) 1 De. G & S. M. 90.
(2) (1880-01) L. R. 18 Ch. D. 109.
(3) (1889) L. R. 14 A. C. 337.
(4) (1898) I. L. R. 25 Cal. 616.

executed a mortgage bond in favour of the Maharaja of Darbhanga to secure an advance of a large sum of money, partly paid and partly agreed to be paid by the Maharaja to them. Kumar Kamalanand died in 1910, leaving three sons, Ambikanand, since deceased, Ganganand and Achhutyanand and a widow Rani Satyarama. Ganganand and Achhutyanand were plaintiffs 1 and 2 in this action.

On the 28th April, 1916, the Maharaja instituted a suit to enforce the mortgage security. The defendants in that suit were (1) Kumar Kalikanand, (2-4) Abhyanand, Bijayanand, and Ghananand. sons of Kumar Kalikanand, (5) Ganganand, and (6) Achhutyanand. Abhyanand, Bijayanand and Ghananand were the three remaining plaintiffs in the present suit. All the defendants other than Kumar Kalikanand were minors at the date of the institution of the suit, and they were sued as minors and guardians ad litem were assigned to each of them. Rani Satyarama was appointed the guardian ad litem of Ganganand and Achhutyanand, the minor sons of Kumar Kamalanand, and Babu Amrita Lal Mazumdar, a pleader of the Dharbhanga Court, was appointed the guardian ad litem of Abhyanand, Bijayanand and Ghananand, the minor sons of Kumar Kalikanand.

On the 11th December, 1916, Rani Satyarama presented a petition to the Court in seisin of the mortgage suit stating therein that Ganganand had attained majority and that she should be discharged from further acting as the guardian of Ganganand and Achhutyanand and that Ganganand should be appointed the guardian ad litem of Achhutyanand. The following order was recorded by the learned Subordinate Judge in the order sheet in regard to the petition of Rani Satyarama:

"Rani Satyarama guardian ad litem of minor defendants nos. 5 and 6 files a petition stating that defendant no. 5 has attained majority and that defendant no. 5 should be appointed guardian of his brother, the other minor defendant no. 6. The former fact is supported by an affidavit.

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ORDER.

The defendant no. 5 be allowed to defend his case as major and to file written statement that the prayer for appointing defendant no. 5 as guardian of his brother defendant no. 6 be disallowed and if Rani Satyarama declines to act as the guardian of defendant no. 6 steps be taken for appointment of another guardian on the 8th December, 1916."

It was alleged by the Maharaja, but which allegation was denied by Ganganand, that Ganganand entered appearance on the 11th July, 1917, and actually filed his written statement on the 24th July, 1917.

On the 17th December, 1918, the Maharaja obtained a mortgage decree by the consent of the parties. He gave up a lakh of rupees and the costs of the suit and gave the defendants in that suit a year to pay the decretal amount which, by consent of parties, was fixed at Rs. 7,42,131-2-3.

On the 15th December, 1921 the suit, out of which this appeal arose, was instituted by the plaintiffs-appellants for a declaration that the consent decree of the 17th December, 1918, was " fraudulent, void and inoperative " and for an injunction restraining the Maharaja from executing his decree against the plaintiffs. The two important defendants in this suit were the Maharaja and Kumar Kalikanand, the Maharaja being defendant no. 1 and Kumar Kalikanand being defendant no. 2. The learned Subordinate Judge dismissed the suit; hence this appeal to the High Court.

Shortly stated, the allegations made in the plaint as grounds for the reliefs claimed were as follows: Ganganand plaintiff no. 1, it was alleged, was born on the 24th September, 1898; and, on the death of his father, his uncle Kumar Kalikanand applied for, and obtained, an order from the District Judge of Purnea appointing him the guardian of the person of Ganganand. According to him, therefore, he attained his majority under the Indian Majority Act on the

24th September, 1919. His case accordingly was that, although he had attained his majority under his personal law at the date of the consent decree, he was still a minor at that date under the Indian Majority Act by which he was governed; and he contended that the consent decree must accordingly be regarded as a void decree so far as he was concerned, since there was no guardian ad litem in the record of the suit at that date to represent his interest. This was the most serious part of the case as set forth in the plaint. The other grounds, which were common to all the plaintiffs, were that both Kamalanand and Kalikanand were men of reckless dispositions and dissolute habits and that the Maharaja, being well aware of these facts, agreed to lend money to them:

"knowing that he would thereby enable the said Kumar Kamalanand and defendant second party to run in their career of immorality and extravagance".

The plaintiffs went on to assert that even if there was any consideration for the mortgage bond, the same was not executed for any valid necessity or for the benefit of the family and there were other good and valid defences to the mortgage suit; but that the Maharaja in collusion with Kumar Kalikanand caused various steps to be taken in the suit in the name of Rani Satyarama without any knowledge on her part and ultimately caused a compromise petition to be put in fraudulently without any reference either to plaintiff no. 1 or to the guardians ad litem of the other plaintiffs and induced the guardians ad litem to sign the petition of compromise without allowing them opportunity to consider whether the settlement was for the benefit of the minors. So far as this part of the case was concerned, the plaintiff sought to avoid the consent decree on two grounds: first, on the ground that the Maharaja and Kalikanand entered into a fraudulent conspiracy to defeat the interest of the minors; and secondly, on the ground, that in entering into the compromise the guardians ad litem were guilty of gross negligence sufficient in itself to

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avoid the consent decree. The Subordinate Judge, while holding that Ganganand was a minor at the date of the consent decree, dismissed the suit principally on the ground that Ganganand represented to the Court that he had attained majority and that such a misrepresentation was a fraudulent one disentitling him to the reliefs claimed by him in the suit. He rejected the case of fraud and conspiracy as an idle one and gave effect to some of the contentions raised before him on behalf of the defendants, namely, (1) that a fresh suit did not lie to get rid of the consent decree, (2) that Ganganand was estopped from disputing the validity of the consent decree; and (3) that the suit was not maintainable since the preliminary mortgage decree, which alone was attacked in the suit, had merged in the final decree which was not attacked in this suit. The plaintiffs contested the findings of the learned Subordinate Judge on each and every point decided by him against them; and the defendant, while supporting the decree passed by the Subordinate Judge, attacked the finding as to the age of Ganganand. He also supported the decree on certain grounds which were not put forward by him in the Court below. They were:

(1) that the order of the Court declaring Ganganand as an adult was an order passed by a Court which had jurisdiction to pass that order and cannot be challenged in this suit;

(2) that the position of Ganganand can not be higher or better than that of a minor in a joint family who has not been made a party to the suit; and that, assuming that Ganganand was a minor at the date of the consent decree, he is nevertheless bound by it as it was obtained in the presence and with the consent of the Karta of the family who sufficiently represented the interests of every individual member of the joint family including those of Ganganand.

C. C. Das (with him *S. M. Mullick*, *G. N. Mukerji*, *J. Ghosh*, *Raja Ram*, *H. P. Sinha* and *S. N. Bose*), for the appellants.

Sultan Ahmad (with him *S. Saran*, *M. Prasad*, *R. K. Jha* and *K. Sen*), for the respondents.

cur. adv. vult.

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11th Feb., 1927.

DAS, J., (after stating the facts set out above, proceeded as follows :)

I will first deal with the question whether the order of the Court declaring Ganganand an adult operates as res judicata between the parties so as to bar the right of Ganganand in this suit to raise an issue as to whether he was a minor at the date of the consent decree. The learned Subordinate Judge has found that Ganganand was born on the 24th September 1898. Although his finding is challenged before us on behalf of the respondent, and I shall have to deal with the arguments in the proper place, I may say at once that there is overwhelming evidence in support of the finding of the learned Subordinate Judge on this point. If the personal law by which Ganganand was governed had any operation in his case, he was undoubtedly an adult on the 24th September, 1916; but on the 9th July, 1910, Kumar Kalikanand had obtained an order from the District Judge of Purnea appointing him the guardian of the person of Ganganand. The appointment so made had the effect of prolonging the minority of Ganganand under the Indian Majority Act ; and it is not open to doubt that he attained his majority only when he completed the age of twenty-one years, that is to say, on the 24th September, 1919. On the 11th December, 1916, Rani Satyarama, who had been appointed the guardian ad litem of Ganganand in the mortgage suit presented the following petition to the Court:

"In the aforesaid suit the petitioner was appointed guardian of Kumar Ganganand Singh and Achhutyanand Singh. But Kumar Ganganand Singh has attained majority. Hence it is not necessary for the petitioner to continue to work as his guardian. It is prayed that Kumar Ganganand Singh be declared major and steps may be taken in the suit accordingly. He may be appointed guardian of Kumar Achhutyanand Singh, as well and the petitioner may be discharged from the guardianship of her both sons."

This petition was supported by the affidavit of Gokhala Prosad in which he stated that he knew:

"that the said Kumar Ganganand Singh attained majority in the month of September, 1916."

The Court thereupon granted the application. [The order is set out in full at p. 392, supra].

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Now it is clear to my mind that in presenting the petition to the Court Rani Satyarama obviously overlooked the fact either that Kumar Kalikanand had been appointed the guardian of the person of Ganganand or that the appointment of Kumar Kalikanand as the guardian of the person of Ganganand had the effect of prolonging the minority of Ganganand. A mistake was undoubtedly made; and the question is whether the defendant is right in saying that the order passed by the learned Subordinate Judge on the 11th December, 1916, on the petition of Rani Satyarama to the effect:

"that defendant no. 5," namely, Ganganand "be allowed to defend his case himself as major"

is final between the parties disentitling Ganganand to ask the Court to hold that he was in fact a minor at the date of the consent decree. Mr. Sultan Ahmad on behalf of the defendant contends that the learned Subordinate Judge had jurisdiction to pass that order and that the order cannot be regarded as a nullity. The question, however, is, not whether the order is a nullity, but whether Ganganand is bound by it. Now it seems to me that, in order to bind Ganganand by the order of the 11th December, 1916, it must be shown that Ganganand was a party to the order or that the order was passed with notice to him. In presenting the petition to Court on the 11th December, 1916, Rani Satyarama was in no sense acting as the guardian ad litem of Ganganand. Her position was that the order appointing her the guardian ad litem of Ganganand was no longer in force having regard to the fact that Ganganand had already attained his majority and she asked for a formal order striking out her name from the record of the suit as the guardian ad litem of Ganganand. The Court acceded to the application without serving any notice upon Ganganand; and seven days later, that is to say, on the 18th December, 1916, directed that:

"a summons with a copy of plaint be served on defendant no. 5," that is Ganganand, "who is no longer a minor."

Now in so far as the Court acted on the hypothesis that Ganganand had attained his majority, the order

of the 11th December, 1916, was passed not only ex parte but without any notice to Ganganand, since Ganganand did not become a party to the suit until summons was actually served on him. The learned Subordinate Judge himself took the view that Ganganand was not a party to the suit at the date of the order of the 11th December, 1916, since a week later he himself directed that summons should be served on Ganganand. In my opinion Ganganand was not a party to the order of the 11th December and is not bound by that order. Since on the hypothesis on which the learned Subordinate Judge acted Ganganand was not a party to the suit on the 11th December, 1916, the latter is in my opinion entitled to show in this suit that he was in fact a minor at the date of that order. On the hypothesis that Ganganand was a minor at the date of the order of the 11th December, 1916, and was therefore properly represented by Rani Satyarama, I am of opinion that Ganganand is still entitled to ask to be relieved from the effect of that order since the guardian ad litem presented the application on the footing that she no longer represented the interest of Ganganand. Any other view would involve grave risks to minors in suits either by them or against them and I am not prepared to accede to the arguments advanced to us on behalf of the respondent on this point.

I now come to the question whether the plaintiffs or any of them are entitled to avoid the consent decree having regard to the fact that it was fairly and properly obtained against Kumar Kalikanand who was the karta of the joint family and who represented the interests of the entire joint family. The answer to the argument seems to be that Kumar Kalikanand was not sued as the karta and as representing the joint family. No doubt it was open to the Maharaja to sue Kumar Kalikanand alone in his capacity as karta of the joint family; but the decree in such a suit would always be open to attacks on grounds ordinarily available to the junior members of a Mitakshara

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family. In order to obviate the risk of further litigation the Maharaja preferred to sue every member of the joint family. It is now too late to say, "Put me in the position which I would have occupied had I brought a suit and obtained a decree against Kumar Kalikanand in his capacity as the karta of the joint family and dismiss the plaintiff's suit on the ground that they were not necessary parties to the mortgage suit and were effectively represented by Kumar Kalikanand." I must overrule the argument of the respondent on this point.

I will now deal with the question whether it is competent to the plaintiff to institute a suit to set aside a consent decree on the ground that it was obtained by fraud. In the Court below the argument was put in a somewhat different form. It was contended, to quote the actual words of the learned Subordinate Judge,

"that a separate suit would lie only where the Court had no jurisdiction to decide the case and not where the Court had jurisdiction, but had acted illegally or with material irregularity".

The Vakil appearing on behalf of the plaintiffs had no difficulty in showing—

"that a separate suit lies where the previous decree is attacked on ground of fraud or collusion."

As I read the judgment of the learned Subordinate Judge he did not accede to the argument put forward on behalf of the defendant; but he thought that the suit was not maintainable because on an examination of the evidence he found that the allegations as to fraud and collusion were unfounded and that in regard to the question of minority Ganganand was guilty of fraudulent misrepresentation disentitling him to the reliefs claimed by him. His decision on this issue is therefore on merits. In this Court the argument has taken a different form. For the purpose of his argument Mr. Sultan Ahmad has assumed, as he must, the truth of the allegations in the plaint; but he contends that on those allegations, although an

application would lie in the mortagage suit itself to set aside the compromise decree, a suit does not lie to set it aside.

Now on an examination of the allegations made in the plaint, it will appear that the plaintiffs are claiming reliefs substantially on two grounds; first, so far as all the plaintiffs are concerned, on the ground that the consent decree was obtained by fraud and was the result of collusion between the Maharaja and Kumar Kalikanand and of gross negligence on the part of the guardians ad litem; and, secondly, so far as plaintiff no. 1 is concerned, on the ground that the decree is a nullity so far as he is concerned, and that, in the circumstances, he is entitled to an injunction restraining the defendant from executing the decree.

It is difficult to understand why a suit on these allegations is not maintainable. It has been held in cases far too numerous to mention that, although a Court has inherent power to correct its own proceedings when it is satisfied that in passing a particular order it was misled by one of the parties, a suit is the proper remedy where the case is one of fraud on the party. Now, so far as the ground common to all the plaintiffs is concerned, it is difficult to understand how that ground can be investigated except in a properly constituted suit. There is no suggestion in the plaint that, in passing the consent decree the Court was in any way misled by any of the parties. The suggestion is that a fraud was practised, not on the Court, but on the minor defendants to that suit in so far as the karta of the family colluded with the Maharaja and the guardians ad litem were prevented from considering whether the settlement was for the benefit of the minors. It is this aspect of the case which distinguishes it from *Sadho Saran Rai v. Anant Rai* (1) which was a case of fraud practised on the Court.

It was then contended that if the plaintiffs other than Ganganand were represented in the record of the

(1) (1923) I. L. R. 2 Pat. 731.

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suit by guardians not disqualified from so acting they cannot impeach the decree even on the ground that there was gross negligence on the part of the guardian; and reliance was placed on *Pande Satdeo Narain* v. *Ramayad Tewari* (1). In my opinion the case cited has nothing to do with the present case. In that case it was contended that a decree obtained against a minor must be considered a nullity if it appeared that the notice of the appointment of the guardian for the suit was not served on the minor and upon the guardian of the minor in terms of Order XXXII, rule 3(4), of the Code and if it also appeared that there was a distinct violation of the statutory provision contained in Order XXXII, rule 4(3), of the Code in so far as a guardian was assigned to a minor without the consent of the guardian. It was held by this Court that " where, on the face of the record, a person qualified to act as the guardian, appears as a guardian of the minor for the suit, the Court has no power in another suit brought for the purpose of impeaching the validity of the decree, to examine the evidence in order to see whether notices under Order XXXII, rule 3(4), were, in fact, served, or whether the person nominated as guardian did consent to act as guardian or whether the Court did expressly appoint such person as the guardian for the suit, unless it is shown that the defect in following the rules has affected the merit of the case ". This Court proceeded to say : " But where the record, on the face of it, shows, that the minor was not represented by a guardian for the suit, or was represented by a guardian disqualified, under the express provision of the statute, from acting as guardian, the position is the same as if the minor were not a party to the suit, and the judgment rendered by the Court is without jurisdiction and null and void." Now in this case so far as the plaintiffs other than Ganganand are concerned they do not ask the Court to hold that the consent decree is a nullity and therefore void against

(1) (1923) I. L. R. 2 Pat., 335.

them. They contend, on the other hand, that it is voidable and that this Court should avoid it on the ground that there was a fraudulent conspiracy between the Maharaja and Kumar Kalikanand and that there was gross negligence on the part of their guardians ad litem. So far as Ganganand is concerned, the case cited completely supports his case, his case being that the record of the mortgage suit on the face of it shows that he was not represented by a guardian for the suit. I must overrule the argument advanced on behalf of the respondent on this point.

I now come to the question whether the plaintiffs are entitled to maintain the suit in so far as they seek to set aside the consent decree since they do not attack the final decree passed under Order XXXIV, rule 5 of the Code. The point was not taken in the written statement; but was allowed to be argued before him by the learned Subordinate Judge. A serious question of fact at once arises, namely, whether Ganganand was a party to the proceedings under Order XXXIV, rule 5, of the Code; and I have very grave doubt whether the learned Subordinate Judge should have permitted any argument on a point which involved an examination of facts. It is contended before me on behalf of Ganganand that he was not a a party to the proceedings under Order XXXIV, rule 5, of the Code, that is to say, proceedings initiated by the Maharaja for obtaining the final mortgage decree. The learned Subordinate Judge says that:

"plaintiff no. 1," that is to say, Ganganand, "evidently appeared during pendency of the decree absolute proceeding and raised objections too"

and he refers to Order no. 120 in the order sheet in support of his conclusion. The order sheet of the mortgage suit is printed at page 266 of Part III of the paper book. The orders in connection with the proceedings under Order XXXIV, rule 5, of the Code will be found at pages 275 and 276 of the paper book. They are order no. 108 to order no. 137. There is nothing, however, in the order sheet to show that notice of the Maharaja's application was served on

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Ganganand. Order no. 120, to which the learned Subordinate Judge refers, runs as follows:—

"Petition of objection filed. Let 18th November next be fixed for hearing. Parties to be ready with their evidence on that day."

The order does not show that any petition of objection was filed on behalf of Ganganand. The learned Subordinate Judge then says:—

"But there is the evidence of Babu Jatindranath Ghosh, D. W. 22, that he had occasion to go to Calcutta in connection with the decree aboslute proceedings to obtain instructions on behalf of his ward and when there he had met Kumar Ganganand and had some talk with him too. Therefore Kumar Ganganand was fully aware of the proceedings regarding the decree being made absolute."

Babu Jatindranath Ghosh was the guardian ad litem of the minor sons of Kumar Kalikanand. In his evidence he says that he had to go to Calcutta to take instructions from Kumar Kalikanand as to the defence to be filed on behalf of his minor sons. He proceeds to say as follows:

"I met Kumar Ganganand Singh and my wards. Kumar Ganganand introduced the wards to me. Khetra Babu," that is to say Babu Khetrapado Bose who was the guardian ad litem of the younger brother of Ganganand, "told Kumar Ganganand that I was one of the guardians ad litem appointed in the case and that we had gone there for instructions in connection with the decree absolute matter. Kumar Kalikanand was not there. Therefore we could not get any instructions."

In his cross-examination, he said that he met Ganganand when he was "ready to go to Law College." It may be mentioned that Kumar Ganganand was a student in Calcutta and was studying for law. The evidence of Jatindra Babu therefore comes to this that he went to Calcutta to see Kumar Kalikanand, that he met Ganganand as he was about to go to the Law College and Ganganand told him that Kumar Kalikanand would give him the instructions. This is all; and I cannot see how a case that Kumar Ganganand had notice of the proceedings under Order XXXIV, rule 5, could be built on this evidence.

It is for the defendant, who raises this point, to establish by satisfactory evidence that Ganganand was a party to the proceedings under Order XXXIV, rule

5, of the Code. He has not produced the notice alleged to have been served on Ganganand; he has not produced a single witness to say that Ganganand was in fact served with notice of his application; and he has not produced the petition of objection alleged to have been filed on behalf of Kumar Ganganand. Not a single question was put to Ganganand in cross-examination to suggest that he was served with the notice of these proceedings. While there is nothing in the record to show that Ganganand was served with notice of those proceedings, a perusal of the final decree as passed by the Court shows, in my opinion, conclusively, that Ganganand was not a party to those proceedings. The final decree runs as follows:

Final Decree in suit no. 172 *of* 1916.

SUBORDINATE JUDGE'S COURT, BHAGALPUR, THE 1ST JUNE, 1925.

Final Decree for sale.

Order XXXIV, rule 5, Code of Civil Procedure.

District Darbhanga.

IN THE COURT OF THE SUBORDINATE JUDGE AT DARBHANGA.

MORTGAGE SUIT NO. 172 OF 1926.

Maharaja Sir Rameswar Singh Bahadur, G.C.I.E., K.B.E., son of Maharaja Maheswar Singh Bahadur, deceased, by caste Brahman Soti, by occupation Zamindar, inhabitant of Darbhanga town, Pargana Haveli Darbhanga, District Darbhanga ... *Plaintiff.*

versus

(1) Kumar Kalikanand Singh, son of Shivanandan (sic) Singh, deceased, (2) Kumar Abhyanand, (3) Kumar Bijayanand Singh, (4) Kumar Ghanand (sic) Singh, minors, sons of Kumar Kalikanand Singh, through Babu Amrita Lal Muzumdar, guardian ad litem and afterwards Babu Jitendra Nath Ghosh, pleader appointed guardian ad litem as per order dated the 17th July, 1920 and Babu Amrita Lal Mazumdar removed from the guardianship, (5) Kumar Ganganand Singh, Major son of Kumar Kamalanand Singh, deceased, (6) Kumar Achhutyanand Singh, minor son of Kumar Kamalanand

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Singh, through Babu Kshetrapado Bose, guardian ad litem, by caste Brahman Maithil, by occupation Zamindars, inhabitants of Deorhi Srinagar, Pargana Haveli, district Purnea ... ... *Defendants 1st party.*

(7) Babu Ramsumaran Prasad, son of Babu Madanmohan, deceased, by caste Agarwala, Mahajan of M. Mahadeo Simaria alias Ulao, Pargana Malki, district Monghyr, (8) Raja Kalanand Singh, (9) Hon'ble Raja Kirtyanand Singh, sons of Raja Sulanand Singh, deceased, by caste Brahman Maithil, by occupation Zamindar, inhabitants of Deorhi Champanagar, district Purneah ... ... *Defendants 2nd party.*

Claim for recovery of Rs. 6,66,787-12-6, principal with interest and compound interest due on the basis of a mortgage bond dated the 7th May, 1900, executed by defendant no. 1 and father of defendants nos. 5 and 6.

Upon reading the preliminary decree for sale made in the above suit on the 17th day of December, 1918, and the petition of the plaintiff, dated the 23rd December, 1919 and after hearing Babu Adwaita Charan Bose, Vakil for the plaintiff and Babu Ramkrishna Jha, Vakil for defendant no. 1, Babu Jatindra Nath Ghosh, pleader, guardian ad litem of the defendants nos. 2 to 4 and Babu Kshetrapado Bose, Vakil, guardian ad litem of the defendant no. 6 and it appearing that the amount declared due by the said preliminary decree has not been paid: It is ordered that the defendants' objection be dismissed with costs and pleader's fee Rs. 80 only and that the immovable properties mentioned in the said decree and specified in the schedules annexed herewith, or so much thereof as may be necessary, be sold by public auction, and that the money which may be realised by such sale (after defraying thereout the expenses of the sale) be paid into court to be (sic) credit of this suit, and that the sum of Rs. 7,42,131-2-3 pies payable under the said preliminary decree and further interest from the 17th December, 1918 (the date of the preliminary decree) up to the date of payment at the rate specified in the said decree, i.e., at Rs. 6 per cent. per annum and costs including the costs of this application amounting to Rs. 425-6-3 as specified below be paid to the plaintiff and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.

Given under my hand the seal of the Court, this 15th day of March, 1921.

(Sd.) AKHAURI NITYANAND SINGH,
Subordinate Judge.
22-3-1921.

Now it will be noticed that Ganganand was defendant no. 5 in the mortgage suit and that, while the decree recites that the plaintiff, defendant no. 1, defendants

nos. 2-4 and defendant no. 6 were represented in those proceedings, the decree is wholly silent as to Kumar Ganganand. It is obvious that Ganganand was not represented before the Court in the proceedings in connection with the final decree obtained by the Maharaja; but it may be argued that he chose to stay away from the Court and that therefore his name does not appear on the face of the order. But the argument is an impossible one, since, if Ganganand had been served with notice of the proceedings, and if it was intended to bind him by those proceedings, the decree would have recited the fact of the service of the notice on Ganganand. The decree does not purport to be a decree against Ganganand at all. There is certainly nothing in the record to show that Ganganand was a party to those proceedings. It is difficult to understand why it should be necessary for Ganganand to ask the Court to set aside a decree which was not passed against him either in his presence or ex parte. Had the question been raised in the written statement, it would have been open to the plaintiffs to ask the Court to amend the plaint by adding a prayer specifically directed against the final decree. The question is one of form rather than of substance; for it is not open to doubt that if the preliminary decree fails the final decree must of necessity fail ; and for my own part I would unhesitatingly have passed an order for the amendment of the plaint if I thought that there was anything in the point.

For there is a more serious answer to the argument. It is well established that a final decree under Order XXXIV, rule 5, is only necessary where there is a preliminary decree in existence under Order XXXIV, rule 4, of the Code. Now in my opinion the consent decree in this case is neither in form nor in substance a decree under Order XXXIV, rule 4, of the Code. The consent decree of the 17th December, 1918 recites the following facts: (1) Rs. 6,94,044-1-6 was due to the Maharaja at the date of the institution of the suit (2) adding interest at the bond rate on Rs. 6,94,044-1-6

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the sum due to the Maharaja on the 17th December, 1918, that is to say, the date of the consent decree, came to Rs. 8,42,131-2-3. The Maharaja gave up a lakh of rupees and obtained a decree for Rs. 7,42,131-2-3 with interest thereon at 6 per cent. per annum. The Maharaja gave a year to the defendants to pay up the amount and it was agreed that in default of such payment the mortgaged property should be sold. Now it will be noticed that there is neither a direction as to accounts being taken between the parties nor a declaration as to what sum would be due to the Maharaja at the date fixed for payment. Now in my opinion an order as to an account between the parties as to what would be due to the mortgagee for principal and interest on the mortgage and for his costs of the suit (if any) on the date fixed for payment, or a declaration as to the amount so due, constitutes the essence of a preliminary decree under Order XXXIV, rule 2, of the Code. In this case the Court declared the amount due to the Maharaja at the date of the consent decree. It did not take the accounts itself or direct an account to be taken to ascertain what would be the sum due to the Maharaja on the date fixed for payment. The decree in this case is a consent decree and it was the obvious intention of the parties that it should be put into execution on the failure of the mortgagors to satisfy the claim of the mortgagee within the time allowed without having to go through the formality of obtaining a final decree under Order XXXIV, rule 5, of the Code. In my opinion the plaintiff was entitled to ignore the final decree (even if he was aware of it) and to ask the Court to relieve him from the effect of the consent decree of the 17th December, 1918. The question is one of utter technicality without any merit to support it and I must overrule the argument on this point.

I now come to the merits of the case between the parties; and I will first consider the case common to all the plaintiffs, namely, the case of fraud of, and

conspiracy between, the Maharaja and Kumar Kalikanand. The learned Subordinate Judge has considered the evidence bearing on this point with very great care and I entirely agree with his conclusion upon it. It is in my opinion idle to suggest that Kalikanand entered into a conspiracy with the Maharaja to defeat the interests of the minors. The interests of Kalikanand are identical with those of the plaintiffs and it is difficult to understand why he should have entered into a fraudulent conspiracy with the Maharaja to defeat his own interest. A suggestion has been put forward in this Court that there was a secret bargain between the Maharaja and Kalikanand and that Kalikanand was out to make a profit for himself at the cost of the minors. There is some amount of evidence that there were negotiations between the Maharaja and Kalikanand for the purchase of some of the properties belonging to the joint family so that the entire debt due by the family to various creditors could be wiped off. I am satisfied on the evidence that there was no concluded agreement between the Maharaja and Kalikanand on this point and that if the negotiations ripened into a contract it would have benefited the minors as much as it would Kumar Kalikanand. It is unnecessary to pursue the point, for I am satisfied that the decision of the learned Subordinate Judge on this point is right.

It was, however, contended that there was gross negligence on the part of the guardians ad litem and that the plaintiffs other than Ganganand are entitled to have the consent decree set aside on this ground. The argument is founded upon the alleged admissions of the guardians ad litem that they never applied their minds to the terms of settlement but that they left the whole matter to Kalikanand.

As already stated Amrita Lal Mazumdar was the guardian ad litem of the minor sons of Kalikanand and Khetrapado Bose was the guardian ad litem of the younger brother of Ganganand. It appears that

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Amrita Lal Mazumdar left Darbhanga for good to set up a practice as pleader in Bhanga, a subdivision of Faridpur in Bengal. It is unfortunate that he did not consider it consistent with his duty to apply to the Court for being discharged from further acting as the guardian ad litem of his wards. What he did however was to give a vakalatnama to Upendra Nath Chakraverty, a vakil practising in Darbhanga, to appear for him in the mortgage suit and represent the interest of his wards. Upendra Babu has been examined in this case on behalf of the Maharaja. His evidence makes very distressing reading indeed. He insists that he " fully considered what terms were beneficial to the minors " but he admits that he " did not make any enquiry about the points in the original suit at the time the compromise petition was filed ". He was confessedly not present at the conference which met to discuss the terms of settlement and he admits that he did not know of the terms on which the suit was to be settled until the draft terms of settlement were put into his hands. He says that the petition for permission to compromise the suit on behalf of his wards " was brought readymade " to him and his whole evidence makes it perfectly clear that he put his signature to the petition of compromise because he was asked to do so, not because he applied his mind to the question whether the terms of settlement were for the benefit of his wards and came to the conclusion that they were. The other guardian ad litem, Khetrapado Bose, has been examined on behalf of the plaintiffs. He admits that he had nothing to do with the settlement of the terms of compromise, but that he left the whole matter to Kalikanand as :

" he was at the helm of the family affairs ".

He says that he understood that it was part of the settlement between the parties that the Maharaja of Darbhanga would purchase part of the estate belonging to the family to enable Kalikanand to clear off the debts due by the family to various creditors and that it is this consideration which moved him to apply to

the Court for permission to compromise the case on behalf of the minor whom he represented. But it is remarkable that he did not take the precaution of stating this important matter in his petition of compromise; although, according to him, it was one of the terms of the consent decree that the Maharaja would purchase some of the properties belonging to the joint family in order to enable Kumar Kalikanand to pay off all the debts binding on the family. It comes to this therefore that he applied for permission to the Court to compromise the case on behalf of his ward in the belief that by such compromise all the debts of the family would be wiped off:

"so that the rest of the estate might be saved and the Srinagar Raj may start with a clean slate,"

but without satisfying himself that this important matter was entered in the petition of compromise.

Now these are the facts established by the evidence of these two vakils practising in the Darbhanga Court. That they acted with entire lack of responsibility is not open to doubt; but Mr. C. C. Das goes further and contends that, on the facts established by him, he is entitled to have the entire proceedings reopened with a view to show that the Maharaja is not entitled to a mortgage against his clients. Mr. Das contends that there is a fixed and unyielding rule of law to the effect that a minor is entitled to obtain the avoidance of proceedings undertaken on his behalf if he satisfies the Court that his guardian consented to a decree against him without applying his mind to the question whether the terms of settlement were for his benefit or not. For myself, I have a strong objection to anything being put as high as an inflexible rule of law which has not the sanction of the legislature behind it. I strongly disapprove of the conduct of the guardians ad litem in this case and I hope that there are not many cases where the guardians act with such lack of responsibility. But the rule for which Mr. Das contends is a rule of prudence, not a rule of law. It is the duty of a guardian for the suit to be at least as

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vigilant in guarding the interest of the minor as he would be expected to be if his own interests were involved; and the Court will ordinarily relieve the minor from the effect of a consent decree and give him an opportunity to defend the suit if it is established that the guardian did no more than put his signature to a petition of compromise without considering for himself the question of benefit to the minor. But as I have said, the rule is one of prudence, not one of law. In this case it has been established that the whole matter was left to Kalikanand, the karta of the family, that Kalikanand had no interest adverse to those of the minors, and that Kalikanand considered that the settlement was for the benefit of the joint family. It is idle to suggest a case of conspiracy between the Maharaja and Kalikanand and it is ridiculous to suppose that Kalikanand was out to make a secret profit for himself at the cost of the minors. The Court considered that the settlement was for the benefit of the minors and Kalikanand whose interests were identical with those of the minors put his signature on the petition of compromise. In my opinion the plaintiffs other than Ganganand are not entitled to avoid the consent decree on any of the grounds argued on their behalf by Mr. C. C. Das.

I now come to the case of Ganganand which stands on a footing of its own. The learned Subordinate Judge has found that he was a minor at the date of the consent decree, but that he is not entitled to any relief as there was a fraudulent misrepresentation on his part as to his age to the Maharaja which induced the Maharaja to enter into the settlement with him. The respondent does not accept the finding of the learned Subordinate Judge on the question as to the age of Ganganand; and the first question which I have to determine is—Was Ganganand a minor at the date of the consent decree? Now in coming to the conclusion that Ganganand was a minor at the date of the consent decree, the learned Subordinate Judge has certainly relied on some evidence which was

inadmissible as against the Maharaja. For instance, the learned Subordinate Judge has relied on various letters written by Kalikanand to Mr. Weatherall who was the manager of the Srinagar Raj at one time, containing statements as to the date of birth of Ganganand. But the statements of Kalikanand are inadmissible in evidence as he is alive and did not choose to come to the witness box. The petition of Kalikanand dated the 1st of May, 1910, applying to be appointed the guardian of the person of Ganganand must also be rejected on the same ground. The order passed by the learned District Judge on the 9th July, 1910 appointing Kalikanand to be the guardian of the person of Ganganand and stating therein that Ganganand was born on the 24th September, 1898, must also be rejected as furnishing any proof of the age of Ganganand; but it is certainly evidence of the fact that an assertion was made so far back as the 9th July, 1910, that Ganganand was born on the 24th September, 1898.

But even rejecting these inadmissible documents, there is still overwhelming evidence is support of the learned Subordinate Judge's finding that Ganganand was born on the 24th September, 1898.

* * * * *

That being so, he was undoubtedly a minor at the date of the consent decree inasmuch as the certificate of guardianship issued to Kalikanand had the effect of prolonging his minority by three years.

Now the important question arises whether Ganganand is entitled to any relief in this case. It is not open to doubt that a consent decree does not stand on a higher footing than a contract between the parties, and that the Court has jurisdiction to set aside a consent decree upon any ground which would invalidate an agreement between the parties. The Indian Contract Act makes it essential that all contracting parties should be competent to contract and expressly provides that a person who by reason of

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infancy is incompetent to contract cannot make a contract within the meaning of this Act. It follows, therefore, that the contract between Ganganand and the Maharaja as contained in the petition of compromise is entirely void and cannot be given effect to in a Court of law.

This is not disputed by Mr. Sultan Ahmad; but he contends that in this matter Ganganand was guilty of a fraudulent misrepresentation to the Court as a result of which the Maharaja entered into the compromise decree with him and he contends that the principle invariably acted upon by the Courts of Equity is that an infant shall not take advantage of his own wrong. But what is Ganganand taking advantage of? Ganganand is merely asking to be put in the position which he occupied before the consent decree was passed so that he may be in a position to contend that the Maharaja is not entitled to a mortgage decree against him. It is not a case where Ganganand obtained property by means of fraudulent misrepresentation as to his age compelling a Court of Equity to interfere to prevent the fraud of the infant from working injustice. As I understand the position, no injustice has been done to the Maharaja. He instituted a suit to enforce his mortgage. It is true he has obtained a consent decree by which he has given up a lac of rupees and the costs of his suit; but if Ganganand succeeds in this suit, the Maharaja's suit will be restored and if his claim be well founded he will be entitled to a full decree against all the defendants. The legal doctrine that an infant cannot make a contract was carried to the extent that he was not bound at law even if he induced the other party to enter into the contract by a fraudulent representation that he was of age. In equity, however, the view has always been taken that if an infant be old enough to commit a fraud by inducing others to think that he is of age, he cannot take advantage of it, and, if the Court cannot restore the parties to their original footing, the infant will be bound as if he

were an adult. But in this case the lac of rupees which the Maharaja has given up has not gone to the pocket of any of the defendants to the mortgage suit, and the Court is in a position to restore the parties to their original footing in all respects. In my opinion this is not a case like those upon which Mr. Sultan Ahmad relied where an infant obtained an advantage by falsely stating himself to be of full age and equity required him to restore his ill-gotten gains or to release the party deceived from obligations or acts in law induced by the fraud. Whether the cases upon which Mr. Sultan Ahmad relied have any application since the decision of the Court of Appeal in *R. Leslie, Limited* v. *Sheill* (1) approved as it was by the Privy Council in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (2), it is not necessary for me to discuss, for I am satisfied that this is not a case which would attract the operation of the equitable principles upon which Mr. Sultan Ahmad relied.

For, in my opinion, there is no evidence of any fraudulent misrepresentation in this case. Now in the first place there is no plea of fraudulent misrepresentation in the written statement filed on behalf of the Maharaja. In the second place, the representation must in order to create the liability, be an express representation and will not be constituted by mere inferences suggested by, or drawn from, the infant's conduct. It is a question of some difficulty to determine what constitutes a fraudulent misrepresentation by an infant; but it is well established that, allowing another person to deal with him as if he were an adult or doing acts which only an adult can properly do is not sufficient:

[*Stikeman* v. *Dawson* (3); *Ex parte Jones* (4).]

It is not pretended that, in this case, there was any declaration by Ganganand that he was of age; but it is said there were various acts by Ganganand which lead to the inference that he held himself out to the

(1) (1914) 3 K. B. 607.
(2) (1916) 2 A. C. 575.
(3) (1847) 1 De. G & Sm. 90.
(4) (1880-01) L. R. 18 Ch. D. 109.

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Maharaja as an adult and thereby induced him to enter into the compromise with Ganganand, and it is contended that those acts by themselves bring Ganganand within the ambit of the rule of equity upon which Mr. Sultan Ahmad relied.

Now what are these acts? It will be remembered that the learned Subordinate Judge in seisin of the mortgage suit passed an order on the 11th December, 1916, directing that Ganganand should defend the suit as an adult. A week later he directed that Ganganand should be served with summons. It is alleged that Ganganand was served with summons on the 4th July, 1917. The first act relied upon is that, notwithstanding the fact that he was served with summons, he not only did not at once indicate to the Court that he was a minor, but actually gave a vakalatnama on the 7th July, 1917, authorizing Harnandan Das and Kaliprasad Jha to appear in the suit on his behalf. The other acts relied upon are as follows: On the 24th July, 1917, Ganganand is alleged to have filed a written statement in the mortgage suit on the footing that he was an adult, and on the 14th December, 1918, he is alleged to have executed a special vakalatnama in favour of Ramanandan Misser and Kaliprasad Jha authorizing them to sign the petition of compromise on his behalf. The defendant Maharaja contends that each and every one of these acts constituted a representation on the part of Ganganand that he was of age and that, as he must have known that he had not attained his majority, such representation must be considered to be fraudulent misrepresentations within the meaning of the cases upon which Mr. Sultan Ahmad relied. Ganganand disputes the fact that he was ever served with summons and denies that he executed either of the vakalatnamas or signed the written statement alleged to have been filed on his behalf. The learned Subordinate Judge considered the matter and found in favour of the Maharaja. On the question whether Ganganand was served with summons, I have no doubt that the conclusion at which the learned Subordinate Judge

arrived is right. On the question whether he executed the vakalatnamas and signed the written statement, I have some doubt whether the finding of the learned Subordinate Judge is correct; but on a prolonged consideration of the matter I have come to the conclusion that I ought not to differ from the learned Subordinate Judge on a question of this nature. But all these acts, taken individually and collectively, did not amount to a representation that he was of age. There was certainly no express representation in any of them. But it was argued that if a person, who is a minor, simply executes a vakalatnama and files a written statement, without making any express representation that he is of age, that of itself amounts to a fraudulent representation that he is of age. The answer is in the words of Jessel, M. R., "you must not invent fraud in that way" [*Ex parte Jones* (1)]. In that case, the infant had himself filed a liquidation petition which he could only do if he was of age. The liquidation proceedings had dropped, and a bankruptcy petition was afterwards presented by a creditor founded on the act of bankruptcy committed by the filing of the liquidation petition. Now the filing of the written statement stands exactly on the same footing as the filing of the liquidation petition. With reference to the argument then advanced, Lush, L.J. said as follows: "How the filing of the liquidation petition could in any way alter the infant's status of infancy I am utterly unable to conceive, and, in my opinion, he might have raised the objection of infancy at any stage of the proceedings. The filing of the petition had no effect on his status. An infant cannot by any false pleading, or by any mistake in pleading, alter his status; his immunity remains notwithstanding." If his immunity remains notwithstanding he has filed a pleading in the case which he could only do if he was of age, is that immunity at an end because, apart from filing the written statement, he executed two vakalatnamas by which he authorized certain pleaders to appear for him and represent his

(1) (1880) L. R. 18 Ch. D. 109, 121.

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interest? I think not, and I must respectfully adopt the view of Lush, L.J., that "according to the decisions the representation must, in order to create the liability, be an express representation (1).

But in truth the difficulty of the Maharaja does not end here. Assuming that there was a misrepresentation by Ganganand as to his age, the question still remains, was there a fraudulent misrepresentation by him? Now it is not open to doubt that there may be a false representation which is not fraudulent; for untruth does not of itself import a dishonest mind. In *Derry* v. *Peck* (2). Lord Herschell, after reviewing the authorities on the question, deduced the following results: "Fraud is proved when it is shown that a false representation has been made (*1*) knowingly or (*2*) without belief in its truth or (*3*) recklessly, careless whether it be true or false". Lord Herschell proceeded to say as follows: "Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth, and this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief". It will appear then that proof of this absence of the actual and honest belief is necessary, but, on the other hand, is sufficient, to satisfy the requirements of the law.

The question then is, has the Maharaja established that there was an absence of the honest belief in the truth of the representation which I am assuming Ganganand made that he was of age when he executed the vakalatnamas in question and signed the written statement in the mortgage suit?

Now it must be remembered that at the date when these documents were executed by him, Ganganand

(1) (1880) L. R. 18 Ch. D. 109, 125. (2) (1889) L. R. 14 A. C. 337.

was of age according to his personal law. This is the point which must be kept in view in considering whether he had an honest belief in the truth of the representation which he is alleged to have made. He was a minor at the date of these documents only because the order of the District Judge appointing Kalikanand as the guardian of his person had the effect of prolonging his minority by three years. It is obvious that the parties overlooked the fact of the appointment of Kalikanand as the guardian of Ganganand. There are two findings of the learned Subordinate Judge on this point which are inconsistent with each other. His conclusion as to fraudulent misrepresentation is based on the view that Ganganand did not come forward to say that he was still a minor, but that on the other hand he " accepted the summons issued at the instance of defendant no. 1 treating him as a major, put in his defence subsequently as a major and the pleader appointed by him signed the petition of compromise knowing him to be a major ". The learned Subordinate Judge then says :

" The filing of the application of the 11th December, 1916, which led to the removal of the guardian and the representation of Kumar Ganganand as a major was a deliberate act for which the plaintiffs and defendant 2 are responsible and not the defendant 1."

It is difficult to see how Ganganand was responsible for the application of the 11th December 1916 which was filed by his mother Rani Satyarama. It may be mentioned that throughout this period Ganganand was a student in Calcutta and used to come to Srinagar only during vacation. How Ganaganand could be responsible for the application of the 11th December, 1916, it is difficult to understand. But the view of the learned Subordinate Judge is that

" the filing of the application of the 11th December 1916 was a deliberate plan to thwart the Maharaja's efforts in enjoying the fruits of his decree in future and a plan in which Kumar Kalikanand, Kumar Gangauand and his mother all made a common cause."

This is the finding at page 211 of Part I of the paper book. At page 215, however, the learned Subordinate

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Judge took an entirely different view of the application of the 11th December, 1916. He says as follows:

"It is clear now that even the petition Ex. B 10 is above all suspicion."

Exhibit B 10 is the petition of Rani Satyarama dated the 14th November presented before the learned Subordinate Judge on the 11th December, 1916. The learned Subordinate Judge goes on to say as follows:

"The petitions were filed by Rani Satyarama because in her opinion Ganganand Singh having completed 18 years of age, had become a major and it was no more necessary for her to represent him. And in fact the date stated by her was the date on which Kumar Ganganand would have attained majority if Kumar Kalikanand had not been appointed his guardian by the District Judge of Purnea under the Guardian's and Ward's Act of 1890. The petition under consideration might therefore be a bona fide and honest expression of the Rani's opinion."

I think the opinion of the learned Subordinate Judge recorded at page 215 of the paper book is correct. When once it is realized that Ganganand was of age according to his personal law, but was a minor only by the application of the Indian Majority Act to him, it becomes impossible to say that he had no actual and honest belief in the truth of the representation which he is alleged to have made by signing the documents in question. I am of opinion that fraud has not been established and the plaintiff Ganganand is entitled to a declaration that the consent decree obtained against him is a nullity and that the defendant should be restrained by an injunction of the Court from executing the consent decree against him.

It only remains to consider the plea of estoppel. I have very grave doubt whether section 115 of the Evidence Act applies to infants. In *Dhurmo Das Ghose* v. *Brahmo Dutt* (1) Jenkins, J. (as he then was) examined all the cases bearing on the point and came to the conclusion that in order to support the plea of estoppel in the case of infants, fraud operating to deceive must be found as a fact. The case went up to Privy Council and although the Privy Council decided the case on the ground that the

(1) (1898) I. L. R. 25 Cal. 616.

section did not apply in the particular case before them, as the statement relied upon was made to a person who knew the real facts and was not misled by the untrue statements, there is nothing in the judgment of their Lordships to indicate that they did not agree with the view expressed by Jenkins, J. The rule of estoppel is a rule of evidence and it must be taken subject to the Indian Contract Act. Even if I am wrong in this view there is in my opinion no case of estoppel to be tried. I can find no evidence of the fact that Ganganand intentionally caused or permitted the Maharaja to believe a thing to be true which was in fact untrue. There is no declaration that he was an adult when in fact he was a minor and there was no unequivocal act on his part to that effect. I must overrule the plea of the defendant on this point.

The result is that I must allow the appeal of Ganganand, set aside the decree passed by the Court below and give Ganganand a decree declaring that the compromise decree passed by the learned Subordinate Judge in suit no. 172 of 1916 is void as against him. I must also issue a permanent injunction restraining defendant no. 1 from executing the decree against the interest of Ganganand in any of the properties. It is obvious that the entire consent decree must go as Ganganand has no interest in it capable of being separated from the interests of the other members of the family. The learned Subordinate Judge will now restore the suit and proceed with it in accordance with law. As the mortgage suit was instituted so far back as the 28th April, 1916, it is obvious that there must be no further delay in trying the suit. We think that the learned Subordinate Judge should not give the parties more than two months time to be ready with their evidence and he should then proceed with the hearing of the suit.

In the circumstances I make no order for costs either in this Court or in the Court below.

ADAMI, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Kulwant Sahay and Allanson, JJ.

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Feb., 16.

SYED AMIR NAWAB

v.

MUSAMMAT WAJDA BEGUM.

Suits Valuation Act, 1887, (*Act VII of* 1887), *section* 8—*suit valued at a sum below Rs.* 5,000—*appeal to High Court on increased valuation, whether maintainable—plaintiff whether can alter valuation—forum, determination of—Bengal, United Provinces and Assam Civil Courts Act*, 1887 (*Act XII of* 1887), *section* 21(1).

Plaintiff brought a suit in the court of the Subordinate Judge for a declaration that the properties in suit were wakf properties and paid the fixed court-fee under Schedule II, Article 17, Court-fees Act, after having valued the suit for the purpose of jurisdiction at a sum below Rs. 5,000. The suit was dismissed. Under section 21(1) of the Bengal, United Provinces and Assam Civil Courts Act, 1887, an appeal lay to the court of the District Judge but the plaintiff preferred an appeal to the High Court on the allegation that the real value of the properties in suit exceeded Rs. 5,000. The defendant accepted the increased valuation but contended that the plaintiff could not change the valuation and that the procedure adopted was illegal.

Held, (*i*) that the plaintiff was not debarred from showing what the real value of the subject-matter of the suit was, and that the forum of appeal was to be determined not by the valuation as stated in the plaint, but by the real value of the subject-matter of the suit;

Mohini Mohan Misser v. *Gour Chandra Rai* (1), *Mahanth Rukmin Das* v. *Deva Singh* (2) and *Shah Radha Kishun* v. *Mahadeo Lal* (3), followed.

(*ii*) that the procedure adopted by the plaintiff in preferring the appeal directly to the High Court, without first appealing to the court of the District Judge, was proper.

(1) (1920) 5 Pat. L. J. 397. (2) (1926) 7 Pat. L. T. 407.

(3) S. A. 1924 of 1922 (unreported).

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The defendant no. 1, Musammat Wajda Begum, obtained a decree for dower against her husband Saiyid Amir Nawab, the plaintiff in the suit, in March 1925. In execution of that decree she attached certain properties alleging the same to belong to her judgment-debtor, the plaintiff in the present suit. The plaintiff objected to the attachment on the ground that the properties sought to be attached were not his personal properties but were waqf properties and that he was in possession as mutwali. His objection was disallowed. The plaintiff thereupon instituted the suit, out of which the present appeal arose, in the Court of the Subordinate Judge of Patna, for a declaration that the properties were waqf properties and not his personal properties. The Subordinate Judge dismissed the suit.

In her application for execution the defendant no. 1 valued the properties sought to be attached at Rs. 3,200. The plaintiff in his suit valued the properties at the same amount of Rs. 3,200. No objection appeared to have been taken by the defendant no. 1 as regards this valuation. No issue was framed on the point, and the suit was disposed of by the Subordinate Judge on the valuation stated in the plaint.

According to this valuation an appeal against the decision of the Subordinate Judge lay to the Court of the District Judge. The plaintiff-appellant, however, preferred the appeal to the High Court and valued the appeal at Rs. 21,620-4-0. The reason of the increase in the valuation was stated to be this: Two properties formed the subject-matter of the suit. One of these properties was acquired by the Government under the Land Acquisition Act and a sum of Rs. 20,420-4-0 was paid as compensation thereof. The other property in suit had been valued at Rs. 1,200; and thus the plaintiff-appellant valued the appeal at Rs. 21,620-4-0.

The acquisition of the property was made, according to the statement of the parties, in December

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1925, and the compensation of Rs. 20,420-4-0 appeared to have been awarded before the institution of the suit in January 1926. The defendant-respondent did not challenge the correctness of the fact that one of the properties was represented by a sum of Rs. 20,420-4-0 as compensation awarded under the Land Acquisition Act. The value of the subject-matter of suit, therefore, was in fact above the sum of Rs. 5,000.

The question which arose in the appeal was, whether under these circumstances the forum of appeal was to be determined by the valuation as stated in the plaint, or by the real value of the subject-matter of the suit.

The Stamp-reporter reported that the appeal lay to the Court of the District Judge inasmuch as the valuation put by the plaintiff in his plaint determined the jurisdiction of the Court, and the value of the subject-matter of the suit, as fixed in the plaint, determined the forum of appeal. The Registrar was also of opinion that the appeal lay to the District Judge, and he relied upon the provisions of section 21(*1*) of the Bengal, United Provinces and Assam Civil Courts Act, 1887.

The matter was referred to a Bench, and by an order dated the 14th of December, 1926, the Court directed notice to issue on the respondent for determining the question whether the High Court had jurisdiction to entertain this appeal.

Rai Tribhuan Nath Sahay, for the appellant:—In the present case the valuation of the suit for the purpose of jurisdiction will be the subject-matter of the suit. Although on the valuation stated in the plaint an appeal would lie to the court of the District Judge, my appeal to this court is not incompetent if I succeed in showing that the real value of the property is a sum far exceeding Rs. 5,000. I am not debarred from showing that the valuation given in

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the plaint was erroneous. The forum of appeal is determined by reference to the real valuation of the subject-matter of the suit. I could not appeal to the court of the District Judge inasmuch as, having regard to the value of the appeal, an appeal to him would have been incompetent and his decree would have been without jurisdiction. The under-valuation in the plaint cannot operate as an estoppel against me; it is the duty of the court to determine the real value of the subject-matter of the suit. I rely on *Mohini Mohan Misser* v. *Gour Chandra Rai* (1), *Dayaram Jagjivan* v. *Gordhan Das Dayaram* (2) and *Satish Chandra Joardar* v. *Kumar Birendra Nath Ray Bahadur* (3).

Under similar circumstances, where the valuation in the plaint was put at a sum below Rs. 5,000, this court ordered an investigation, and, after having found that the real value of the subject-matter of the suit was higher than the pecuniary jurisdiction of the District Judge, held that the decree of the District Judge was without jurisdiction. [*Mahanth Rukmin Das* v. *Dera Singh* (4) which has followed an earlier unreported decision of this court in *Shah Radha Krishna* v. *Mahadeo Lal Goenka* (5)].

In *Satish Chandra Joardar* v. *Kumar Birendra Nath Ray Bahadur* (3) the plaintiff was allowed to appeal to His Majesty in Council although originally he had valued the suit at a sum below Rs. 10,000.

Khurshaid Husnain (with him *Syed Ali Khan*) for the respondent:—The appellant having valued the suit at a sum below Rs. 5,000, cannot now turn round and say that he had undervalued it. He cannot be allowed to approbate and reprobate to suit his purpose. Under Order VII, rule 1, the plaintiff has to value the suit and when once he has done so the forum of appeal is determined

(1) (1920) 5 Pat. L. J. 397.
(2) (1907) I. L. R. 31 Bom. 73.
(3) (1926-27) 31 Cal. W. N. 268.
(4) (1926) 7 Pat. L. T. 407.
(5) (1922) S. A .1904 (unreported).

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under section 21 of the Act by reference to such valuation. It is merely to escape the bar of limitation that the plaintiff has appealed directly to this court; his appeal to the District Judge had in fact become time-barred. As a rule of law a party cannot at his leisure choose a forum of appeal before the real value of the subject-matter of the suit is judicially determined. Under section 96, Code of Civil Procedure, read with section 21 of Act XII of 1887, the plaintiff was bound to go to the District Judge in appeal on the valuation as it stood. The cases cited by the appellant have no bearing as in each of them the parties had, in the ordinary course, proceeded through the proper channel according to the original valuation. *Satish Chandra Joardar* v. *Kumar Birendra Nath Ray Bahadur* (1) is not applicable inasmuch as appeals to His Majesty in Council are not controlled by section 21 of Act XII of 1887, and, secondly, because these cases are generally governed by the second part of section 110, Code of Civil Procedure, which lays down that "the decree or final order must involve directly or indirectly some claim or question to or respecting property of like amount or value".

Tribhuan Nath Sahay, replied.

Cur. adv. vult.

S. A. K.

KULWANT SAHAY and ALLANSON, JJ. (after stating the facts set out above, proceeded as follows:)

Under section 8 of the Suits Valuation Act where in suits other than those referred to in section 7, paragraphs V, VI and IX, and paragraph X, clause (*d*), of the Court-fees Act, court-fees are payable advalorem, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same. In the present case court-fee is payable under Schedule II, Article 17 of the Court-fees Act. The fee payable on the plaint

(1) (1926-27) 31 Cal. W. N. 268.

as well as on the memorandum of appeal is a fixed sum of Rs. 15 and not advalorem. Therefore, the value of the subject-matter of the suit must be the market value thereof. Having regard to the circumstances of the present case, there can be no doubt that the market value of the subject-matter of suit exceeds the sum of Rs. 5,000, and under section 21(1) of Act XII of 1887 the appeal would lie to the High Court.

It has, however, been contended on behalf of the defendant-respondent that the plaintiff having valued the properties in suit in his plaint at a sum below Rs. 5,000, he is not now entitled to alter the valuation, and that the value of the subject-matter of the suit must be taken to be the valuation as stated in the plaint, and that, therefore, the appeal would lie to the District Judge. Learned Advocate for the defendant-respondent referred to Order VII, rule 1, of the Code of Civil Procedure where it is provided that the plaint shall, among other matters, contain a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees so far as the case admits. He next refers to section 96 of the Code and contends that the appeal would lie to the Court authorised to hear the appeal, and that the Court authorised to hear this appeal under section 21 of Act XII of 1887 is the Court of the District Judge. These provisions, however, in my opinion, do not help us in determining the question now before us. Order VII, rule 1, merely directs that the value of the subject-matter of the suit should be stated in the plaint, and section 96 directs that the appeal would lie to the Court authorised to hear the appeal. The real question is, what is the value of the subject-matter of the suit. The value of the subject-matter of the suit unquestionably exceeds the sum of Rs. 5,000, and, therefore, the Court authorised to hear the appeal would be the High Court.

It is, however, contended that the plaintiff having valued the subject-matter of the suit in the plaint

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at a certain sum cannot now turn round and say that the valuation is higher than that sum. In my opinion there is nothing in the law to prevent the plaintiff-appellant from showing what the real value of the subject-matter of the suit is. Cases have frequently come up to this Court where objection has been taken that the valuation given in the plaint did not represent the true value of the subject-matter of the suit, and this Court has on several occasions enquired into the real value of the subject-matter of the suit inspite of the fact that the plaintiff had stated the value at a certain figure in the plaint.

In *Mohini Mohan Misser* v. *Gour Chandra Rai* (1) the suit was valued in the plaint at Rs. 1,400. An appeal against the decree passed by the trial Court was filed in the Court of the District Judge, and on the case coming up in Second Appeal to the High Court against the decree of the District Judge in appeal, it was found that the proper valuation of the subject-matter of the suit was Rs. 16,275. It was held that the appeal to the District Judge was incompetent and that his decree was without jurisdiction. No doubt, objection as regards valuation in that suit was taken in the trial Court as well as in the District Judge's Court, but this circumstance does not affect the question now for determination.

In *Mahanth Rukmin Das* v. *Deva Singh* (2) it was held under similar circumstances that the appeal to the District Judge was incompetent, and his decree was without jurisdiction.

In *Shah Radha Kishun* v. *Mahadeo Lal* (3) the Second Appeal was heard by a Division Bench of this Court and judgment delivered. But before judgment was signed, a question was raised as regards the value of the subject-matter of the suit. An inquiry was ordered, and it was found that the value exceeded the sum of Rs. 5,000. It was held

(1) (1929) 5 Pat. L. J. 397. (2) (1926) 7 Pat. L. T. 407.
(3) S. A. No. 1204 of 1922.

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that the District Judge had no jurisdiction to hear the appeal and his decree was set aside on this ground, and the memorandum of appeal presented in the Court of the District Judge was directed to be returned in order to be presented to this Court.

It is contended that, having regard to the valuation put by the plaintiff in his plaint, the memorandum of appeal must be presented before the District Judge, and the question as regards valuation determined by him, and if he found that the value exceeded the sum of Rs. 5,000, it was for him to return the memorandum of appeal to be presented to this Court. and that the plaintiff-appellant could not come up directly to this Court without first going to the Court of the District Judge. In my opinion this is not the proper procedure. If the District Judge had no jurisdiction to entertain the appeal, the plaintiff-appellant cannot be compelled to present his memorandum before the District Judge with the object of its being returned.

The question whether the plaintiff can be allowed to show that the valuation given by him in the plaint is below the real value has been frequently raised in applications for leave to appeal to the Privy Council. Under section 110, paragraph 1, of the Code of Civil Procedure the amount or value of the subject-matter of the suit in the court of first instance must be Rs. 10,000 or upwards, and plaintiffs desiring to appeal to His Majesty in Council have frequently been allowed to show that although the valuation put by them in the plaint was below the sum of Rs. 10,000, yet the real value was above Rs. 10,000.

On a consideration of all the circumstances we are of opinion that this Court has jurisdiction to entertain this appeal, and the memorandum of appeal was properly presented to this Court. We, therefore, direct that the appeal be admitted and proceeded with in the ordinary course.

Appeal admitted.

CRIMINAL REFERENCE.

Before Jwala Prasad, J.

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Dec. 1.

JAGROSHAN BHARTHI

v.

MADAN PANDE.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 133—*Nuisance—conditional order—matter referred to another Magistrate for disposal—Encroachment on public road—discharge of conditional order illegeal.*

The Magistrate who passes a conditional order under section 133 of the Code of Criminal Procedure, 1898, may refer the matter to another Magistrate for disposal.

Manipur Dey v. *Bidhu Bhusan Sarkar* (1), *Queen-Empress* v. *Bissessur Sahu* (2), *Preonath Dey* v. *Gobordhone Malo* (3) and *Narasinha, In re* (4), followed.

Chandrika Koeri v. *Budhu Dusadh* (5), referred to.

Where it is found that an encroachment has in fact been made upon a public road, a conditional order under section 133 must be made absolute. To discharge the conditional order in such a case on the ground that the encroachment causes no inconvenience is illegal.

Municipal Commissioner of Calcutta v. *Mahomed Ali* (6) and *Preonath Dey* v. *Gobordhone Malo* (3) referred to.

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

JWALA PRASAD, J.—This is a reference under section 438 of the Code of Criminal Procedure by the Sessions Judge of Saran, recommending that the order passed by Babu Sheonandan Prasad, Deputy Magistrate, dropping the proceedings and discharging the

* Criminal Reference no. 73 of 1926, by A. N. Mitter, Esqr., Rai Bahadur, Sessions Judge of Saran, dated the 1st October, 1926, recommending that the order passed by Babu Sheonandan Prasad, Deputy Magistrate of Chapra, dated the 25th August, 1926, be set aside.

(1) (1915) I. L. R. 42 Cal. 158.
(2) (1890) I. L. R. 17 cal. 562.
(3) (1898) I. L. R. 25 Cal. 278.
(4) (1886) I. L. R. 9 Mad. 201.
(5) (1923) 73 Ind. Cas. 802.
(6) (1873) 7 B. L. R. 499.

rule issued under section 133 of the Code of Criminal Procedure against the 2nd party be set aside and the case be heard according to law. The ground urged in support of the reference is that Babu Sheonandan Prasad to whom the case was made over by the Sub-Divisional Officer for disposal was not competent to pass the final order in the case and that he should have sent back the record to the Subdivisional Officer, after recording the evidence, for passing final order. The second ground urged is that the said Magistrate having found that there was some encroachment on the public road in question he was wrong in holding that there was no nuisance committed such as is contemplated by section 133 of the Code.

The first ground is not tenable. The learned Sessions Judge says that the Magistrate who issues a conditional rule under section 133 of the Code of Criminal Procedure is alone competent to make the rule absolute upon the evidence recorded and report submitted to him by another Magistrate to whom he had referred the matter under the last paragraph of clause (*1*) of section 133 of the Code and for this he relies upon *Chandrika Keori* v. *Budhu Dusadh* (1). That case does not lay down that the Magistrate before whom the person against whom the conditional order is passed is directed to appear and show cause is not competent to dispose of the matter upon the inquiry held by him; vide *In re Narasinha* (2), *Preonath Dey* v. *Gobordhone Malo* (3) and *Venkanna* (4). Babu Sheonandan Prasad, in his decision, dated the 25th August 1926, makes a distinction between an order made by the Magistrate issuing a conditional rule and directing the petitioner to appear before himself or some other Magistrate and to move to have the order set aside or modified. He says that whereas the Subdivisional Magistrate who issued the conditional rule was competent to direct in that rule that the person against whom the order was made should

(1) (1923) 73 Ind. Cas. 802.
(2) (1886) I. L. R. 9 Mad. 201.
(3) (1898) I. L. R. 25 Cal. 278.
(4) (1899) 2 Weir, 61.

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apear before him (Babu Sheonandan Prasad), the Subdivisional Officer not having done so and having directed the person complained against to appear before himself, he was not competent afterwards to make over the case to him (Babu Sheonandan Prasad) for disposal. In the present case the person against whom the conditional order was passed before the 7th June by the Subdivisional Officer showed cause and did not claim a jury under section 135, clause (*p*), of the Code of Criminal Procedure. The Subdivisional Officer directed the parties to adduce evidence and fixed the 26th of June. On the 7th July the Subdivisional Officer made over the case "to Babu S. N. Prasad for favour of disposal". Babu Sheonandan Prasad took evidence and disposed of the case by discharging the rule under section 137, clause (*2*), of the Code. He also held that the reference to him for disposal was irregular and that the Subdivisional Officer who issued the conditional order under section 133 and directed the petitioner to appear before himself should have himself disposed of the matter. In this view the Magistrate is wrong. There is nothing in the Code to prevent the Subdivisional Officer who made the conditional rule under section 133 from referring the matter to another Magistrate subordinate to him for disposal. This view is supported by the following cases: *Manipur Dey* v. *Bidhu Bhushan Sarkar* (1), *Queen-Empress* v. *Bissessur Sahu* (2) and *Preonath Dey* v. *Gobordhone Malo* (3). It is only when the person against whom the notice is issued appears and demands a jury under section 135 that the matter must be disposed of by the Magistrate issuing the conditional rule, and not by any other Magistrate to whom the case might have been referred for inquiry. In my opinion, Babu Sheonandan Prasad was competent to dispose of the rule and pass final order upon the inquiry made and the evidence taken by him.

(1) (1915) I. L. R. 42 Cal. 158. (2) (1890) I. L. R. 17 Cal. 562.
(3) (1898) I. L. R. 25 Cal. 278.

The first ground urged by the learned Sessions Judge, therefore, must fail.

The second ground however, is substantial. In the present case Babu Sheonandan Prasad came to the finding that there was encroachment upon the public road but he refused to make the conditional rule absolute upon the ground that it did not cause any inconvenience. Encroachment upon a public road such as the one in the present case as is obvious from the map made by the Amin is an obstruction to the public path and is a nuisance in itself under section 268 of the Indian Penal Code. No length of user can justify an encroachment upon a public way. The question of a sufficient width of the road being left in support of the encroachment for public use is no ground for allowing the encroachment or obstruction to continue. The public has a right to the use of every inch of the public path or way and nobody has a right to encroach upon any portion of it: *Municipal Commissioners of Calcutta* v. *Mahomed Ali* (1) as pointed out in the case of *Preonath Dey* v. *Gobordhone Malo* (2). Therefore, the order of Babu Sheonandan Prasad is illegal and must be set aside. The case must be sent back to the Subdivisional Officer for holding a fresh inquiry into the matter and dispose of it in accordance with law.

Another error committed in the course of the inquiry by Babu Sheonandan Prasad was the omission to come to a finding whether the claim made by the opposite party was bona fide or not. The question of possession is relevant for the purpose of finding out whether the claim is bona fide or not. If the claim is held to be bona fide then the rule must be discharged. If it is held to be not bona fide and if there be encroachment upon the public path the rule must be made absolute. This is the procedure laid down in the aforesaid decision.

The reference is, therefore, accepted.

(1) (1871) 7 Ben. L. R. 499. (2) (1898) I. L. R. 25 Cal. 278.

APPELLATE CIVIL.

Before Das and Adami, JJ.

MURLIDHAR KHETAN

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v.

Dec., 16.

NAWAB SAIYID MUHAMMAD.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rules* 69(2) *and* 72—*decree-holder allowed to bid—absence of express permission by the court, effect of—property under hammer for more than a week—whether "adjourned" sale—Order XXI, rule* 69(2), *applicability of.*

Where the decree-holder filed a petition before the executing court asking for permission to bid at the sale and no order was passed on the petition but the decree-holder was allowed to bid throughout the course of the sale,

held, that although there was no express permission in writing, the court must be deemed to have permitted the decree-holder to bid, and that the decree-holder could not be made to suffer on account of the mistake of the court unless it could be shown that the properties were not sold for a proper price.

Where property was put up to sale on the 16th January and, the highest bid being Rs. 25,000, the court ordered the nazir to endeavour to obtain a higher bid, and unsuccessful attempts to increase the bid were made on several days between the 16th and 27th, on which latter date the property was knocked down for Rs. 25,000, *held*, that the sale had not been "adjourned" within the meaning of Order XXI, rule 69(2), Code of Civil Procedure, 1908, and, therefore, no fresh sale proclamation was required.

Appeal by the judgment-debtor.

The facts of the case are stated in the judgment of Adami, J.

Kailaspati, (with him *Sarjoo Prasad*), for the appellant:—The decree-holder having purchased the property without the express permission of the court

* Appeal from Original Order no. 45 of 1926, from an Order of Babu Sheo Nandan Prasad Singh, Subordinate Judge of Gaya, dated the 6th February, 1926.

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the sale is void and must be set aside. The provisions of Order XXI, rule 72, Civil Procedure Code, 1908, are mandatory, failure to comply with them renders the sale void.

[*Das, J.*—The sale is simply voidable as has been laid down in *Rai Radha Krishna* v. *Bisheshar Sahay* (1). The question is whether the property has been realized to the best advantage.]

My second contention is that the sale was attended with material irregularities by reason of the fact that there was no compliance with the provisions of Order XXI, rule 60(*2*). A fresh sale proclamation was necessary at each stage of the adjourned sale.

In *Jamini Mohan Nundy* v. *Chandra Kumar Roy* (2) a fresh sale proclamation was held to be necessary where there was a series of short postponements for less than seven days which, taken together, in the aggregate amounted to more than seven days.

[*Das, J.*—But the distinction lies in the fact that in the present case the sale was a continuing sale and not an adjourned sale.]

Lastly I submit that the decree-holder having failed to deposit 25 per cent. of the purchase money the sale is void under Order XXI, rule 84(*1*) and must be set aside.

In *Amir Begum* v. *Bank of Upper India, Limited* (3), it has been ruled that a sale in such a case is a nullity.

[*Khurshaid Husnain—Amir Begam* v. *Bank of Upper India, Limited* (3) has been overruled by the decision of a Full Bench in *Sita Ram* v. *Janki Ram* (4).]

I also rely on *Ali Muhammad* v. *Alia Khanum* (5) where it was held that the failure to make a deposit

(1) (1922) I. L. R. 1 Pat. 733 P. C.
(2) (1901-02) 6 Cal. W. N. 44.
(3) (1908) I. L. R. 30 All. 273.
(4) (1922) I. L. R. 44 All. 266 F. B.
(5) (1915) 30 Ind. Cas. 230.

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under Order XXI, rule 84, is not only an irregularity but renders the sale void.

Khurshaid Husnain, (with him *Syed Ali Khan*), for the respondent was not called upon to reply.

S. A. K.

ADAMI, J.—The grounds on which the appellant seeks to set aside the sale of the two properties mauza Tajpur Bishunpur and mauza Itwa are that an inadequate price was fetched at the sale owing to certain material irregularities. It is urged that the value of these properties was no less than Rs. 50,000 and they fetched at the sale only Rs. 32,000. The irregularities complained of are, first, that the decree-holder had not the express permission of the court to bid at the sale, and, secondly, that the sale was adjourned without issue of fresh sale proclamation. Another ground put forward is that the decree-holder failed to deposit the 25 per cent. of the purchase money on the day of the sale.

With regard to the permission granted to the decree-holder to bid at the sale, admittedly the decree-holder filed a petition before the executing court asking for permission to bid. No order was passed on his petition, but the decree-holder was allowed to bid throughout the course of the sale. The bid-sheet shows that on the several days on which the sale was held, a note was made that the decree-holder's pleader had bid a certain amount and on this note there was the order by the Subordinate Judge to try again to get a better price. There is no doubt that the Subordinate Judge gave tacit permission for the bidding by the decree-holder, and it can be taken, I think, that the court geve permission to the decree-holder to bid himself. It is true that there is no express permission in writing, but this was a mistake made by the court and not by the decree-holder and there is no good reason why the decree-holder should suffer by the court's mistake, unless it can be shown that the properties were not sold for a proper price and that question I will deal with later.

The next ground is that there was no sale proclamation with regard to the later stages of the sale. It is admitted that the sale was fixed for the 14th November, 1925, and on that date the bidding took place but the judgment-debtor appellant filed a petition asking that the sale might be adjourned to the 16th January and in that petition the appellant undertook to make no objection on the ground of any irregularities if the adjournment were allowed. The adjournment was allowed and bidding took place on the 16th January. The decree-holder's bid was the biggest, amounting to Rs. 25,000. The learned Subordinate Judge was not satisfied with the bid and gave directions to the nazir " to try again ". The four following days were holidays and on the 20th January the order on the bid-sheet is—

" decree-holder's pleader bid Rs. 25,000 and there is no further increase."

The learned Subordinate Judge then ordered that the sale should be kept on hammer till the 22nd. On the succeeding days up to the 27th attempts were evidently made each day to obtain a higher bid but the attempts were unsuccessful, and on the 28th the bid of the decree-holder of Rs. 25,000 for mauza Tajpur Bishunpur was accepted. It is argued that on each of these days there was an adjournment of the sale but the bid-sheet clearly shows that there was no such adjournment at all. The property was kept on hammer throughout from the 16th January to the 28th January. On none of those dates did the bidding start afresh from the beginning, only an attempt was made to obtain some bid higher than the Rs. 25,000 bid by the decree-holder. It was a continuous sale and the provisions of sub-rule (*2*) of Rule 69 of Order 21 do not apply. This ground, is, I think, untenable.

With regard to the failure to deposit the 25 per cent. of the purchase money on the date of sale, the learned Subordinate Judge has given very good reasons why the money was not deposited on that day. All the proper steps were taken by the decree-holder and the reasons shown are good ones.

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Then, finally, as to the price fetched. The bid-sheet and the order sheet show quite clearly that the Subordinate Judge was doing his very best to help the judgment-debtor to get a better price but no bidders came forward to outbid the decree-holder and of necessity the two mauzas had to be sold for Rs. 32,000 which was offered. There is nothing to show that this price was an inadequate price under the circumstances. It can never be expected that at an auction sale it is possible that the full value of the property can be obtained. The learned Subordinate Judge had good local knowledge, and it is clear that in his opinion the best price available had been obtained for the properties. I see no reason to think that an inadequate price was obtained or that such inadequate price was due to any material irregularity.

I would, therefore, dismiss the appeal with costs in both courts.

DAS, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

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

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Dec., 17.

BARA HAPAN MANJHI

v.

GOPI MANJHI.*

Chota Nagpur Tenancy Act, 1908 (*Bengal Act VI of* 1908), *sections* 139(5) *and* 139A—*possession of land voluntarily given up by tenant—suit by tenant to recover possession not barred.*

The plaintiff was a tenant of certain lands to which the Chota Nagpur Tenancy Act, 1908, applied. He placed those lands in charge of the defendants during his absence. On his

* Miscellaneous Appeals nos. 223 to 225 of 1925, from a decision of Babu Narendra Lal Bose, Additional Subordinate Judge of Purulia, dated the 3rd June, 1926, reversing a decision of Babu Manindra Nath Mittra, Munsif of Raghunathpur, dated the 9th November, 1925.

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return the defendants claimed the lands as their own and refused to quit them. Plaintiff sued for recovery of possession. It was contended that the suit was barred by sections 139(5) and 139A of the Act.

Section 139A enacts :

" No court shall entertain any suit, concerning any matter in respect of which an application is cognizable by the Deputy Commissioner under section 139.....".

Under section 139(5) :

" All applications to recover the occupancy or possession of any land from which a tenant has been unlawfully ejected by the landlord or any person claiming under or through the landlord,"

are cognizable by the Deputy Commissioner.

Held, that the plaintiff never having been ejected from the lands the suit was not barred by sections 139(5) and 139A.

Dhuplal Sahu v. *Bhekha Mahton* (1), referred to.

Appeal by the defendant.

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

S. C. Mazumdar, for the appellant.

G. C. Mukharji, for the respondents.

DAWSON MILLER, C.J.—The facts of this case as they appear from the judgment of the Munsif and of the Subordinate Judge on appeal are shortly as follows: The plaintiff took settlement of certain lands from the Equitable Coal Company in mauza Nimlikuri in 1322 B.S. He remained in possession of the lands for about two years. Thereafter being laid up with an attack of rheumatism he was compelled to leave the locality and go elsewhere in the interests of his health. He thereupon placed the lands in question in charge of the defendants to look after them on his behalf and if necessary to further his interests in the settlement operations which were about to take place. When he returned after three years

(1) (1926) C. W. N. (Pat.) 228.

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the survey attestation had already taken place and the defendants had apparently had their own names recorded in the survey record as tenants in place of the plaintiff. He thereupon demanded recovery of the lands but the defendants refused to quit contending that the lands had been theirs all along and that the plaintiff was not and never had been entitled to them.

The learned Munsif of Raghunathpur before whom the case came for trial in November 1925 held that such a suit was barred by reason of the provisions of section 139 (*5*) and section 139A of the Chota Nagpur Tenancy Act. The former section provides that certain suits and applications shall be cognizable by the Deputy Commissioner, and shall be instituted and tried or heard under the provisions of the Act, and shall not be cognizable in any other court, except as otherwise provided in the Act. The suits there referred to include in sub-section (*5*)

"All suits and applications to recover the occupancy or possession of any land from which a tenant has been unlawfully ejected by the landlord or any person claiming under or through the landlord."

Section 139A provides that

"No court shall entertain any suit, concerning any matter in respect of which an application is cognizable by the Deputy Commissioner under section 139, and the decision of the Deputy Commissioner on any such application shall, subject to the provisions of this Act relating to appeal, be final."

The learned Munsif considered that this was a case of ejectment within the meaning of section 139 (*5*).

The case then went on appeal to the Subordinate Judge. The learned Judge took the view that the suits referred to in sub-section (*5*) of section 139 were suits which claimed merely a right of possession and did not raise any question of title for the determination of the court. His view apparently was that the suits referred to in the sub-section were possessory suits only, such as are mentioned in section 9 of the Specific Relief Act, that is to say, suits where possession alone is claimed apart altogether from any question of title.

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In answer to that finding of the learned Subordinate Judge the defendants in appeal before this court have referred to the case of *Dhuplal Sahu* v. *Bhekha Mahton* (1), a decision of a Division Bench of this court. In that case the learned Judges are reported to have said that a suit in ejectment falling within section 139 (*5*) is nevertheless barred because it also seeks a declaration of title as well as delivery of possession of the property. In that case the learned Judges considered that the decision on the question of title was merely ancilliary to the main object of the suit, namely, possession of the land. We are told that there are other decisions of this court which conflict with that decision. Whether that be so or not it is not necessary for us to determine, for, in my opinion, the suit in question is not one falling within section 139 (*5*). It is not in fact a suit for the recovery of possession of any land from which a tenant has been unlawfully ejected. The tenant in this case was never ejected at all. What he did was, being in possession of the land, he gave up possession voluntarily to the defendants. He remained away for some years, then returned and when he tried to get back possession the defendants refused to give it up. That, in my opinion, is not a case of ejectment. It follows that the result at which the learned Subordinate Judge arrived was, in my opinion, the correct result. He was therefore justified in sending back the case to the Munsif to be tried upon the merits. This appeal will be dismissed with costs.

Miscellaneous appeals nos. 224 and 225 of 1926 were put up to be heard together with this appeal. The facts in each case are similar and the judgment just delivered will govern the other two appeals. There will be one set of costs.

ADAMI, J.—I agree.

Appeals dismissed.

(1) (1926) Cal. W. N. (Pat.) 223.

APPELLATE CIVIL.

Before Das and Adami, JJ.

1926.

Dec. 31.

MUSAMMAT BIBI AISHA

v.

MAHABIR PRASAD.*

Execution of Decree, application for,—Succession certificate not filed—whether is a step-in-aid of execution—Limitation Act, 1908 (*Act IX of* 1908), *Schedule I, Article* 182(5)*—Code of Civil Procedure,* 1908 (*Act V of* 1908), *Order XXI, rules* 11 *to* 14.

An application for execution was dismissed on the ground that some of the original decree-holders had died and their heirs, who were substituted in their place, had not produced the succession certificate.

Held, that the application was nevertheless a step-in-aid of execution and, therefore, that another application made within three years of the former application was within time.

Hafizuddin Chowdhury v. *Abdool Aziz* (1), followed.

Where an application for execution contains all the particulars required by Order XXI, rules 11 to 14, it is a step-in-aid of execution even though it is otherwise defective.

An application for execution which satisfies the requirements of the Order XXI, rules 11 to 14, but which is not accompanied by a succession certificate, where that is required, is in order, but no relief can be granted until the certificate is filed.

Appeal by the plaintiffs.

The facts of the case are stated in the judgment of Das, J.

Syed Noorul Hosain (with him *A. H. Fakhruddin*) for the appellant: The court below is wrong in

* Appeal from Appellate Order no. 288 of 1926, from a decision of A. C. Davies, Esqr., District Judge of Patna, dated the 6th September, 1926, reversing a decision of Babu Brajendra Prasad, officiating Subordinate Judge of Patna, dated the 15th February, 1926.

(1) (1893) I. L. R. 20 Cal. 755.

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holding that the previous application for execution was not in accordance with law on the ground that it was not accompanied with the succession certificate. In order that an application for execution may be in accordance with law within the meaning of Schedule I, Article 182(*5*), Limitation Act, 1908, it need only comply with the requirements of Order XXI, rules 11 to 14. The law does not require any other condition to be fulfilled. See *Jogendra Prasad Narain Singh* v. *Mangal Prasad Sahu* (1). The filing of a succession certificate along with the application for execution not being one of the essential requirements laid down in the Code, the previous application was one in accordance with law. I rely on *Hafizuddin Chowdhury* v. *Abdool Aziz* (2) which lays down that although, for want of a succession certificate, the court may not be able to proceed with the application, it is nevertheless maintainable in law. Want of succession certificate may be a defect sufficient to prevent the decree-holder from proceeding with his application or getting any relief, but it is not such a defect as can by itself make the execution application not in accordance with law.

My second contention is that as a notice under Order XXI, rule 22, had been issued by the court in the previous execution case, it was a step-in-aid of execution within the meaning of Article 182(*6*) which will give a fresh start to limitation. This view is supported by the case of *Jogendra Prasad Narain Singh* v. *Mangal Prasad Sahu* (1).

The previous application, therefore, being either in accordance with law or a step-in-aid of execution, the present execution is not barred by limitation.

Anand Prasad, for the respondent: The previous execution petition cannot be regarded as an application in accordance with law, inasmuch as no step was taken by the decree-holder to comply with the order of the court to supply the succession certificate.

(1) (1927) 7 P. L. T. 330. (2) (1893) I. L. R. 20 Cal. 755.

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Without a succession certificate an execution petition cannot proceed and is infructuous. It cannot, therefore, be regarded as an application in accordance with law.

[*Das, J.*—The Act provides that an application cannot proceed without a succession certificate but it does not say that such an application will not be maintainable in law.]

The previous execution petition was not a bona fide petition and it was put in simply for the purpose of saving the bar of limitation. See *Jogendra Prasad Narain Singh* v. *Mangal Prasad Sahu* (1) and *Sheo Prasad* v. *Mussammat Naraini Bai* (2).

DAS, J.—I am unable to agree with the view taken by the learned District Judge. The first execution was taken on the 27th June, 1922. Some of the decree-holders had died and their heirs, who were substituted, did not produce the succession certificate. On an objection being taken by the judgment-debtor the application for execution was dismissed. The present application for execution was filed on the 13th June, 1925. The question is whether this application was presented within time. Now, it is not open to doubt that if the application of the 27th June, 1922, was an application to take some step-in-aid of execution, then the present application must be regarded as having been filed within time. The learned District Judge has taken the view that because the succession certificate was not produced, the court could not possibly entertain that application and therefore that application could not be regarded as a proper application. I am unable to accept this view as correct. The Civil Procedure Code has authoritatively laid down what are the particulars which must be contained in an application for execution of a decree. It has been held in this court in the case of *Jogendra Prashad Narain Singh* v. *Mangal Prasad Sahu* (1) that an execution application is one made in accordance with

(1) (1927) 7 Pat. L. T. 330. (2) (1926) A. I. R. (All). 95.

law within the meaning of Article 182 (5) of Schedule I of the Limitation Act if the particulars required by rules 11 to 14 of Order XXI of the Civil Procedure Code are mentioned in the application. It is not disputed that all these particulars required by law were given in the application of the 27th June, 1922. Precisely the same question was debated in the Calcutta High Court in the case of *Hafizuddin Choudhury* v. *Abdool Aziz* (1). In that case the decree-holders applied for execution of a decree without having taken out a certificate under Act VII of 1889. The application was dismissed. Within three years from the date of the first mentioned application the decree-holders again applied for execution of the decree and it was contended that that application was barred by limitation. It was held that the first mentioned application was made in accordance with law within the meaning of Article 179 (4) of the Limitation Act and that therefore the second application was within time. Those cases are distinct authorities against the view which has been taken by the learned District Judge.

The second question is whether the court executing the decree should have summarily rejected the application for execution when it was presented for the second time on the 13th June, 1925, because from the former proceedings the decree-holders must have known that an application without a succession certificate could not be good in law. Now, in my opinion this is not a correct way of stating the position. An application without a succession certificate is perfectly in order; only no relief can be granted until the succession certificate is produced. This being the position, the order of the learned District Judge must be set aside and the execution must be allowed to proceed. The decree-holder is entitled to the costs of this appeal.

SCROOPE, J.—I agree.

Order set aside.

(1) (1893) I. L. R. 20 Cal. 755.

APPELLATE CIVIL.

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

EAST INDIAN RAILWAY COMPANY

v.

BADRI NARAIN.*

1927.

Jan., 4.

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 110—*Appeal to His Majesty in Council—Valuation under Rs.* 10,000, *whether costs may be included.*

Costs of the suit are in no sense the subject-matter of the suit in the court of first instance, and, therefore, cannot be added to that subject-matter in order to bring the valuation up to the appealable amount under section 110 of the Code of Civil Procedure Code, 1908.

Application by the defendant.

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

N. C. Sinha and *N. C. Ghosh*, for the applicant.

S. M. Mullick and *S. N. Bose*, for the respondents.

DAWSON MILLER, C.J. and ADAMI, J.—This is an application on behalf of the East Indian Railway Company for leave to appeal from a decision of this court to His Majesty in Council. It appears that five suits claiming compensation for loss or damage to goods consigned by the plaintiffs to the East Indian Railway Company for carriage on their railway system were instituted by the same plaintiff against the Railway Company. The suits although they related to different consignments appear to have raised exactly the same questions for determination. They were accordingly heard together in the trial court and judgment was entered in favour of the plaintiffs.

On appeal by the Railway Company that judgment was reversed by the District Judge who dismissed the suits. Again the suits were tried together and decided in that appeal by the same judgment.

* Privy Council Appeals nos. 39 to 43 of 1926.

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A further appeal was preferred by the plaintiffs to this court and amongst other points it was urged that the appeal before the District Judge was not competent. The ground upon which that argument was based was that two of the parties who had been plaintiffs in the trial court and who were members of the joint family to which the plaintiffs belonged were not added as parties in the appeal and that the Judge after the period of limitation had expired had improperly joined them as respondents under the provisions of Order XLI, rule 20, of the Code of Civil Procedure. This court took the view that the lower appellate court had acted improperly in joining the respondents under the provisions of that rule the period of limitation having expired before the order joining them was passed and accordingly held that the appeal to the lower appellate court was not competent and that the decision ought to be reversed. The court accordingly overruled the decision of the lower appellate court and restored that of the trial court.

From that decision the Railway Company now seeks to appeal to His Majesty in Council. None of the five suits taken alone involve a claim to a sum of Rs. 10,000 or anything like it. If, however, the five suits should be consolidated, and we think that this would be a proper case in the circumstances for ordering consolidation for the purposes of pecuniary valuation under Order XLV, rule 4 of the Court of Civil Procedure, then the value amounts to roughly Rs. 8,870 or thereabouts. It follows therefore that the total value of the subject-matter of the suits when consolidated does not amount to the sum of Rs. 10,000. The learned Advocate for the appellant contends, however, that the costs amounting to a sum of Rs. 1,196 should be added to the amount of compensation claimed and awarded in order to bring the valuation up to Rs. 10,000. In our opinion this cannot be done. The costs of the suits are in no sense the subject-matter of the suit in the court of first instance and ought not to be added to that subject-matter in order to bring the

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valuation up to the appeable amount under the provisions of section 110 of the Code of Civil Procedure. The consequence is that in our opinion the case is not one which complies with the provisions of section 110 and the applications in these five suits and the application for consolidation must be dismissed. The respondents are entitled to their costs. There will be one set of costs.

Application dismissed.

APPELLATE CIVIL.

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

1926-27.

Dec., 8, 9; Jan., 21.

SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

NISTARINI ANNIE MITTER*.

Ref. 55 C.W.N. 171.

Registration Act, 1908 (*Act XVI of* 1908), *section* 90(*1*)—*lease of land by Government, whether exempted from registration—ejusdem generis, rule of, whether applicable to section* 90(*1*)(*d*)—*Transfer of Property Act*, 1882, (*Act IV of* 1882), *section* 107, *whether applies to leases granted by the Crown—Crown Grants Act*, 1895 (*Act XV of* 1895), *section* 2.

Section 17(*1*), Registration Act, 1908, requires the following documents to be registered :

" (*d*) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent ".

Section 90(*1*)(*d*), however, exempts from registration, inter alia,

" sanads, inam title deeds and other documents purporting to be or to evidence grants or assignments by Government of land or any interest in land ".

Held, that a lease of land by Government is covered by section 90(*1*)(*d*) and is exempt from registration.

Held, further, that the words " other documents purporting to be or to evidence grants or assignments by Government

* First Appeals nos. 60 and 61 of 1923, from a decision of Babu Phanindra Lal Sen, Subordinate Judge of Hazaribagh, dated the 25th January, 1923.

of land or any interest in land " are not words of such general import in themselves as to afford any scope for the application of the rule of ejusdem generis.

Kallingal Moosa Kutti v. *The Secretary of State for India in Council* (1), followed.

Munshi Lal v. *The notified area of Baraut* (2), dissented from.

Section 2, Crown Grants Act, 1895, provides

" Nothing in the Transfer of Property Act, 1882, contained shall apply.....to any grant or other transfer of land or of any interest therein.....by or on behalf of Her Majesty..... .....or by or on behalf of the Secretary of State for India in Council to, or in favour of any person whomsoever;.....".

Held, that leases granted by the Crown are outside the operation of section 107, Transfer of Property Act, 1882, which provides that a lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent can be made only by a registered instrument.

Appeal by the plaintiff.

This was an appeal by the Secretary of State for India in Council against a decree of the Additional Subordinate Judge of Hazaribagh dismissing his suit for ejectment of the defendant.

The plaintiff's case, appearing in the plaint and the particulars delivered thereunder, was that many years ago, before the year 1888, leases for building purposes of certain lands constituting a Government khas mahal were granted to various tenants, including the predecessors in interest of the defendant, at a rent liable to revision periodically at intervals of about 15 years when fresh settlements were made by Government. Before 1888 the lease granted to the defendant's predecessor was a verbal lease, but in 1888 a fresh settlement took place, the rent being revised and a written lease being granted. Again in 1903 a further settlement was made the rent being enhanced and a new written lease being granted. At the last settlement, the date of which was not stated in the

(1) (1920) I. L. R. 43 Mad. 65. (2) (1914) I. L. R. 36 All. 176.

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plaint, but which was about the year 1918, the Government again purported to make a fresh settlement and called upon the defendant to pay an enhanced rent. The enhancement proposed was a large one, being three times the amount of the previous rent. The property had undoubtedly increased in value as houses had been built thereon. As already stated there were various leases to different tenants of different plots of lands in the khas mahal estate, and the resettlements with the tenants appeared to have taken place at the same time. The tenants protested against so large an enhancement at one time with the result that the matter was submitted by the Board of Revenue to the Lieutenant-Governor of Bihar and Orissa who decided that an enhancement of double the previous rent with a lease for 30 years with certain rights of renewal should be offered. The majority of the tenants of the estate accepted these terms but some of them, including the defendant's father who was then in possession of the property comprised in the present suit, upon being asked to take a new lease and execute a kabuliyat on the revised terms, refused to do so. In September 1920 a notice to execute a kabuliyat on the terms proposed, or to give up possession, was served upon the defendant upon whom the interest previously held by her father had then devolved. The notice expired on the 31st March, 1921, the defendant having failed to execute a new kabuliyat or to give up possession. The present suit was accordingly instituted shortly afterwards against the defendant claiming a decree for ejectment.

These facts were set out at length in the plaint and in the further particulars delivered, and in paragraph 13 of the plaint it was stated

> "That the defendant had no right to continue in occupation of the holding without taking out a lease on terms and rents proposed by the Government, and in consideration of rents in other health resorts the rents claimed are very low and moderate."

It appeared therefore, that the defendant was claiming to remain in possession under the old lease

although according to the appellant, the term had expired, and was not willing to execute a fresh kabuliyat upon terms which the Government considered reasonable. As an alternative to the prayer for ejectment it was prayed

> "That, if in the opinion of the court the plaintiff be not found entitled to ejectment, the rents of the holding held by the defendant be now assessed at Rs. 135-14-0 or such other amount as the court may think fit and that the defendant be directed to pay rent at that rate with effect from the current year, or such other time as the court may think fit, and it be declared that the rates will remain in force for the next 30 years, or such other period as the court may consider fair and proper."

As this was not a suit relating to agricultural land governed by the Bengal Tenancy Act the court had no power to impose upon the parties a bargain not of their own making. The High Court, therefore, was not concerned in this appeal with that part of the claim and it need not be further referred to.

The leases alleged to have been granted to the defendant's predecessor in 1888 and 1903 were not produced by her. Her contention was that the holding in question had been in the possession of herself and her predecessors in title for over half a century at the same rent except for an enhancement of 2 annas in the rupee which was submitted to to avoid the trouble and expense of litigation and which enhancement could not be used as a ground for a periodical enhancement of rent. She further raised a plea of estoppel stating that the holdings had been built upon and improved from time to time at great cost in the bona fide belief of a perpetual tenure at a fixed rent to the knowledge of the plaintiff. The appellant was also unable to produce the leases of 1888 and 1903 but claimed to prove the contents thereof by secondary evidence by the production of correspondence entered into with the defendant's father. In the particulars delivered by the appellant under Order VI, rule 5, of the Code of Civil Procedure, he admitted that the defendant's tenancy was in its origin one for building purposes but alleged that it was terminable, the period

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of each settlement being apparently until the next revision of the settlement which ordinarily took place at intervals of about 15 years. It was further admitted on his behalf at or before the hearing that the written leases referred to were not registered. In view of these admissions, and especially the fact that the leases were not registered, a preliminary issue arose, namely, whether in the absence of registration the plaintiff was entitled to rely upon the terms of the lease and obtain a decree for ejectment.

The trial court held that leases of this nature required to be registered under section 17 of the Indian Registration Act and were not exempted from registration by section 90, and, accordingly, could not be received in evidence as provided by section 49 of the Act. He therefore dismissed the appellant's suit. From that decision the present appeal was preferred.

Sir Ali Imam (with him *Sultan Ahmed* and *L. N. Sinha*), for the appellant.

B. Chakravarty of the Calcutta Bar (with him *B. C. De*), for the respondent.

21st Jan. 1927.

DAWSON MILLER, C. J. (after stating the facts set out above proceeded as follows):—

The determination of the question raised in this appeal depends primarily upon the construction of section 90 of the Indian Registration Act coupled with sections 17 and 49. The Act in force when the last lease of 1903 is alleged to have been granted was the Indian Registration Act of 1877, but the sections in question do not differ in any material particular from the corresponding sections of the present Act of 1908. Under section 17(*1*) of the Act four classes of documents are required to be registered, namely,

(*a*) instruments of gift of immovable property;

(*b*) other non-testamentary instruments which purport or operate to create, declare, assign limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(*c*) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(*d*) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent.

We are directly concerned only with the fourth class. By sub-section (*2*) it is provided that

" Nothing in clauses (*b*) and (*c*) of sub-section (1) applies to "—

various classes of documents including

" (*vii*) any grant of immovable property by Government."

This would not affect leases which come under clause (*d*) of sub-section (*1*). For their exemption, if any, we must look to section 90.

By section 49 it is provided that no document required by section 17 to be registered shall

(*a*) affect any immovable property comprised therein or.....

(*c*) be received as evidence of any transaction affecting such property.....unless it has been registered.

Section 90(*1*), however, exempts from registration, inter alia, by clause (*d*),

" sanads, inam title deeds and other documents purporting to be or to evidence grants or assignments by Government of land or of any interest in land."

The main question in this appeal is whether the lease relied on comes within the above exemption, for, if not, then neither the document itself nor secondary evidence of its contents can be admitted in evidence. The trial court held that the lease was not exempted from registration under section 90 upon two grounds, (*1*) that the interest of the Secretary of State in the property being a mukarrari interest acquired from the Ramgarh Raj, he could not in law claim a higher status in respect of the villages than a private person could have claimed under a grant of the same nature and, (*2*) that the exempting clause relied on in section 90 must be construed by reference to the

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ejusdem generis rule as laid down in *Munshi Lal* v. *Notified Area of Baraut* (1), and that the lease in question did not come within the letter or spirit of the exemption when construed on the principle enunciated in that case. It would also appear from the judgment of the learned additional Subordinate Judge, although it is not clear that he based his decision upon it, that he considered that the ground alleged in the plaint as giving rise to the right of ejectment was not the expiry by efflux of time of the lease, but a breach of a covenant to take a fresh lease upon terms proposed by the appellant, the refusal to do so amounting to a forfeiture entitling the appellant to enter. I shall deal with these three points in their inverse order.

As I read the amended plaint the cause of action is the expiry of the existing lease and the refusal of the defendant to quit on receiving notice to do so, although there is an admission that she may remain in if she will take a fresh lease upon the terms proposed by the appellant. Although the learned Judge's criticism of the plaint is not altogether without foundation I think that on the whole the facts alleged therein sufficiently indicate a cause of action founded on the termination of the lease and refusal to comply with the notice to suit.

In *Munshi Lal's case* (1), relied upon by the learned Judge of the trial court, it was held that the concluding words of section 90(*1*) (*d*) of the Indian Registration Act included only such documents as were ejusdem generies with sanads or inam title deeds and that a lease for a term of years, or reserving a yearly rent, although granted by Government, did not come within the exemption. In arriving at this conclusion the learned Judges of the Allahabad High Court appear to have been influenced by the fact that whereas grants of immovable property by Government

(1) (1914) I. L. R. 36 All. 176.

were expressly exempted from registration by the second sub-section of section 17 this exemption was restricted to the documents enumerated in clauses (*b*) and (*c*) of the first sub-section of section 17 and did not apply to those mentioned in clause (*d*), namely, leases of immovable property. They inferred from this that had it been the intention of the legislature to exclude Government leases such intention would have found place in section 17 itself. With great respect to those learned Judges, I hardly think that the inference is a legitimate one, for the documents enumerated in clause (*a*) of the first sub-section as requiring registration, namely, instruments of gift of immovable property are also excluded from the exemption of Government grants in the second sub-section which is expressly confined to the documents mentioned in clauses (*b*) and (*c*). On turning to section 90 it is clear that gifts of immovable property would be included under the words " sanads and inam title deeds ". It could not have been the intention, therefore, that the exemptions set out in section 90, so far as they relate to Government grants, should be co-extensive only with the exemptions contained in clause (*vii*) of sub-section (*2*) of section 17.

It is contended, however, that the ejusdem generis rule should be applied in construing clause (*d*) of section 90(*1*). It is not easy to formulate a genus to which sanads and inam title deeds would belong and which at the same time would exclude grants of a leasehold interest; and the attempts of the learned Counsel for the defendant to define the genus which would include the one and exclude the other have not been very successful. It was suggested that it should be restricted to cases in which the grant passed the whole interest of the grantor without reservation, that is to say without retaining the reversion or reserving a rent. But I can see no reason why the word " sanad " should not apply to a grant subject to conditions which form the consideration for its continuance such as a service tenure. Inams which, as the

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word implies, are in the nature of a gift are prevalent I believe in Bombay and Madras and are in many cases grants on condition of performing services. They are frequently enfranchised the effect of which is to convert the tenure from a service tenure into an estate subject to the payment of a quit rent. The term " inam title deeds ", as I understand it, applied to the deeds evidencing the enfranchisement of the inam whereby the Crown releases its reversionary rights which would come into operation on failure to perform the services. In order to give effect to the clause and to ascertain its true intent and meaning I think it must be regarded as a whole. It would then appear that the documents which it is intended to exclude from the necessity of registration are those which purport to be or are evidence of grants or assignments by Government of any interest in land, including sanads and inam title deeds.

Munshi Lal's case (1), above referred to, was considered and dissented from by the Madras High Court in *Kallingal Moosa Kutti* v. *Secretary of State for India in Council* (2). In that case the Court considered that there was no ground for imputing to the legislature a restricted scope of the operation of section 90(*1*)(*d*) and further, even applying the ejusdem generis rule, they were not satisfied that a lease of land was not of the same character as a sanad. Of the two cases I think that of the Madras High Court is to be preferred. Moreover it seems to me that the words " other documents purporting to be or to evidence grants or assignments by Government of land or any interest in land " are not words of such general import in themselves as to afford any scope for the application of the rule. They afford in themselves a precise definition of the classes of documents which I think it was intended to exempt and I can see no reason for restricting their operation to a class of

(1) (1914) I. L. R. 36 All. 176. (2) (1920) I. L. R. 43 Mad. 65.

documents which has not been satisfactorily defined. In my opinion the lease or leases in question were exempt from registration and it is open to the appellant to prove the same or, if the circumstances should warrant it, to adduce secondary evidence of their contents.

As to the other ground upon which the learned additional Subordinate Judge based his decision no authority was referred to in support of it, and I confess I am unable to see why a lease of Crown lands granted by the Secretary of State, whilst acting under the powers conferred upon him by statute as the representative of the Crown, should be treated as a lease granted by a private individual and therefore subject to registration. Nor can the source from which the Crown derives its interest in the lands, in my opinion, have any bearing on the question for determination.

Section 107 of the Transfer of Property Act was also referred to by the learned Counsel for the respondent in support of his contention in favour of registration. The section provides that a lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent can be made only by a registered instrument. But the Transfer of Property Act does not apply to any grant, or other transfer of land, or any interest therein made by or on behalf of the Crown in favour of any person whomsoever. This is the language of the Crown Grants Act (Act XV of 1895) and, in my opinion, it leaves no doubt that leases granted by the Crown are outside the operation of the Transfer of Property Act. It was argued that a distinction should be made between grants by virtue of the prerogative rights of the Crown and grants made as a mercantile transaction for profit. If profit is to be the distinction, it might be answered that history is not without instances of the exercise of the royal prerogative for motives of gain, as a study of the grants of monopolies

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under the Tudor and early Stuart monarchs will shew. But apart from this, it is not, I think, permissible to construe the statute by reference to such a speculative matter as the motives actuating the grant. The language of the Crown Grants Act is clear and unambiguous and affords no scope for such a distinction.

DAWSON MILLER, C. J.

Two other points were urged before us by the learned Counsel for the respondent. They both arise upon the pleadings. Although in the plaint, as originally drafted, it may be gathered that the appellant's cause of action was the refusal of the defendant to comply with the notice to quit or to accept a new lease, paragraph 13 of the plaint was originally so drafted that it might be taken that the failure to pay a fair rate of rent was the ground alleged for ejectment. The appellant accordingly applied and was granted leave to amend the plaint by alleging in paragraph 13 that the defendant has no right to continue in the occupation of the holding without taking out a lease on terms and rates proposed by the Government. It was argued before us that this amendment ought not to have been allowed, as it altered the cause of action originally alleged. I cannot accept this argument. The refusal to comply with the notice to quit was clearly indicated and relied on in the plaint at all times and, although there may have been some ambiguity in paragraph 13, I consider that the court was fully empowered to allow the amendment of that paragraph under the provisions of Order VI, rule 17, of the Code of Civil Procedure. The nature of the suit was in no way altered by the amendment nor was it shewn that the defendant was in any way prejudiced by it.

The other point urged was that even now since the amendment the plaint discloses no cause of action. It is sufficient to say that, in my opinion, if the facts alleged in the plaint are proved the appellant is entitled to a decree.

One other matter arises for consideration out of the decision of the trial court. Even if an unregistered lease granted by Government cannot be relied upon or tendered in evidence, then neither party could refer to it in support of their respective contentions. It is not disputed that the property in suit belongs to the Government as part of the Government khas mahal. The defendant claims to be in possession as a tenant having a permanent tenure under Government. The appellant has served her with notice to quit. In such circumstances, in the absence of any evidence by the plaintiff as to the nature of the defendant's tenancy, the onus would lie upon the defendant to shew that she had a right to remain in possession but this she has at present not done, and she would probably have some difficulty in proving her permanent right in the absence of the lease or secondary evidence of its contents. The learned Judge of the trial court ought not, therefore, in my opinion, to have dismissed the suit. The decree appealed from will be set aside with costs of the appeal and the case will be remanded to the trial court for hearing according to law, the appellant being allowed to prove the contents of the lease either by producing it or, if the facts proved permit, by secondary evidence. The costs of the trial already heard in the court below will abide the ultimate decision.

Before delivering this judgment I submitted it to the late Mr. Justice Foster for consideration and he returned it to me with a note that he concurred. He was subsequently taken ill and during his last illness I delivered the judgment stating before doing so that he agreed. As it was doubtful whether he would be in a fit condition to sign it I asked the learned Advocates appearing for the parties whether they were willing to accept the decision as that of the court even assuming that Mr. Justice Foster should not recover and be able to sign it. To this course they agreed. Mr. Justice Foster died on the 1st January, 1927, without being able to sign the judgment.

APPELLATE CIVIL.

Before Kulwant Sahay and Allanson, JJ.

RAMCHANDRA PRASAD

v.

FIRM PARBHU LAL RAMRATAN.*

1927.

Jan. 24, 25, 26; Feb. 6.

Ex-parte decree, suit to set aside on the ground of fraud—Court, whether can enter into the merits of the previous suit.

In a suit to set aside an ex-parte decree on the ground of fraud, it is open to the court, after non-service of the summons is proved, to enter into the merits of the previous suit with the object of determining whether there was any motive for the fraud and whether fraud was actually perpetrated, or whether, if opportunity had been given to the defendant, he could have produced evidence which might have led the court to come to a different decision.

Kedar Nath Das v. *Hemanta Kumari Debi* (1), *Damodar Prasad* v. *Ramsarup Kumar* (2) and *Maharani Janki Kuer* v. *Babu Thakur Rai* (3), followed.

Manindra Nath Mittra v. *Hari Mondal* (4), *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (5), *Mahanth Ramrup Ghoshain* v. *Mahabir Singh* (6), *Maharani Janki Kuer* v. *Mahabir Singh* (7) and *Mahanth Krishna Dayal Gir* v. *Lakshmi Narain* (8), distinguished.

Lakshmi Charan Saha v. *Nur Ali* (9) and *Munshi Mosaful Huq v. Surendra Nath Ray* (10), referred to.

Ram Narain Lal Shaw v. *Tooki Sao* (11), explained.

Appeal by the plaintiffs.

This was an appeal by the plaintiffs against the decree of the District Judge of Patna, dated the 15th

* Second Appeal no. 1182 of 1926, from a decision of A. C. Davies, Esq., I.C.S., District Judge of Patna, dated the 15th July, 1926, reversing the decision of Babu Raj Narain, Subordinate Judge, 3rd Court, Patna, dated the 31st July, 1925.

(1) (1913-14) 18 Cal. W. N. 447.
(2) (1923) 4 Pat. L. T. 102.
(3) (1924) 5 Pat. L. T. 37.
(4) (1920) 54 Ind. Cas. 626.
(5) (1914) I. L. R. 41 Cal. 990.
(6) (1923) I. L. R. 2 Pat. 833.
(7) (1920) 58 Ind. Cas. 317.
(8) (1920) 56 Ind. Cas. 270.
(9) (1911) I. L. R. 38 Cal. 936.
(10) (1911-12) 16 Cal. W. N. 1002.
(11) (1920) 5 Pat. L. J. 259.

July, 1926, whereby he set aside the decree of the Subordinate Judge and dismissed the plaintiffs' suit. The suit was for a declaration that a decree obtained by the defendant no. 1 from the court of the District Judge at Agra was without jurisdiction, fraudulent and null and void and incapable of execution against the plaintiffs.

The plaintiff no. 1 was one Ramchander Prasad and the second plaintiff was a firm Gauri Lal Ramchander Lall carrying on business at Barh in the District of Patna. The first defendant was a firm Parbhu Lal Ramratan which carried on business at Agra, and the second defendant was one Ram Prasad, also a resident of Agra. The plaintiffs' case was that there were two firms at Agra, one known as Parbhu Lal Ramratan and the other as Ramratan Ganga Prasad, both of which were owned by one Bankey Lal and his brothers. The plaintiff firm used to work as commission agents at Barh, and a part of their business was to purchase and sell grains. According to the plaintiffs the second defendant Ram Prasad, who was alleged to be a partner of the firm Ramratan Ganga Prasad, came to Barh and negotiated with the plaintiffs on behalf of his firm Ramratan Ganga Prasad for purchase of grains to which the plaintiffs agreed, and dealings between the parties were opened. The plaintiff firm alleged that they used to purchase grains for the firm of Ramratan Ganga Prasad and to despatch the same to Agra, that money used to come from the Agra firm to Ram Prasad at Barh and he used to make payments from time to time to the plaintiff firm, that Ram Prasad returned to Agra after sometime and a consignment of grains sent by the plaintiff firm to Agra was not taken delivery of by the firm Ramratan Ganga Prasad whereupon the plaintiff firm wrote to the firm Ramratan Ganga Prasad at Agra about it and gave notice to them, in reply whereof Ramratan Ganga Prasad stated that they had no transaction with the plaintiff firm and that they did not know them.

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On the 24th of May, 1919, a suit was instituted by the other firm at Agra, known as Parbhu Lal Ramratan against Ram Prasad who was defendant no. 2 in the present suit and against the plaintiff firm who were described in the plaint as Gauri Lal Ramchander. According to the plaintiffs this suit was instituted by Parbhu Lal Ramratan on the allegation that money was due to them from Ram Prasad on account of loans advanced to him, and that the plaintiff firm Gauri Lal Ramchander were sought to be made liable on the allegation that the loans were advanced to Ram Prasad on the writing and assurance of the firm Gauri Lal Ramchander. This suit was dismissed by the Subordinate Judge on the 28th of February, 1920, on the finding that the defendant no. 1 in the suit, viz., Ram Prasad was not a debtor of the firm but a partner thereof, and that no loan had been advanced to him. Against this decree there was an appeal before the District Judge of Agra which was dismissed on the 29th of June, 1921. Thereafter there was an application before the District Judge for review of judgment. This review was granted and the suit was ultimately decreed against the plaintiff firm Gauri Lal Ramchander alone. The decree of the District Judge of Agra was dated the 16th January, 1922. It was this decree which was sought to be avoided in the present suit on the ground of want of jurisdiction and of fraud on the part of the plaintiffs in the suit at Agra.

The decree appeared to have been transferred to the Patna Court for execution; and an execution was first applied for at Patna with a prayer for arrest of the plaintiff no. 1 Ramchander Prasad. This application appeared to have been dismissed; and a second application then appeared to have been made for execution by attachment and sale of certain properties belonging to the plaintiff Ramchander Prasad.

The plaintiffs asserted that no summons was served upon them in the suit, nor any notice of the appeal or of the application for review was served

upon them, that the said summons and notices were fraudulently suppressed by the plaintiffs, that there was no foundation for the claim as against the plaintiffs, and that the decree was obtained against them by fraud on wilful suppression of summons and notices, and was based on a false claim.

The defence of the defendant no. 1 was that there was no fraud in obtaining the decree, and that the claim was a just claim. The defendant no. 2, Ram Prasad, did not appear in the suit either in the Subordinate Judge's Court or before the District Judge on appeal, nor did he appear in the High Court.

The Subordinate Judge framed a number of issues, and he found them in favour of the plaintiffs and decreed the suit. His findings were: First, that the description of the present plaintiffs, as given in the plaint in the Agra suit, was incorrect they having been described therein as Gauri Lal Ramchand; second, that the summons was not served on the present plaintiffs; third, that the service of the summons by publication in the "Searchlight" newspaper was not a proper service; fourth, there was no service of notice of the appeal or of the application for review upon the plaintiff firm; fifth, that the summons and the notices were fraudulently suppressed with the object that the present plaintiffs may get no opportunity to contest the suit or the appeal or the review application and with the motive to mislead the court to pass an ex parte decree.

After coming to these findings, the Subordinate Judge observed as follows:

"To see whether the defendant no. 1 was actuated by fraud to take such steps we have to go into the facts to a certain extent".

The Subordinate Judge then proceeded to consider the case on the merits, and he came to the finding, on a consideration of the entire evidence and circumstances of the case, that the claim of the plaintiff in the Agra suit was false and unfounded. He, therefore, decreed the suit and made a declaration that the decree passed

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by the District Judge at Agra after review was illegal and void, and was obtained by fraud, and that it was not binding on the plaintiffs.

When the matter went in appeal before the District Judge, he came to the finding that it was not open to the Subordinate Judge to go into the merits of the suit instituted at Agra. He was of opinion that the decision of the District Judge at Agra operated as res judicata, and that the only way to attack the correctness of that decision was by means of appeal or review and that no separate suit was maintainable to contest the correctness of the decision of the District Judge of Agra on merits. He, therefore, refused to consider the question as to whether the claim of the plaintiffs in the Agra suit was well founded or not, and he confined himself to a consideration of the question whether there was fraud in the service or non-service of the summons. In considering this question he was of opinion that he was not trying the question whether there was a proper service of the summons or whether the procedure of the Agra Court was in accordance with law. He laid down that the only question for consideration was whether the procedure adopted by the Agra Courts was a result of fraud practised on them by the plaintiffs in the suit in the Agra Court. The District Judge was of opinion that the allegations of fraud made in the plaint were mostly vague and that there was only one definite allegation of fraud, viz., that the defendant no. 1 of the present suit with the fraudulent intention of obtaining a fraudulent ex parte decree intentionally misdescribed the plaintiffs in order to facilitate the suppression of summonses and notices. The District Judge was, therefore, of opinion that the only ground of fraud alleged in the plaint was a misdescription of the defendant firm in the Agra suit. He came to the finding that the misdescription was not fraudulent but was due to an innocent mistake. The District Judge, therefore, was of opinion that no fraud had been made out and he set aside the decree of the Subordinate Judge.

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P. K. Sen (with him *Rai Guru Saran Prasad* and *Chowdhury Mathura Prasad*) for the appellants:— The court can go into the merits of the previous suit in order to determine whether any irregularity in the service of summons in the former suit was caused by fraud or otherwise. The failure to serve summons on a defendant may be accidental or deliberate, and where the court finds as a fact that there was no foundation for the suit itself, it is open to the court to hold that the suppression of smumons was deliberate. See *Maharani Janki Kuer* v. *Babu Thakur Rai* (1).

Similarly in *Damodar Prasad* v. *Ram Sarup Kumar* (2) it was held that the plaintiff can show that the claim was false so as to lead to an inference as to the fraudulent suppression of sommons: *Jangal Chowdhury* v. *Laljit Pasban* (3) is distinguishable. In that case an application under Order IX, rule 13, Code of Civil Procedure, had been dismissed and then a suit was brought to set aside the decree on the same allegation. It was rightly held that the matter was res judicata. In *Ram Narain Lal Shaw* v. *Tooki Sao* (4), as the defendant, after filing his written statement, had withdrawn from the suit, it was pointed out that the matter was no longer open. In *Munshi Mosuful Huq* v. *Surendra Nath Ray* (5) the fraud alleged was such as could have been a matter of defence for the previous suit. *Kedar Nath Das* v. *Hemanta Kumari Debi* (6) supports my contention and distinguishes *Munshi Mosuful Huq* v. *Surendra Nath Ray* (5).

Ram Prasad (with him *Dhinesh Chandra Verma*) for the respondent:

My first submission is that where there is a finding of fact that there was no fraud in the service of summons, this Court is precluded in second appeal from going into the question whether the claim in the former suit was false or not.

(1) (1924) 5 Pat. L. T. 37.
(2) (1923) 4 Pat. L. T. 102.
(3) (1921) 6 Pat. L. J. 1.
(4) (1920) 5 Pat. L. J. 259.
(5) (1911-12) 16 Cal. W. N. 1002.
(6) (1913-14) 18 Cal. W. N. 447.

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[*Kulwant Sahay, J.*—But when in coming to that finding the court has excluded an important piece of evidence by not going into that question, his finding cannot be sustained.]

Ram Narain Lal Shaw v. *Tooki Sao* (1) is not against me. In that case it was held that the duty of the court in the first instance should be to investigate whether or not there was a fraud in the service of process and then, in order to find whether the fraud, if any, was deliberate or accidental, the court may enter into the merits of the claim in the previous suit. If, therefore, as in the present case, there is a finding that there was in fact no suppression of the processes the court cannot go into the subsidiary question of intention. I rely on *Damodar Prasad* v. *Ram Sarup Kumar* (2) which supports my interpretation of *Ram Narain Lal Shaw* v. *Tooki Sao* (1). The same view was taken in *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (3) where it was laid down that fraud must first be proved before such investigation can be held by the court. Where there is no finding that fraud was at all practised, the decree cannot be set aside merely on the ground that it was obtained by perjured evidence. See *Manindra Nath Mittra* v. *Hari Mondal* (4).

[*Kulwant Sahay, J.*—These cases do not lay down as a proposition of law that in order to find out whether there has been fraud, a court cannot go into the merits of the previous claim.]

I rely on *Maharani Janki Kuer* v. *Mahabir Singh* (5).

[*Kulwant Sahay, J.*—In that case the ex parte decree was sought to be set aside on the ground that it was obtained on a false claim; there was no allegation of fraud with regard to the suppression of summons.]

(1) (1920) 5 Pat. L. J. 259.
(2) (1923) 4 Pat. L. T. 102.
(3) (1914) I. L. R. 41 Cal. 990.
(4) (1919-20) 24 Cal. W. N. 133.
(5) (1920) 58 Ind. Cas. 317.

In *Mahanth Krishna Dayal Gir* v. *Lakshmi Narain* (1) it was held that if the plaintiff cannot prove that the decree was fraudulently obtained he cannot succeed whether the original claim against him was true or false. *Munshi Mosuful Huq* v. *Surendra Nath Ray* (2) and *Abdul Huq Chowdhury* v. *Abdul Hafez* (3) have been considered in *Kedar Nath Das* v. *Hemanta Kumari Debi* (4) where the apparent conflict has been reconciled.

P. K. Sen, replied.

Cur. adv. vult.

S. A. K.

KULWANT SAHAY, J. (after stating the facts set out above, proceeded as follows): The important question for decision is whether in a suit to set aside an ex parte decree on the ground of fraud, it is open to the court to consider the question as to whether the claim of the plaintiff in the previous suit was a true or a false claim. The learned District Judge seems to be of opinion that it is not at all open to the court in which the suit to set aside the decree on the ground of fraud is instituted to look into the merits of the previous suit, that the only thing which it can enquire into is as to whether any fraud was perpetrated by the plaintiff in the previous suit in the service of the summons or notices upon the defendant.

I am of opinion that the view taken by the learned District Judge was erroneous. The plaintiffs have in the first place to show that there was no service of summons or notice of the appeal or of the application for review of judgment. They have then to show that the non-service of the summons or the notices was due to a fraud practised by the plaintiff in the previous suit with the object of keeping the defendant in that suit in ignorance of the suit and of preventing him from placing his case before the court. A decree

(1) (1920) 56 Ind. Cas. 270.
(2) (1911-12) 16 Cal. W. N. 1002.
(3) (1909-10) 14 Cal. W. N. 695.
(4) (1913-14) 18 Cal. W. N. 447.

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passed by a competent court cannot be set aside by a suit simply on the ground that the decree passed was based on a false claim, nor can a decree be set aside simply on the ground that there was no service of summons or notices. But, once it is established that there was no service of summons or notices, it is in my opinion open to the plaintiff in the subsequent suit to show that the claim in the previous suit was a false claim and the court can go into the question with the object of determining as to whether there was a wilful and fraudulent suppression of the notices and summons in order to obtain a decree based on a false claim by preventing the defendant from placing his case before the court. In other words, after non-service of the summons is proved it is open to the court to go into the question as regards the merits of the previous suit with the object of finding as to whether there was any motive for the fraud and as to whether fraud was actually perpetrated, and as to whether, if opportunity had been given to the defendant, he could have produced evidence which might have led the court to come to a different decision. The learned Subordinate Judge in the present case first came to the finding that there was no service of summons or notices and then, as he expressly stated in his judgment, he looked incidentally into the merits of the case in order to see whether the plaintiffs in the Agra suit were actuated by fraud.

The view taken by me is supported by authority. In *Kedar Nath Das* v. *Hemanta Kumari Debi* (1) the findings of the court of appeal below were (*1*) that the fact of the previous suit was not known to the plaintiff, and (*2*) that the said suit was in fact a false suit. From these two findings the third finding was arrived at that the decree obtained in the previous suit was obtained by fraud. Fletcher, J., considered the two apparently conflicting decisions of the Calcutta High Court in *Lakshmi Charan Saha* v. *Nur Ali* (2) and in

(1) (1913-14) 18 Cal. W. N. 447. (2) (1911) I. L. R. 38 Cal. 936.

Munshi Mosuful Huq v. *Surendra Nath Ray* (1) and the learned Judge pointed out that the two decisions could be reconciled when closely looked at. It was pointed out by the learned Judge that the only point decided in *Mosuful Huq* v. *Surendra Nath Ray* (1) was that a decree obtained in a suit could not be set aside in a subsequent suit brought for the purpose on the mere proof that the previous decree was obtained by perjured evidence. It was further pointed out that the mere fact that a decree had been obtained by perjury is not a sufficient ground for setting it aside and that this proposition was never challenged. The learned Judge thereafter proceeded to observe as follows:—

"A different consideration arises where a false case is placed before the court. We have got the decisions in *Abouloff* v. *Oppenheimer* (2) and *Vedala* v. *Lawes* (3) which show quite clearly that, if the case which was placed before the court was a false one, the court has jurisdiction in a subsequent suit to set aside the decree which was obtained by fraud practised on the court".

The learned District Judge in the present case referred to *Lakshmi Charan Saha* v. *Nur Ali* (4) and to *Mosuful Huq* v. *Surendra Nath Ray* (1). But these decisions were explained in the case of *Kedar Nath Das* v. *Hemanta Kumari Debi* (5) just referred to, and I respectfully agree with the view expressed by Fletcher, J., in the said case.

In *Damodar Prasad* v. *Ramsarup Kumar* (6) a Division Bench of this Court held that in a suit to set aside a decree on the ground of fraud, if the court comes to the conclusion that summons was not in fact served upon the defendant, it is at liberty to examine the evidence with a view to find out whether there was any foundation for the previous suit, but that it was

(1) (1911-12) 16 Cal. W. N. 1002.
(2) (1882-83) L. R. 10 Q. B. D. 295.
(3) (1890) L. R. 25 Q. B. D. 310.
(4) (1911) I. L. R. 38, Cal. 936.
(5) (1913-14) 18 Cal. W. N. 447.
(6) (1923) 4 Pat. L. T. 102.

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only for the purpose of enabling it to decide whether the failure to serve the summons was accidental or deliberate that the court could do so. The same view was taken in *Maharani Janki Kuer* v. *Babu Thakur Rai* (1).

The learned District Judge has referred to *Ram Narain Lal Shaw* v. *Tooki Sao* (2) where it is stated that the test as to whether a suit lies to set aside a decree is whether there was fraud practised in relation to the proceedings in court by which the defendant in the original suit was prevented from placing his case before the court, and that until this was found, the court in which the second suit was instituted was not entitled to investigate the question whether the original suit was a false suit or not. Das, J., who was one of the Judges who decided this case, was a party to the decisions in both the subsequent cases of *Damodar Prasad* v. *Ramsarup Kumar* (3) and *Maharani Janki Kuer* v. *Babu Thakur Rai* (1), and the learned Judge has explained his view in the later cases. Once it is established that there was fraud practised whereby the defendant was prevented from placing his case before the court, it is no longer necessary to go further into the question and to investigate the question whether the original suit was a false suit or not. Such investigation is necessary only where the non-service of the summons is not sufficient by itself to prove fraud.

Reliance has been placed by the learned Advocate for the respondents upon the following cases:— *Manindra Nath Mittra* v. *Hari Mondal* (4), *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (5) *Mahanth Ramrup Ghoshain* v. *Mahabir Singh* (6), *Maharani Janki Kuer* v. *Mahabir Singh* (7) and *Mahanth Krishna Dayal Gir* v. *Lakshmi Narain* (8).

(1) (1924) 5 Pat. L. T. 37.
(2) (1920) 5 Pat. L. J. 259.
(3) (1923) 5 Pat. T. T. 259.
(4) (1920) 54 Ind. Cas. 626.
(5) (1914) I. L. R. 41 Cal. 990.
(6) (1923) I. L. R. 2 Pat. 833.
(7) (1920) 58 Ind. Cas. 317.
(8) (1920) 56 Ind. Cas. 270.

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In *Manindra Nath Mitra* v. *Hari Mondal* (1) the defendant in the previous suit appeared, filed a written statement and then absented himself on the adjourned date of hearing. There was, therefore, no fraud committed by the plaintiff in the previous suit whereby the defendant in that suit was prevented from placing his case before the court, and the suit was really to set aside the decree in the previous suit only on the ground that the claim in the previous suit was not a true claim. It is clear that under those circumstances the court could not investigate the question as regards the merits of the previous suit. In *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (2) the decree in the previous suit was passed after contest and, therefore, there was nothing to show that the defendant in that suit was prevented by fraud from contesting the suit. Jenkins, C.J., in that case observed that the character of fraud vitiating a decree would vary with the circumstances of each class of decree, and there is nothing in the decision of this case which would go to show that the court is prevented in a subsequent suit from examining the merits of the previous suit in order to come to a finding on the question of fraud. In *Mahanth Ramrup Ghoshain* v. *Mahabir Singh* (3) there was an application to set aside the previous ex parte decree under the provisions of Order IX, rule 13, Civil Procedure Code, which had been dismissed, and in the subsequent suit the same allegations were made as regards fraud as in the application under Order IX, rule 13, and there is nothing in the decision in that case which goes to show that the truth or falsity of the claim in a previous suit ought not to be enquired into in the subsequent suit, when fraud was alleged. In *Maharani Janki Kuer* v. *Mahabir Singh* (4) the whole foundation of the second suit was that the ex parte decree in the previous suit was obtained upon a false claim: no other fraud was alleged. In *Mahanth Krishna Dayal Gir* v. *Lakshmi Narain* (5) there was an application under Order IX,

(1) (1920) 54 Ind. Cas. 626.
(2) (1914) I. L. R. 41 Cal. 990.
(3) (1923) I. L. R. 2 Pat. 833.
(4) (1920) 58 Ind. Cas. 317.
(5) (1920) 56 Ind. Cas. 270.

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rule 13, Civil Procedure Code, to set aside the ex parte decree which failed and it was found that there was no fraudulent suppression of processes. These cases, therefore, do not help the respondents upon the question now for decision.

After a review of the authorities, I am of opinion that the view taken by the learned District Judge was erroneous. He has come to no distinct finding as to whether or not there was no service of summons or notices, as was found by the Subordinate Judge. He merely came to a finding that the misdescription of the defendant in the Agra suit was not a fraudulent misdescription. To my mind it is necessary for a proper decision of the case to come to a finding on the question of fraud as alleged by the plaintiffs on a consideration of the entire evidence in the case. There were specific allegations of fraud in the plaint and they must be investigated into on a consideration of the entire evidence. If the learned District Judge finds that there was no service of summons or notices, it would be open to him to see on the evidence whether the claim in the suit in the Agra Court was a true or a false claim in order to arrive at a finding as to whether there was fraud perpetrated by the plaintiffs in the Agra suit in obtaining the decree. Both sides have referred to portions of the evidence in the case on the question as to whether the claim in the previous suit was a false claim or not. We cannot go into that evidence and decide the point here. It is necessary to look into the whole evidence in the suit in order to come to a finding as to whether there was fraud committed and as to whether the decree was passed with or without jurisdiction.

The decree of the learned District Judge must, therefore, be set aside and the appeal remanded to him for re-hearing after consideration of the entire evidence in the case. Costs will abide the result.

ALLANSON, J.—I agree.

Appeal remanded.

REVISIONAL CRIMINAL.

Before Adami and Scroope, JJ.

REKHA RAI

v.

KING-EMPEROR.*

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Feb., 16.

Penal Code, 1860 (*Act XLV of* 1860), *section* 363—*kidnapping, whether is a continuous offence—question of fact.*

Whether the offence of kidnapping under section 363, Penal Code, is complete as soon as the minor is removed from the custody of the guardian is a question of fact to be determined according to the circumstances of each case.

Where *L* enticed a minor girl to come out of a gachhi to the road and then to the motor car in which *R* was sitting, so that the latter might drive away with her, *held*, that the offence of kidnapping was complete only when *R* drove away with her.

Rakhal Nikari v. *Queen-Empress* (1), *Nemai Chattoraj* v. *Queen-Empress* (2) and *Nanhak Sao* v. *King-Emperor* (3), referred to.

The petitioner was sentenced to rigorous imprisonment for two years on a charge under section 366 of the Indian Penal Code. The conviction and sentence passed by the trial court were upheld by the Sessions Judge.

The facts found by the courts below were that a little girl, Kailasia, aged about eleven years, went out with some other girls and a man and a woman to a gachhi to gather mahua fruit on the 8th July. Kailasia and her sister went from this gachhi to another gachhi, and there one Latu Dusadh came to Kailasia and told her that he would show her another place where she could get good fruit; and she went alone with him. He took her to a road where a motor

* Criminal Revision no. 51 of 1927, from a decision of J. A. Saunders, Esq., I.C.S., Sessions Judge of Muzaffarpur, dated the 4th December, 1926, affirming a decision of Maulavi Wali Mohammad, Assistant Sessions Judge of Motihari, dated the 1st October, 1926.

(1) (1897) 2 Cal. W. N. 81. (2) (1900) I. L. R. 27 Cal. 1041, F. B.
(3) (1926) 7 Pat. L. T. 812.

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car was standing in which the present petitioner was sitting. The little girl was forced into the car and the petitioner drove away the car. It is not necessary to mention here her subsequent movements further than to say that, after travelling some distance in the motor car, the girl was transferred to a cart and in it was taken to a ghat on the river bank, and at the ghat the girl begged the cartman to rescue her saying that she was being abducted by the petitioner. The girl's cries attracted the notice of some people with the result that she was questioned and thereafter taken to the Kesaria police station where she gave information; and on that same night her father, having missed the girl, gave information also at the Segauli police station.

The courts below found Latu Dusadh, who brought the girl to the motor car, guilty under section 366 and also the petitioner.

S. P. Varma and *Bhagwan Prasad*, for the petitioner.

ADAMI, J. (after stating the facts set out above, proceeded as follows): Before us it is argued that the offence of kidnapping is not a continuing offence and that the offence was complete when the girl was enticed out of the gachhi and taken to the motor car. It is urged that the petitioner in fact committed no offence. Mr. Varma, on behalf of the petitioner, relies on the cases of *Rakhal Nikari* v. *Queen-Empress* (1) and *Nemai Chattoraj* v. *Queen Empress* (2). He has also called our attention to *Nanhak Sao* v. *King-Emperor* (3). In the first of these cases it was laid down that the offence of kidnapping a person is complete when such person has actually been taken out of the custody of the lawful guardian. In that case a girl was enticed away from her parents' house to the house of a prostitute and in the house of the prostitute the accused met her and cohabited with her. It was held that the accused was not shown by any evidence to have

(1) (1897) 2 Cal. W. N. 81. (2) (1900) I. L. R. 27 Cal. 1041, F. B.
(3) (1926) 7 Pat. L. T. 812.

done anything before the offence was completed, and, therefore, he could not be said to have abetted the offence. In the second case it was held that the offence of kidnapping is not an offence continuing so long as the person kidnapped is kept out of guardianship. Rampini, J. in that case held that kidnapping under section 363 is not necessarily or in all cases complete as soon as the minor is removed from the house of the guardian; whether the act of kidnapping is complete is a question of fact to be determined according to the circumstances of each case. There too the girl kidnapped was taken from her husband's house to another house and was taken kept there for two days and then taken to another house where she was kept for twenty days. After that she was taken to the house of the accused in the case. Those two cases are clearly very different in their circumstances from the present case.

In the case of this court it was held that whether the kidnapping is complete or not it is a question of fact and must in each case be decided upon the particular evidence of each particular case. Where the finding is that the accused took part in the actual removal of the girl immediately after she was taken out of the house of her guardian, his conviction under section 363 read with section 114 is correct.

Now what happened in this case was that Latu Dusadh enticed the girl to come out of the gachhi to the road and then to the motor car in which the present petitioner was sitting. It is not a case of enticing the little girl out of her parents' house but of enticing to enter into the motor car, so that the petitioner might drive away with her. There is no doubt that the petitioner took the car to the village in order that he might kidnap her and Latu was only employed in order to enable the petitioner to kidnap the girl. In my opinion the kidnapping was not already completed at the moment when the girl entered the car. It was completed by petitioner driving her off in the motor car. The circumstances of the present case are not

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like those cited by the learned Counsel for the petitioner. The courts below, in my opinion, have rightly held that the petitioner did kidnap the girl and that it was he who took her out of the lawful guardianship of her father. Until she was put into the car she could still be said to be under her father's guardianship.

The only other question raised on behalf of the petitioner is that the sentence is too severe. It is represented that the prosecution case was that the purpose of the kidnapping was that the petitioner might marry the girl, and there is no insinuation that he was taking her away for any improper purpose. It is also pointed out that his companion Latu received a punishment of one year's rigorous imprisonment only. Under the circumstances of the case we are of opinion that the sentence of two years is somewhat severe considering that the petitioner had honourable motives and that no eventual harm had happened to the girl.

We think that a sentence of one year's rigorous imprisonment would be sufficient and reduce the sentence accordingly. The conviction is upheld.

SCROOPE, J.—I agree.

Order modified.

APPELLATE CIVIL.

Before Adami and Scroope, JJ.

1927.

Feb., 17.

MUSAMMAT BODHIA

v.

RAM CHANDRA MARWARI.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order IX, rule* 13 *and Order XLIII, rule* 1(*d*)—*Application to set aside ex parte decree, dismissal of—whether appeal lies.*

* Appeal from Original Order no. 108 of 1926, from an order of Rai Bahadur Amrita Nath Mitter, Subordinate Judge of Dhanbad, dated the 27th March, 1926.

An appeal lies from an order dismissing an application to set aside an ex parte decree whether the dismissal be on the merits or otherwise.

Kumud Kumar Bose v. *Hari Mohan Samadar* (1), referred to.

Appeal by defendant no. 2.

This was an appeal from a decision of the Subordinate Judge of Dhanbad, dismissing an application under Order IX, rule 13, of the Code of Civil Procedure, to restore a mortgage suit which had been decreed ex parte against the defendant no. 2 Musammat Bodhia, who was the appellant.

The suit was decreed ex parte on the 5th January, 1926, and on the 3rd February, the present appellant, filed an application for restoration under Order IX, rule 13, alleging that on the 5th January, the date on which the suit was decreed ex parte, she was under treatment in the Medical College at Patna for eye disease; that she had entrusted the conduct of the suit to her son-in-law, Sitaram Sao, but that he had made a mistake as to the pleader engaged and instead of giving the petition for time to the pleader engaged in the case, Babu Suresh Chandra Singha, he had made it over to another pleader, Babu Manindra Nath Das, and that as the latter's vakalatnama was not on the record, the court had declined to accept the petition and had decreed the suit ex parte. The application under Order IX, rule 13, was registered on the 3rd February, 1926, and the 13th March was fixed for hearing. On that date the opposite party had appeared and were ready and yet the case was adjourned on the petitioner's application to the 27th March for hearing and the parties were directed to come ready on that date. On the 22nd March the petitioner prayed for the examination of a witness, Dr. Khan of Patna, on commission. This was heard

(1) (1916) 21 Cal. L. J. 628.

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on the next day 23rd March but was disallowed on the objection of the opposite party. Application was then made for summons on her witnesses; these were ordered to be issued at her own risk. On the 27th March the case was next taken up but petitioner again applied for time and for issue of summonses on her witnesses who had not yet been served but the court disallowed the prayer and dismissed the application.

N. C. Sinha and *P. De*, for the appellant.

A. B. Mukerji, for the respondents.

SCROOPE, J. (after stating the facts set out above, proceeded as follows): A preliminary objection is taken that no appeal lies: it is urged that Order XLIII, rule 1(*d*), which allows an appeal from an order dismissing an application under Order IX, rule 13, applies only where there has been an actual hearing of the application and that in this case there was no actual hearing of the application which was dismissed for default. But there is direct authority in the case of *Kumud Kumar Bose* v. *Hari Mohan Samadar* (1) for holding that an appeal lies under Order XLIII, rule 1 (*d*), against an order dismissing for default an application to set aside an ex parte decree and the learned Vakil for the respondent has not shown any authority for discriminating for the purpose of Order XLIII, rule 1(*d*), in this way between a dismissal on the merits and a dismissal for default. This contention therefore cannot succeed.

As regards the merits of the appeal there is no getting away from the fact that on the 13th March there was a direction of the court that the parties must come ready by the 27th March and that it was only on the 22nd March that the application for the examination of Dr. Khan on commission was made. The appellant must have known that there was no

(1) (1916) 21 Cal. L. J. 628.

possible chance of getting a commission executed at such short notice, and I do not see any substance in the argument put forward that at least the court might have sent out the commission and allowed it to take its chance. Obviously there was no chance of it being executed. Besides, after the refusal to issue the writ of commission, there was no reason why the appellant should not have had her pleader Suresh Chandra Singh examined on her behalf as the real ground for the rehearing application was that her son-in-law had made a mistake and had gone to the wrong pleader. No application was made at any stage to examine either pleader. Further the application which was filed on the 23rd March for the examination of witnesses shows that there were Jharia witnesses and there is nothing to show why the application could not have been made before to examine these three witnesses. Another feature is that the appellant on her own showing had entrusted the management of the case to her son-in-law on the 5th January, 1926. It is not suggested that he ever offered himself for examination in the rehearing matter. He must have known all the facts and was the person really in charge of the case yet no attempt was made to have him examined. There is no doubt that the appellant put off till the eleventh hour any real effort to take steps to support her restoration petition by evidence and if she has now suffered for it, it is her own fault. She was certainly guilty of laches in the matter, and, on the materials before me, I would say that the learned Subordinate Judge had no alternative but to dismiss the rehearing application for default, and I can see no reason for disturbing that decision.

The appeal accordingly fails and is dismissed with costs.

ADAMI, J.—I agree.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Adami and Seroope, JJ.

FAZLUR RAHMAN

v.

KING-EMPEROR.*

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Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 360—*deposition not read over to witnesses—re-trial ordered—previous deposition whether admissible in evidence—Evidence Act,* 1872 (*Act I of* 1872), *section* 145.

Where a trial was set aside and a re-trial ordered on the ground that the depositions of the witnesses had not been read over to them in the presence of the accused, *held*, that in the subsequent trial the depositions recorded in the first trial could be put to the witnesses under section 145 of the Evidence Act for the purpose of contradicting them.

The petitioner, Fazlur Rahman, was put on his trial under section 326, Penal Code, and the two other petitioners were tried on charges under section 323. Their case came before the Deputy Magistrate of Arrah who convicted Fazlur Rahman under section 326 and sentenced him to one year's rigorous imprisonment and sentenced the other two to eight months' rigorous imprisonment each under section 323. An appeal was made to the Sessions Judge, and the ground taken was that the depositions of the witnesses during the trial had not been read out in the presence and hearing of the accused. On this ground the learned Sessions Judge ordered a retrial of the case, holding that the trial was vitiated by the omission to read out the depositions in the presence and hearing

* Criminal Revision no. 79 of 1927, from an order of T. Luby, Esq., I.C.S., Sessions Judge of Shahabad, dated the 8th January, 1927, affirming the order of Lala Ashutosh, Deputy Magistrate, 1st class, Arrah, dated the 15th November, 1926.

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of the accused. Consequently a second trial was held of these three petitioners with the result that the petitioner Fazlur Rahman was sentenced to 18 months' rigorous imprisonment under section 326 and the other two petitioners were sentenced to rigorous imprisonment for six months each. On appeal the convictions and sentences were upheld.

Sir Ali Imam (with him *Noor-ud-din*) for the petitioners.

C. M. Agarwala, Assistant Government Advocate, for the Crown.

ADAMI, J.—The point taken by Sir Ali Imam on behalf of the petitioners is that the Deputy Magistrate who tried the case on the second occasion has refused to consider the statements put to the witnesses as contradicting the statements made at the first trial. The learned Deputy Magistrate in his judgment has stated

> " As to the previous depositions of the witnesses before the Special Magistrate, there has been no compliance at all with the provisions of section 360, Criminal Procedure Code, and hence there is no guarantee of their absolute correctness. Consequently any attempt at contradiction by means of such incomplete records must fail ".

Now in the first place, this point was not taken in the lower appellate court; and secondly I have asked Sir Ali Imam to point out in what way the statements taken in the previous case would have been helpful to the petitioners as contradicting the statements made in the second trial. Sir Ali Imam rightly concedes that he is unaware of any such contradictions as could affect the case.

The learned Deputy Magistrate is perhaps wrong in stating that these statements made in the previous trial could not be referred to for the purpose of contradicting the statements made in the second trial. Those statements may not possibly be used as evidence in the case in which they were made but nevertheless they

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are statements made by the witnesses previous to the trial and it was open to the defence to put those statements to the witnesses and in fact those statements were put to the witnesses and they were questioned with regard to them.

We have looked into the evidence in the present case and find that this is so. There is nothing then to show us that the petitioners have been in the least affected by the failure of the Deputy Magistrate to consider whether any contradictions that there may have been affected the prosecution case at all. I do not think that we are called upon in any way to interfere on the ground put forward.

Then the question of the severity of the sentence has been brought to our notice. Sir Ali Imam pleads on behalf of the petitioner Fazlur Rahman that the second trial has led to an increase of his sentence, and in regard to all three petitioners he pleads that the fact that they have twice been on trial should be taken into consideration.

Now with regard to the first plea, Fazlur Rahman took the risk when he asked for a fresh trial and with regard to all three petitioners it has to be remembered that it was their own fault that the trial had to be repeated. They put forward a ground before the Sessions Judge which was in fact accepted but which would not now be accepted after the ruling of their Lordships of the Privy Council. The offence committed was a very serious one considering the state of feeling between the rival parties at the time when the offence was committed; and in my mind the sentence is not in any way too severe. I do not feel inclined to interfere either with the conviction or the sentence and therefore the application must be rejected.

SCROOPE, J.—I agree.

Rule discharged.

PRIVY COUNCIL.

J. C. 1927.

Feb., 25.

MAHARAJA OF DUMRAON

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL*

Alluvion—Gradual Accretion—Reformation in situ—Riparian Owners—Alluvion and Diluvion Reg., 1925 (*Ben. Reg. XI of* 1825), *s.*4.

Land which by fluvial action has gradually accreted to that of a riparian owner does not become his property under Ben. Reg. XI of 1825, s.4, if it is a reformation on the site of diluviated land of another proprietor, who has not abandoned his right to it. The above rule applies whether the land of the two proprietors was originally on the same or on different sides of the river.

Lopez v. *Muddun Mohun Thakoor* (1), *Hursuhai Singh* v. *Lootf Ali Khan* (2), and *Sardar Jagjot Singh* v. *Brijnath Kunwar* (3), followed. *Rughoobur Dyal Sahoo* v. *Kishen Pertab Sahee* (4) distinguished.

Judgment of the High Court affirmed.

Appeal (no. 37 of 1925) from a decree of the High Court (June 1, 1923) affirming a decree of the District Judge of Shahabad (December 19, 1918).

The suit was brought by the respondent, the Secretary of State for India in Council against the appellant Maharaja to obtain a declaration of the plaintiff's title to certain lands, for possession and mesne profits.

The material facts in the appeal may be stated shortly as follows; they appear more fully from the judgment of the Judicial Committee.

Turk Ballia was permanently settled as a mahal in 1793, the proprietors not being parties to the suit.

*Present: Lord Phillimore Lord Sinha, Lord Blanesburg, and Sir Lancelot Sanderson.

(1) (1870) 13 M. I. A. 467, 475.
(2) (1874) L. R. 2 I. A. 28.
(3) (1900) I. L. R. 27 Cal. 768; L. R. 27 I. A. 81.
(4) (1879) L. R. 6 I. A. 211.

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In 1871 the mauza was situated on the northern bank of the Ganges. About that year the river began to shift its course northward, and by 1884 had completely submerged the mauza. The river continued to shift northwards and in course of time the mauza was reformed on the south side, as part of an accretion which had been taking place to lands of the appellant settled in 1800. It was concurrently found that the accretion to the appellant's estate was slow, gradual and imperceptible; also that the reformed mauza did not become cultivable until 1909. While the mauza was submerged the revenue was suspended. On reformation, the mauza, which had previously been in the Ballia district, United Provinces, was transferred to the Shahabad district, on the south side and in Bihar, and placed on the rent roll of the Collector of Shahabad. In 1911 the mauza was sold after notification under Act XI of 1859 for arrears of revenue; it being purchased on behalf of the Government. The respondent refusing to give up possession, the present suit was brought.

The appellant by his written statement pleaded that the lands in suit had become part of his estate, as a gradual and slow accretion thereto, also in accordance with an immemorial custom prevailing in the locality, whereby the Ganges was the boundary of the riparian estate. He also denied the validity of the sale.

The District Judge found that the accretion to the appellant's estate was slow and gradual, but that the appellant obtained no title under s.4 of the Bengal Regulation XI of 1825 because the land was identified as a reformation in situ of the mahal Turk Ballia. He found that there had been no abandonment by the previous proprietor; also that the alleged custom was not established. A contention by the defendant that under the terms of the settlements with his predecessors in 1790 and 1800 all accretions were included in the jama was rejected on the construction of the

documents. The sale was held to be valid. A decree for possession was therefore made.

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The High Court affirmed the decree. The learned Judges (Dawson Miller, C. J. and Foster, J.) concurred with the District Judge in holding (1) that the lands in question were a reformation in situ of Turk Ballia, (2) that there had been no abandonment by the previous proprietors, and (3) that the sale was valid. They referred to the findings that Ben. Reg. XI of 1825, s.4 did not apply and that the custom was not proved; they said that they were prepared to accept those findings, but deemed it unnecessary to go into those matters having regard to the conclusions arrived at on other points. They also concurred that the settlement gave no title to the Maharaja.

1926. *Dec. 6, 7, 9, 10, 13, 14, 16.*

DeGruyther K. C. and *E. B. Raikes* for the appellant. The accretion of the land in suit to the appellant's property was found to be slow, gradual and imperceptible; it was therefore land "gained by gradual accession" within the meaning of Reg. XI of 1825, s.4, cl. 1: *Secretary of State for India in Council* v. *Raja of Vizianagaram* (1). The appellant acquired a good title to the land under that clause. The observation in the judgment of the Board in *Lopez* v. *Muddun Mohun Thakur* (2) to the effect that the Regulation does not refer to a gain from another individual but only to a gain from the public domain, is not consistent with other judgment of the Board; in any case it does not apply to a case where, as here, the lands of the two proprietors were originally on opposite sides of the river. To apply the observation in that case would result in a riparian property being converted into a non-riparian property; that would result in anomalies.

Reliance was placed more particularly upon the judgments in *Rughoobur Dyal Sahoo* v. *Kishan*

(1) (1921) I. L. R. 45 Mad. 207; L. R. 49 I. A. 67.

(2) (1870) 13 Moo. I. A. 467, 475.

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Pertab Sahee (1), and *Ritraj Koer* v. *Surfraz Koer* (2); reference was made also to various decisions mentioned in the judgment of the Judicial Committee, and to the following: *Doe* v. *East India Co.* (3); *Eckowri Singh* v. *Heeraloll Seal* (4); *Nogender Chunder Ghose* v. *Mahomed Esof* (5); *Balusu Ramalakshmamma* v. *Collector of Godavari* (6); and *Devi Baksh Singh* v. *Tirbhawan Singh* (6a). If the appellant did not get a title under s.4, cl. 1 of the Regulation, he did so under s.4, cl. 5, by which the "principles of justice and equity" are to be applied. That in effect means the principles of English law: *Waghela Rajsanji* v. *Masludin* (7). According to those principles the appellant gained a title: *Attorney-General* v. *McCarthy* (8); *Hinton* v. *Ashby* (9); *Mayor of Carlisle* v. *Graham* (10); *Foster* v. *Wright* (11).

Secondly, the local custom alleged, which was that referred to in the Regulation, was proved. The oral evidence was similar to that in *Dhanj* v. *Ganganand Singh* (12); in that case the trial Judge had treated the evidence as inadequate for the same reason as in this case.

Thirdly if the appellant had a good title, the sale was invalid in the absence of any assessment upon him. If he had no title the sale was invalid, as the Collector had no jurisdiction to sell for arrears accrued in another district. The suit being in ejectment, the plaintiff had to prove a good title. If a sale is without jurisdiction *Balkishen Das* v. *Simpson* (13)

(1) (1879) L. R. 6 I. A. 211.
(2) (1905) I. L. R. 27 All. 655; L. R. 32 I. A. 165.
(3) (1856) 6 Moo. I. A. 267.
(4) (1868) 12 Moo. I. A. 136.
(5) (1872) 10 Ben. L. R. 406 (P. C.)
(6) (1899) I. L. R. 22 Mad. 464; L. R. 26 I. A. 107.
(6a) (1896) I. L. R. 19 All. 238.
(7) (1887) I. L. R. 11 Bom. 551, 561; L. R. 14 I. A. 89, 96.
(8) (1911) 2 I. R. 260.
(9) (1896) 2 Ch. 1.
(10) (1869) L. R. 4 Ex. 361.
(11) (1878) 4 C. B. D. 439.
(12) (1925) I. L. R. 4 Pat. 788; L. R. 52 I. A. 279.
(13) (1898) I. L. R. 25 Cal. 853; L. R. 25 I. A. 151.

and other authorities show that no suit to set aside the sale was necessary.

[Their Lordships did not require to hear arguments in support of the sale if the appellant failed to establish a title.]

Dunne K. C. and *Kenworthy Brown* for the respondent. The land in suit was found to be a reformation in situ. There is no case in which it has been held that a title by gradual accretion prevails over the title to land upon it being reformed in situ. What has been described as the "observation" in *Lopez's Case* (1), was a material part of the judgment. The rule being a decision as to the true construction of the Regulation applies whether the lands of the two proprietors were originally on the same or on different sides of the river. The rule there laid down has not been questioned in any judgment of the Board, and has frequently been affirmed. It was affirmed in *Hursuhai Singh* v. *Lootf Ali* (2) and in *Sardar Jagjot Singh* v. *Brijnath Kunwar* (3) where the lands of the two proprietors were originally on opposite sides of the river; the facts in the last named case are similar to those in the present suit. Nothing was decided in *Rughoobur Dyal Sahoo* v. *Kishen Pertab Sahee* (4) or in *Ritraj Koer* v. *Surfaraz Koer* (5) inconsistent with the rule laid down in *Lopez's Case* (1). Reference was made also to *Court of Wards* v. *Radha Prosad Singh* (6); *Collector of Rajshahye* v. *Soonduree Debia* (7); *Sarat Sundari Debya* v. *Soorjya Kant Acharjya* (8). Fluvial action in India differs in character so much from that in England that English law cannot be applied. Further, the decisions of the Board apply whether the appellant claims

(1) 13 Moo. I. A. 467, 475.
(2) (1874) L. R. 2 I. A. 28.
(3) (1900) I. L. R. 27 Cal. 768; L. R. 27 I. A. 81.
(4) L. R. 6 I. A. 211.
(5) I. L. R. 27 All. 655; L. R. 32 I. A. 165.
(6) (1874) 22 W. R. 238.
(7) (1874) 22 W. R. 324.
(8) (1876) 25 W. R. 242 (P.C.).

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under clause 1 or clause 5 of s. 4. The "principles of justice and equity" referred to in clause 5 support the title of the owner of the site.

The custom alleged was not proved; there were in substance concurrent findings to that effect. The appellant himself in other circumstances had denied the custom; in one previous suit he set it up and it was found not to be established (1).

It is conceded that the sale was invalid if the appellant acquired a title by accretion.

DeGruyther K. C. replied.

1927 *February*, 25. The judgment of their Lordships was delivered by Sir Lancelot Sanderson.

This is an appeal by the Maharaja of Dumraon, who was the defendant in the suit, against a decree of a Division Bench of the High Court of Judicature at Patna, dated the 1st June, 1923.

The suit was brought by the Secretary of State for India in Council to obtain a declaration of the plaintiff's title to certain lands called the Mahal of Turk Ballia, to recover possession of the said lands from the Maharaja, and for mesne profits.

The suit was tried by the learned District Judge of Shahabad, who made a decree in favour of the plaintiff dated the 19th December, 1918. The High Court, by the above-mentioned decree of 1st June, 1923, dismissed the Maharaja's appeal with costs.

The River Ganges separates the Shahabad district in Bihar from the United Provinces of Agra and Oudh. The Ballia district is to the north of the Ganges and the Shahabad district is to the south of the river.

The Mahal Turk Ballia, which consists of a single mouzah of that name, was settled with proprietors, other than the appellant, in the year 1790

(1) (1919) 5 Pat. L. J. 1, 10.

as a separate estate, and in 1793 or 1795 was permanently settled and assessed to revenue at Rs. 251. It had a nominal area of 275 bighas, and at that time was situated to the north of the River Ganges.

Between 1871 and 1884 the land of this village was washed away by the Ganges, which was gradually moving northwards, until in 1884 the whole of the village had disappeared.

As the land of this estate became submerged in the river, proportionate remission of revenue was allowed, until at last the proprietors were paying a nominal sum of Rs. 2 per annum in order to preserve their right to the estate in the event of its reappearing. In 1884, however, they were informed by the authorities that this payment was no longer necessary to keep alive their rights, and the Board of Revenue in the United Provinces directed that the payment of revenue should be suspended and written off from year to year in the revenue account. This was accordingly done in the revenue accounts of the collectorate.

As the river altered its position to the northward, accretions took place on the opposite bank in the Shahabad district, and in 1909 correspondence took place between the respective collectors, from which it appeared that Turk Ballia had reformed on the south side of the river.

Accordingly, by two notices issued in the Gazettes of the respective provinces, dated the 25th and 26th May, 1910, it was formally notified that the permanently settled estate of Turk Ballia had ceased to form part of the Ballia district in the United Provinces, and that it formed part of the Shahabad district in Bengal (which at that time included Bihar) in respect of its civil, criminal and revenue jurisdiction.

It is not clear when the Mahal of Turk Ballia began to appear as dry land on the south side of the

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river. It would, in the natural course of things, be difficult to ascertain this with any accuracy; the learned Judges of the High Court stated that there could be little doubt that for some years after it emerged, as the river subsided after the floods, it would be again covered during the rainy season, and that it might reasonably be inferred that for some time after its emergence it would be sandy waste unfit for cultivation.

The learned Judge who tried the suit held on the evidence that it did not become cultivable before 1909, and the learned Judges of the High Court agreed with that finding. The abovementioned date is material to the question whether the Maharaja had acquired a title by adverse possession as against the recorded proprietors when the suit was instituted, viz., on the 8th December, 1916.

This question may be disposed of at once; the High Court held that no title was acquired by the appellant by adverse possession up to the date when the suit was brought, thus affirming the finding of the trial court. The learned counsel who appeared for the appellant on this appeal stated during the argument that he accepted the two findings in this respect, and did not dispute them. Their Lordships see no reason for differing from the above-mentioned findings as to adverse possession.

The village of Turk Ballia having been placed on the rent-roll of the collector of Shahabad, as appears from paragraph 7 of the appellant's case, notices were given to the original proprietors to pay the arrears of revenue alleged to be due in respect of the said estate.

It further appears that no revenue from this estate was paid up to the end of the financial year 1910-1911; and on the 4th May, 1911, when the revenue was in arrear for one year, notification for the sale of the Mahal of Turk Ballia for arrears of

revenue was issued under the provisions of Act XI of 1859. The Turk Ballia estate was put up for auction, and in the absence of bidders it was duly purchased by the collector on behalf of the Government.

The collector of Shahabad then began relaying the boundaries of Turk Ballia under the Survey Act, on the basis of the maps of the Revenue Survey and the Diara Survey.

The defendant Maharaja, who was in possession of the lands in suit, objected to the demarcation, and claimed the land as an accretion to his own estate. He refused to give up possession, with the result that this suit was instituted, as already stated, on the 8th December, 1916, by the Secretary of State for India in Council.

The Maharaja's estates in the locality lie mainly on the south side of the river. As the new land formed on the southern side of the river, the Maharaja had treated it as a portion of his property.

As the learned Judge, who tried the suit, pointed out, if this land was an accretion to the property of the Maharaja, it would ordinarily have been liable to assessment of land revenue under Act IX of 1847. But the Maharaja claimed special privileges in respect of alluvial accretions.

The bulk of the estates which form the Maharaja's zemindary were permanently settled at the decennial settlement of 1789-90, which was confirmed by Regulation I of 1793. This included the estate of "Dhakaich Mahal," and in connection with this estate there was a condition agreed to that the Maharaja's predecessor should not claim abatement of revenue for losses by diluvion and he should not be liable to additional assessment on account of alluvial accretions.

To the north of the Dhakaich Mahal, between this estate and the Ganges, were certain villages, not

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included in the settlement of 1790, which were either waste or uncultivable, or partly or wholly submerged. These villages were settled with the Maharaja in 1800, and form part of the "Jauhi Mahal," and include the villages of Jagdispur and Parsanpa.

It was as alluvial accretions to these two villages that the Maharaja entered into possession of the lands in suit, as parts of it became fit for cultivation.

It was argued on behalf of the appellant before their Lordships that if the appellant acquired a good title to the lands in suit by reason of their gradual accession to his other lands, it would be necessary for the authorities to assess the accreted land under Act IX of 1847 before revenue could be levied in respect thereof, that as this was not done, the Maharaja could not be said to be in default of payment of revenue, and that consequently the sale was without jurisdiction and was invalid.

The learned counsel argued, therefore, that he need not rely on the settlements of 1790 and 1800, inasmuch as his case was that the Maharaja was the proprietor of the accreted land, and that he had not been assessed in respect thereof.

Their Lordships agree with this part of the learned counsel's argument, and are of opinion that if it could be shown that the Maharaja had become the proprietor of the lands in suit by reason of their gradual accession to his other lands, a fresh assessment of such accreted lands under Act IX of 1847 would be necessary before the Maharaja could be called upon to pay revenue in respect of such accreted lands.

The learned Judges of the High Court seems to have thought that the appeal mainly depended upon the construction of the terms of the settlements of 1790 and 1800. Their Lordships are unable to accept that view for the reasons already stated.

The learned Judges of the High Court came to a further conclusion, as follows:—

"Having already determined that the settlement of 1800 does not include the lands now in suit, and assuming that the lands never reverted to the Crown by abandonment, it becomes unnecessary to consider whether the appellant has acquired any proprietary interest in the lands or not."

Their Lordships are not able to agree with this conclusion.

The main point argued before their Lordships on behalf of the appellant was that the Maharaja had obtained a good title to the lands in suit by reason of their gradual accession to his estate to the south of the Ganges by reason of the recess of the river to the northward, and their Lordships agree that this is the principal question in the case.

It raises an important issue which goes to the root of the case, and, in their Lordships' opinion, a decision in respect thereof is essential to the disposal of the appeal.

The argument of the learned counsel on behalf of the appellant in respect of the last-mentioned submission—viz., that the Maharaja had obtained a good title to the lands in suit by reason of their gradual accession to his estate on the south side of the river—was based upon the provisions of Regulation XI of 1825, section 4, clause (1). The clause is as follows:—

IV.—First. When land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zemindar or other superior landholder, or as a subordinate tenure, by any description of under-tenant whatever. Provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed, to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure land may be annexed, and shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue to which it may be liable under the provisions of Regulation II, 1819, or of any other Regulation in force. Nor if annexed to a subordinate

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tenure held under a superior landholder, shall the under-tenant, whether a khoodkasht ryot, holding a mouroosee istimraree tenure at fixed rate of rent per bigah, or any other description of under-tenant liable by his engagements, or by established usage, to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be justly liable.

It was urged on behalf of the appellant that the above-mentioned clause was applicable to the facts of this case.

Before considering this question it is necessary to mention certain findings of fact of the learned District Judge who tried the suit:—

1. The learned Judge found that the Mahal Turk Ballia, which originally lay on the north side of the river, was washed away to a depth of 80 or 100 yards in a year; that the erosion was slow and gradual in a limited sense, in that it operated by degrees upon the face of the bank; that it could not be called imperceptible.

2. The learned Judge found that the process of alluvion by which the land in suit was formed on the south side of the river was slow, gradual and imperceptible.

3. He held that it was hardly open to question that the land in suit stands on the site formerly occupied by the Mouzah Turk Ballia; that is to say, though Turk Ballia formerly lay on the north of the Ganges and the land in suit lies on the south of the river, this land lies in the same geographical position, in the same latitude and longitude as that which was originally occupied by Turk Ballia.

These findngs were adopted by the learned Judges of the High Court, and in the argument before their Lordships they were not contested.

It was argued on behalf of the plaintiffs (respondent) that, inasmuch as the lands in suit had been identified as the Mahal Turk Ballia, and inasmuch as this was a case of "re-formation in situ," the

first clause of section 4 of Regulation XI of 1825 did not apply, but that the fifth clause was applicable and that by general principles of equity and justice it should not be held that the Maharaja was the proprietor of the lands in suit.

The terms of the first clause of section 4, taken literally and by themselves, may be said to be sufficiently wide and general to include the facts of this case, but the clause has been the subject of judicial decisions, some of them by the Judicial Committee, which appear to their Lordships to place a limitation upon the application of the first clause.

A large number of cases were referred to during the course of the argument, and these have been fully considered; their Lordships, however, do not think it necessary to refer to all the cases, and they are of opinion that it will be sufficient to mention the following:—

In *Lopez* v. *Muddun Mohan Thakoor* (1) it appeared that land forming part of a mouzah on the banks of the Ganges, by reason of continual encroachments of that river became submerged, the surface soil being wholly washed away. After recession and re-encroachment by the river, the waters ultimately subsided and left the land re-formed on its original site. It was held by the Judicial Committee, applying the principles of English law and following *Imam Bandi* v. *Hur Gobind Ghose* (2) that the land washed away and afterwards re-formed on the old ascertained site was not land gained by increment within the meaning of section 4 of the Bengal Regulation XI of 1825. Their Lordships' judgment in that case in the first place stated the rule of English law, and it was noted that it is not a principle peculiar to any system of municipal law, but that it is a principle founded in universal law and justice. It was then mentioned that the principle of law so far as relates to

(1) (1870) 13 Moore, I. A. 467. (2) (1848) 4 Moore. I. A. 403.

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accretions had to some extent been made part of the positive written law of India.

Their Lordships then referred to Regulation XI of 1825, section 4, clause (1), and proceeded as follows:—

"It is to be observed, however, that the clause refers simply to cases of gain, of acquisition by means of gradual accession. There are no words which imply the confiscation or destruction of any private person's property whatever. If a Regulation is to be construed as taking away anybody's property, that intention to take away ought to be expressed in very plain words, or be made out by very plain and necessary implication.

"It would certainly seem that something more than mere reference to the acquisition of land by increment, by alluvion, or by what other term may be used, would be required in order to enable the owner of one property to take property which had been legally vested in another. In truth, when the whole words are looked at, not merely of that clause but of the whole Regulation, it is quite obvious that what the then Legislative authority was dealing with was the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain not usable in the ordinary sense—that is to say, the sea belonging to the State, a public river belonging to the State; this was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which by accretion became valuable and usable out of that which was in a state of nature neither valuable nor usable."

That decision was given in the year 1870, but the principle had been stated in 1862 by Sir B. Peacock in *Ramanath Thakore* v. *Chundernarain Chowdhury* (1).

The head-note in the last-mentioned case is as follows:—

"Lands washed away and afterwards re-formed upon the old site, which can be clearly recognised, are not lands 'gained' within the meaning of section 4, Regulation X, of 1825; they do not become the property of the adjoining owner, but remain the property of the original owner."

Sir Barnes Peacock, in giving judgment, is reported to have said:—

"We are of opinion that the word 'gained' in section 4 of Regulation XI of 1825 does not extend to cases of land washed away and afterwards re-formed upon the old site, which can be clearly recognised.....In such a case we think the land formed by accretion on the old recognised site remains the property of the owner of the original site.

(1) (1862) 1 Marshall 136.

"The principle is that where the accretion can be clearly recognised as having been re-formed on that which formerly belonged to a known proprietor, it shall remain the property of the original owner."

The decision in *Ramanath* v. *Chundernarain Chowdhury* (1) was approved by their Lordships of the Judicial Committee in *Lopez* v. *Muddun Mohun Thakoor* (2).

It was conceded by learned counsel for the appellant that the decision in *Lopez* v. *Maddan Mohun Thakore* was correct, having regard to the facts of that case; and it was not denied that if, in the present case, after the Mahal Turk Ballia had been wholly submerged, the river had receded to the south and the land had re-formed on the ascertained original site of Turk Ballia, and if such site lay to the north of the river, the land so re-formed would belong to the original proprietors.

It was argued, however, that this principle did not apply when the question arose between two riparian owners, who owned property on either side of the river, and when the land was washed away from one side of the river and re-formed on the other side, even though it was re-formed on the old ascertained site.

Their Lordships are unable to see why the principle should apply in the one case and should not apply in the other.

There is no doubt in this case that the land re-formed on the old ascertained site of Turk Ballia. If the river had receded to the south, and had left the land re-formed on the site of Turk Ballia on the north side of the river, it would undoubtedly have belonged to the original proprietors; but as the river receded towards the north and left the land re-formed on the old ascertained site of Turk Ballia on the south side of the river, it was argued that the proprietors had lost their property, and that it belonged to the appellant Maharaja by reason of gradual accession.

(1) (1862) 1 Marshall 136. (2) 13 Moore, I. A. 467, 476.

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Their Lordships are not prepared to accept that argument, and are of opinion that the principle laid down in the two above-mentioned cases applies to the facts of the present case.

Their Lordships are confirmed in this opinion by several later decisions to which it is desirable to draw attention.

In *Nogendra Chunder Ghose* v. *Mohomed Esof* (1) their Lordships of the Privy Council in 1872 again had to consider Regulation XI of 1825. They discussed the different sections of the Regulation, and stated that—

> " Two observations arise on this Statute:
>
> " (1) There is nothing to show that the first rule contemplates land other than that which commonly falls within the definition of ' alluvion,' viz., land gained by gradual and imperceptible accretion, the *incrementum latens* of the civil law.
>
> " (2) No express provision is made for the case of land which has been lost to the original proprietor by the encroachment of the sea or a river, and which after diluviation, reappears on the recession of the sea or river. But, on the other hand, there is nothing to take away or destroy the right of the original proprietor in such a case; which must, therefore, be determined by ' the general principles of equity or justice ' under the 5th Rule. That the right of the proprietor in the case last put exists and is recognised by law in India, is established by at least two cases decided at this Board."

It was further stated by their Lordships that—

> " It is not easy to see upon what principle a title to alluvion by gradual accretion should prevail against the original ownership established by identification of site; unless it be that where the accretion is so gradual as to be latent and imperceptible during its progress, the law, on grounds of convenience, presumes incontrovertibly that no other ownership can be shown to exist and so bars enquiry."

The case of *Hursuhai Singh* v. *Syud Lootf Ali Khan* (2) is on the same lines, and was decided in 1874.

It is important both on account of the facts of the case and on account of the decision thereon. The suit was brought by the appellants, the proprietors of the Mouzah Muteor, in Tirhoot, against the respondents, the proprietors of Mouzah Ramnuggur, to

(1) (1872) 10 Ben. L. R. 406. (2) (1874) L. R. 2 I. A. 28.

recover the possession of a large quantity of land which had been submerged by the River Ganges. It appears that the river flowed between the estates of the plaintiffs and the defendants, and in its course between the two estates there were from time to time various changes. There were two or three defined channels, which at times the river overflowed and formed a pool or lake.

The land which was the subject of the suit was submerged, and when it first became free from water and reappeared, in the view which their Lordships took of the facts, it adhered to and adjoined the estate of Ramnuggur, and "*prima facie* the accretion was to that estate." But upon enquiry made by the Judge of Patna, who went to the spot, heard evidence and took great pains to survey the district, he came to the conclusion that the submerged land, although it had re-formed close to Mouzah Ramnuggur, was, in point of fact, land which belonged to Mouzah Muteor, and that there were means by which he could identify, and did identify, the land as having been before its deluviation part of that mouzah.

Two points should be noted about this case: (1) The river ran between the estates of the plaintiffs and the defendants; (2) when the land became free from water and reappeared, it adhered to and adjoined the estate of Ramnuggur (*i.e.*, the defendants' estate), and, to use the words of their Lordships, "*prima facie* the accretion was to that estate."

Their Lordships, however, held, on the authority of *Lopez* v. *Muddun Mohun Thakoor* (1), that where land which has been submerged re-forms and can be identified as having formed part of a particular estate, the owner of that estate is entitled to it.

Their Lordships accordingly allowed the appeal and restored the decree originally made by the Judge of Patna, which was to the effect that the plaintiffs (appellants) were entitled to the lands.

(1) (1870) 13 M. I. A. 467.

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In *Rani Sarat Sundari Debya* v. *Soorjya Kant Acharjya* (1) (decided in 1876 the head-note is as follows:—

"Where land re-forms by alluvion on a site capable of identification, the right of the owner of the original site to the chur is indisputable."

This case, which is another decision of the Judicial Committee, is material because the plaintiff sought to establish his title on the ground that the land had, in consequence of the recession of the River Jamoona and by gradual accretion, become part of the village of Juggatpoora, which formed part of his zamindari.

The plaintiff failed in his suit because it was found that the land claimed by him was a re-formation upon land which belonged to the defendants, and it was pointed out that even if the defendants had been plaintiffs and could make out that the land claimed was a re-formation upon land which had belonged to them, they would be entitled to recover it from a party in possession.

In *Radha Proshad Singh* v. *Ram Coomar Singh* (2) (decided by the Judicial Committee in 1877) the doctrine in *Lopez's* case (3) was accepted, but it was held that it did not apply to lands in which after their re-formation an indefeasible title had been acquired by long adverse possession or otherwise. The judgment is important, because at page 800 their Lordships are reported to have said:—

"The doctrine in *Lopez's* case (3) was doubtless in favour of the defendants in both suits; and if they had in no way lost their rights, would give them a title to the land re-formed upon sites identified by the thakbust proceedings of 1864 as within the boundaries of their original mouzahs, which would *prima facie* override a title founded on the principle of the acquisition of that land by the proprietor of the northern bank of the Ganges by means of gradual accretion. Their Lordships conceive, however, that the doctrine in *Lopez's* case (3) cannot be taken to apply to land in which, by long adverse possession or otherwise, another party has acquired an indefeasible title."

(1) (1876) 25 W. R. 242. (2) (1877) I. L. R. 3 Cal. 796.
(3) (1870) 13 M. I. A. 467.

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In *Sardar Jagjot Singh* v. *Rani Brijnath Kunwar* (1) (decided in 1900) it was held by their Lordships of the Judicial Committee that land submerged by the wanderings of a river from its course and afterwards re-emerging in a form capable of being identified, does not cease to belong to its original owner. The adjoining proprietor cannot make title to it either under sub-section 1 or sub-section 5 of Regulation XI of 1825, section 4, or on any known principle.

Lord Robertson, in giving judgment, said :—

"It is perfectly plain that neither the specific provision of the first sub-section nor the general principles of equity and justice lend the slightest support to the pretension of the appellant, which is to land that would be gained not from the river but from a neighbour."

Their Lordships are of opinion, in view of the principles adopted in the above-mentioned decisions, and in view of the above-mentioned findings of fact, especially the finding that the lands in suit, which appeared on the south side of the river, occupied the site whereon Turk Ballia stood before it was submerged, that the lands did not become part of the Maharaja's estate, and that the Maharaja did not obtain title thereto under the provisions of section 4, clause (1), of Regulation XI of 1825, but that the title to the land remained in the original proprietors of Turk Ballia. Subject to the question of custom, which is dealt with hereafter, they are further of opinion that it would not be in accordance with general principles of equity and justice to hold that the lands belonged to the Maharaja.

Their Lordships, therefore, are of opinion that the learned District Judge's conclusion on this part of the case was correct.

Much reliance was placed by the learned counsel appearing on behalf of the appellant upon the case of *Rughoobur Dyal Sahoo* v. *Maharaja Kishen Pertab Sahee.* (2).

(1) I. L. R. 27 Cal. 768; L. R. 27 I. A. 81.
(2) L. R. 6 I. A. 211.

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Their Lordships are of opinion that the question, which is directly in issue in the present case, was not raised in the above-cited case.

In the cited case the two principles, upon which the determination of the Board of Revenue was based, were the existence of an alleged usage, and the inference that by reason of that usage the antecedent interest of the plaintiffs and their predecessors in the land was only of a limited, temporary, and conditional character. Their Lordships of the Judicial Comittee held that the trial of the cause had been unfortunate inasmuch as it failed to determine the substantial questions (*see* page 216); hence the remand and the further trial which was directed.

When the case came before the Judicial Committee the second time, on appeal from the High Court, it appeared that the High Court had based their decision on a finding that the settlements made with the plaintiffs were temporary settlements, and were made on the basis that the River Gunduck was the boundary line not only of the two Zillahs Sarun and Tirhoot, but of the estates appertaining to these districts; that the land in dispute was settled with the plaintiffs on temporary leases, and that those settlements were of a limited and temporary character, and that, such being the case, the finding was fatal to the plaintiffs' suit. It was assumed that the accretion belonged to the plaintiffs by virtue of the first clause of section 4 of Regulation XI of 1825, and it hardly could have been otherwise because the contention of the defendants was that the title of the land depended upon the course of the river. Their Lordships then proceeded to direct their attention to the question whether the settlements with the plaintiffs were of a temporary character. Their Lordships held that the interest of the plaintiffs was not temporary but permanent, though the assessments were merely temporary, and that the real question was whether there was a clear and established usage that the river should

be the constant boundary between the zamindaries on either side. Their conclusion was that the plaintiffs were during twenty years in occupation of the land, when at the expiration of the settlement of 1887, in consequence of a sudden turn of the River Gunduck, it was on the southern side of the river, capable of being identified; that it still belonged to the plaintiffs unless there was a clear and definite usage that the River Gunduck was the boundary not only between the two districts but also between the zamindaries on either side. It was held that such a custom or usage was not found ever to have existed. Their Lordships accordingly reversed the decree of the High Court and declared that the plaintiffs were entitled to the land in dispute. It is not clear that the defendants were relying on the 1790 settlement as giving them any present right, but rather as a historical event, for the purpose of showing that they were right in their contention that the boundary between the two estates was the main channel of the River Gunduck. In fact, it appears that in order to get rid of the plaintiffs' contention that they had a good title by reason of the settlements of 1837 and 1847, the defendants argued that the proprietary right in the soil might have all along remained in the Government, and that the settlements with the plaintiffs were merely temporary. Their Lordships do not find in the last-cited case anything conflicting with the principles upon which the afore-mentioned decisions of the Judicial Committee were based.

It was next argued on behalf of the Maharaja that he had title to the lands in suit by reason of an alleged immemorial custom in the locality in question, by which land adhering by gradual alluvion to a riparian village becomes a part of the estate to which it accretes.

As the learned District Judge pointed out, the evidence called for the defendant was directed to show

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that there was a custom by which accretions to the Shahabad side vested in the Shahabad zamindar, viz., the Maharaja.

The first thing to be noted is that the custom which the Maharaja by his witnesses attempted to prove was not the custom pleaded.

The pleading alleged that according to immemorial custom and usage prevailing in the locality, the deep stream of the Ganges is the boundary of the riparian estates and consequently all accretions to an estate by that local custom as well as by the law governing accretions become a part and parcel of the estate to which accretions have formed.

It would be sufficient for their Lordships to leave the matter there, but as their Lordships have come to a clear conclusion on the merits of this question, they consider that it is desirable to state it.

The learned District Judge found that no custom as alleged had been proved to exist. The learned Judges of the High Court on appeal stated that they would be prepared to accept the findings of fact arrived at by the learned Judge, but having already determined that the settlement of 1800 did not include the lands in suit, and assuming that the lands never reverted to the Crown, it became unnecessary to consider whether the appellant acquired any proprietary interest in the lands or not.

It might be argued that this was a concurrent finding of fact, but however that may be, their Lordships are of opinion that the learned District Judge's finding in this respect was correct, and that the custom alleged was not proved.

It should be noted that up to a comparatively recent time the Maharaja had been upholding the opposite contention, viz., that there was no such custom as that which was alleged by him in this case.

It should be stated that having regard to the facts stated in the earlier part of the judgment, in their Lordships' opinion there is no ground for holding that the proprietors of the Turk Ballia estate abandoned their estate and interest therein.

There remains another point with which their Lordships think it necessary to deal. It was argued on behalf of the appellant Maharaja that even assuming he failed to obtain a title to the lands in suit, either under the Regulation XI of 1825, section 4, or by reason of the alleged custom, the sale of the lands in suit was invalid, and the plaintiff obtained no title thereby; consequently, it was argued that as the defendant was admittedly in possession of the lands, and if, as the defendent alleged, the plaintiff obtained no title by the sale, the suit should have been dismissed.

In view of their Lordships' decision on the above-mentioned points, the defendant, though in possession of the lands, was merely a trespasser. The question remains whether the sale was good and valid as against the original proprietors of Turk Ballia, so as to give the plaintiff a title on which he could base his suit for possession of the lands. There is no doubt that there was revenue due at the date of the sale, that such revenue was not paid, although, as stated in the appellant's case, notices had been given to the original proprietors to pay the revenue alleged to be due; and their Lordships are satisfied that the collector had jurisdiction to sell, and that the allegations as to irregularities in the sale were not substantiated.

Further, no suit was instituted within a year of the sale, and the provisions of section 33 of Act XI of 1859, might have to be considered.

For these reasons their Lordships are of opinion that the sale was not invalid, and that the plaintiff did obtain a good title as the purchaser at the sale—and that he was competent to obtain a decree for possession against the defendant, who had no title to the lands.

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Though not agreeing, as already stated, with some of the grounds of the High Court's judgment, their Lordships are of opinion that the decree of the learned District Judge was correct, and that the Maharaja's appeal to the High Court was rightly dismissed.

They will, therefore, humbly advise His Majesty that this appeal should be dismissed, and that the appellant should pay the costs of the appeal.

Solicitors for appellant: *Watkins and Hunter.*
Solicitor for respondent: *Solicitor, India Office.*

REVISIONAL CRIMINAL.

Before Kulwant Sahay and Allanson, JJ.

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Feb., 1.

PARSOTIM DAS

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 263(g), 342 *and* 364—*Summary trial—examination of accused—questions and answers need not be recorded.*

Although section 342, which requires the court trying an offence to examine the accused person after the witnesses for the prosecution have been examined, applies to the summary trial of a warrant case, it is not necessary, in such a trial, for the court to record the questions put to the accused person or his answers. *Balkeshwar Singh* v. *Emperor*(1), referred to.

The facts of the case material to this case are stated in the judgment of Kulwant Sahay, J.

S. Sinha (with him *D. L. Nandkeolyar*), for the petitioner.

KULWANT SAHAY, J.—The petitioners were convicted of an offence punishable under section 121 of the Indian Railways Act. The petitioner no. 1 was sentenced to pay a fine of Rs. 60 and the petitioner no. 2 to pay a fine of Rs. 30.

* Criminal Revision no. 773 of 1926, from an order of F. F. Madan, Esq., I.C.S., Sessions Judge of Shahabad, dated the 4th October, 1926, affirming a decision of S. Chandra, Esq., Magistrate, 1st Class, Sasaram, dated the 15th September, 1926.

(1) (1922) 3 Pat. L. T. 322.

The only question raised in the present application for revision is that the provisions of section 342 of the Code of Criminal Procedure have not been complied with. The trial in this case was a summary trial under the provisions of Chapter XXII of the Code. Section 263 of the Code prescribes the form in which certain particulars have to be recorded and clause (*g*) of section 263 provides that the plea of the accused and his examination (if any) are to be recorded in the form prescribed. Section 364 of the Code prescribes the mode in which an accused person ought to be examined by a magistrate or by any court other than a High Court. Clause (*4*) of section 364, however, says :

" Nothing in this section shall be deemed to apply to the examination of an accused person under section 263 (or in the course of a trial held by a Presidency Magistrate)."

The case made is that the examination of the accused persons by the Magistrate was not in compliance with the provisions of section 364 inasmuch as the proper questions to be put to the accused under section 342 were not put to him. It appears from the ordersheet of the Magistrate that the examination of the prosecution witnesses was finished on the 10th August, 1926, and thereafter the accused were told what the charge against them was and they pleaded not guilty to the charge. Thereafter on the 20th August, 1926, one prosecution witness was recalled and examined. Thereafter as appears from the ordersheet of that date, the accused persons were examined and then a date was fixed for defence witnesses. The record in the form prescribed under section 263 of the Code shows in the column prescribed for recording the plea of the accused and his examination if any, the accused pleaded not guilty, and it is stated that they would file a written statement. Therefore on a reference to the ordersheet of the 20th August, 1926, and to the form prescribed under section 263 of the Code, it is clear that the accused were examined under the provisions of section 342. What the nature of the examination was is not stated; but in a summary trial, under the provisions of section 364, it is not necessary for the Magistrate to take down the questions and answers in detail and there is nothing in this case to show that the

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KULWANT SAHAY, J.

examination of the accused persons in this case was not a proper examination as prescribed by section 342 of the Code.

Reliance has been placed by learned Counsel for the petitioners upon the decision in *Balkeshwar Singh* v. *Emperor*(1) where it was held that a written statement filed by an accused person cannot take the place of his examination under section 342 and that the procedure laid down for warrant cases applies although the trial is a summary one under section 262 and that it is therefore mandatory upon the Magistrate to examine the accused under section 342 even in a summary trial of warrant cases. The correctness of this proposition is not challenged and nobody denies that even in a summary trial the Magistrate is bound to examine the accused under section 342. The question is whether he is bound to record the examination as provided for in section 364 of the Code. That section itself says that it is not necessary for the Magistrate in a summary trial to record the examination in detail. Nothing has been shown in this case that the examination was not a proper examination.

This application is dismissed.

ALLANSON, J.—I agree.

APPELLATE CIVIL.

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Feb., 4, 5, 8, 9, 10, 15, 16, 17, 18, 19, 22, 23.

Before Jwala Prasad and Bucknill, JJ.

ISHWARI PRASAD

v.

RAI HARI PRASHAD LAL.*

Hindu Law—Kayasthas of Bihar, whether belong to regenerate class—daughter's son, sister's son, mother's sister's son, adoption of, whether valid—factum valet, applicability of—plaintiff, whether can rely on general principle of prohibition, when point not specifically raised in pleadings—mere declaration, whether sufficient to create valid adoption—"giving and taking" essential—partition, claim for, after questioning an apparent adoption—limitation.

* Appeal from Original Decree no. 207 of 1922, from a decision of Babu Raj Narayan, Additional Subordinate Judge of Gaya, dated the 30th June 1922.

(1) (1922) 3 Pat. L. T. 822.

The Kayasthas of Bihar belong to one of the three regenerate classes and are not Sudras.

Tulsi Ram v. *Bihari Lal*(1), followed.

Raj Kumar Lal v. *Bisesher Dayal*(2), dissented from.

Asita Mohan Ghosh v. *Nirod Mohan Ghosh Maulik* (3), referred to.

The mere non-observance of the orthodox practices cannot take away the rights of a Kayastha in matters of inheritance, marriage and adoption.

The adoption of a daughter's son, sister's son and mother's sister's son being expressly forbidden by the texts on Hindu law, is void among the three regenerate classes, viz., Brahmins, Kshatriyas and Vaisyas ; and such an adoption cannot be validated by application of the doctrine of factum valet.

Bhagwan Singh v. *Bhagwan Singh*(4), followed.

But where, however, the plaintiffs did not specifically raise this legal objection to the validity of an adoption and the defendant was thus precluded from pleading custom varying the rule, and there was no issue raised upon the point, *held*, that the plaintiff could not rely upon the general principle of prohibition.

Lalrup Narain v. *Gopal Debi*(5), relied on.

Where the plaintiffs brought a suit for partition of the ancestral properties and for recovery of possession of their shares therein after bringing into question the validity of an apparent adoption by virtue of which the defendant had been in possession of the properties, *held*, that the plaintiffs could not succeed without displacing the adoption and that inasmuch as a suit for setting aside the adoption was long barred by limitation, the plaintiffs' claim for partition was time-barred.

Mohesh Narain Munshi v. *Taruck Nath Moitra*(6), *Jagadamba Chowdhrani* v. *Dakhina Mohan*(7) and *Vaithialinga Mudaliar* v. *Srirangath Anni*(8), followed.

Appeal by the plaintiffs.

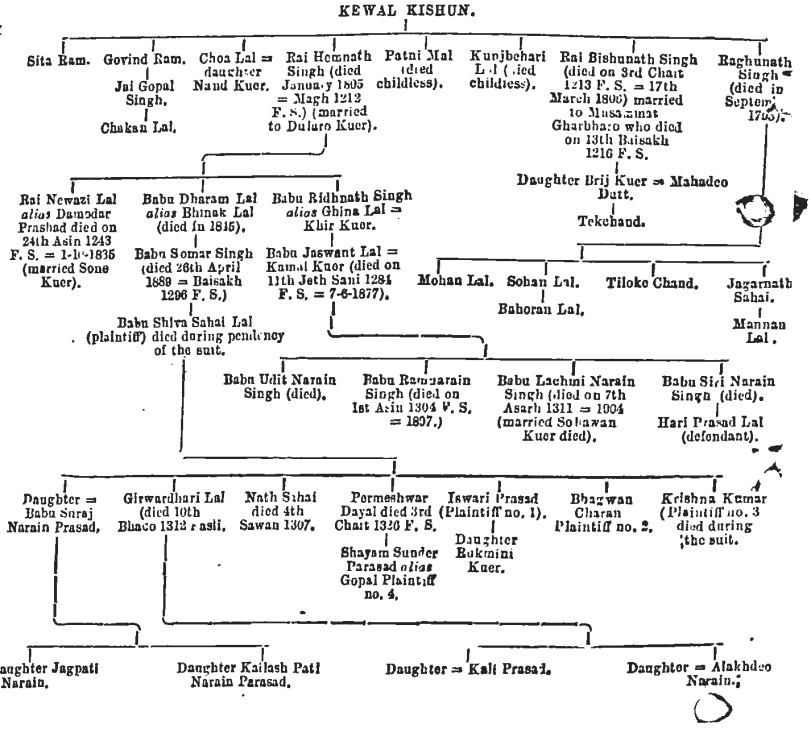
This was an appeal against a decision of the Subordinate Judge of Gaya, dated the 30th June, 1922, dismissing the plaintiff's suit.

(1) (1890) I. L. R. 12 All. 328, F. B.
(2) (1884) I. L. R. 10 Cal. 688.
(3) (1920) L. R. 47 I. A. 140 (145).
(4) (1899) I. L. R. 21 All. 412, P. C.
(5) (1909) I. L. R. 36 Cal. 780, P. C.
(6) (1893) I. L. R. 20 Cal. 487, P. C.
(7) (1886) I. L. R. 13 Cal. 308; L. R. 13 I. A. 84.
(8) (1925) I. L. R. 48 Mad. 883, P. C.

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The following genealogy taken from the pleadings and the evidence was not disputed :—



The dispute in this appeal related to the property of one Rai Hemnath Singh. He died in Magh 1212, Fasli, (January 1805), leaving his widow Dulari Kuar and a daughter Nand Kuar who was married to one Choa Lal. Nand Kuar had three sons Newazi Lal, Dharam Lal and Ridhnath. The plaintiffs were the descendants of Dharam Lal. The defendant was the descendant of Ridhnath. Newazi Lal had no issue. The plaintiffs' case was that the three brothers Newazi Lal, Dharam Lal and Ridhnath succeeded to the properties of Hemnath Singh being his daughter's sons and remained in joint possession of the same as members of a joint Mitakshara Hindu family; that by an arrangement set forth in an ekrarnama (Exhibit 1), dated the 14th November, 1811, entered into amongst the aforesaid three brothers, Newazi Lal was to remain in possession of the joint family properties during his lifetime and after his death Ridhnath, the ancestor of the defendant and his descendants were to remain in possession on behalf of the other members of the family, whereas Dharam Lal and his heirs were to receive allowances with rights in certain circumstances set forth in the ekrarnama to have the family properties partitioned; that in accordance with this arrangement after the death of Newazi Lal who had no issue Ridhnath came into possession of the properties on behalf of all the members of the family including Dharam Lal and his descendants; that the defendant was now in possession of the family properties on behalf of himself and the plaintiffs who were descendants of Dharam Lal and that he (the defendant) had been of late mismanaging the properties, had incurred heavy debts and had stopped payment of allowances to the plaintiffs and thus the plaintiffs were entitled to have the properties partitioned.

Accordingly, the plaintiffs prayed (*1*) for a partition of the family properties claiming 8-annas share therein, (*2*) in the alternative for delivery of possession of properties representing their moiety share in case

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they were found to be out of possession and (3) in the event of their not getting the aforesaid reliefs, for payment of maintenance allowance to them at the rate of Rs. 21 per diem from Kartik 1326, Fasli, declaring the same to be the first charge on the estate.

The defendant resisted the claim of the plaintiffs. He denied that the three brothers Newazi Lal, Dharam Lal (ancestor of the plaintiffs) and Ridhnath (ancestor of the defendant) succeeded to the properties of their maternal grandfather Hemnath Singh and remained in joint possession of the same as members of a joint Mitakshara family. He said that the ordinary succession by inheritance to the properties of their grandfather was intercepted by the adoption of Newazi Lal, one of the brothers, by Hemnath, and that Newazi Lal succeeded to the properties as an adopted son and having no male issue he adopted his youngest brother Ridhnath, ancestor of the defendant. Thus, the defendant said that the properties came to be held by Ridhnath not as a grandson of Hemnath but as an adopted son of his brother Newazi Lal, and the succession to the properties had accordingly been in the line of Ridhnath, and thus the properties had now come to the defendant in the ordinary course as the sole direct male descendant of Ridhnath; and that Dharam Lal the ancestor of the plaintiffs did not succeed to the properties nor had he any share therein and consequently the plaintiffs had no share or interest in the properties. He also denied the genuineness of the ekrarnama (Exhibit 1) set up by the plaintiffs as having been executed by the aforesaid three brothers and its binding effect on him. Accordingly, he said that the plaintiffs had no right to partition the properties in suit or to obtain maintenance allowance. He said that the plaintiffs and their ancestors were servants of the estate and received salaries and occasional help; that Sheo Sahay Lal, who was originally plaintiff and died during the pendency of the suit, was dismissed from service and was no longer entitled to receive any salary or maintenance. The defendant asserted that the

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plaintiffs or their ancestors had never been in possession of the properties and that the suit was barred by limitation.

The plaintiffs denied the adoption of Newazi Lal by Hemnath and that of Ridhnath by Newazi Lal set up by the defendant and the validity thereof.

Upon these contentions, the Subordinate Judge framed amongst others issues nos. 9 and 10. Issue no. 9 related to the adoption of Newazi Lal by Hemnath and issue no. 10 related to the adoption of Ridhnath by Newazi Lal.

The Subordinate Judge decided both these issues against the plaintiffs and his decision was challenged in this appeal.

K. Husnain, *Kailaspati*, *A. Reza*, *Syed Ali Khan* and *N. C. Ghose*, for the appellants.

P. Dayal, *S. Dayal* and *B. K. Prasad*, for the respondent.

23rd Feb. 1926.

JWALA PRASAD, J.—(After stating the facts set out above, proceeded as follows:)

The plaintiffs deny the adoptions and say that even if the adoptions did take place they were wholly invalid. It is urged that the adoption of Newazi Lal by Hemnath was invalid, inasmuch as Newazi Lal being the daughter's son of Hemnath was not capable of being taken in adoption by the latter. It is not disputed and in fact it has been settled by the authority of the highest judicial tribunal that an adoption of a daughter's son, sister's son and mother's sister's son being expressly forbidden by the texts on Hindu law is contrary to law and void in the three regenerate classes: Brahmin, Kshatriya and Vaisya and the principle of factum valet will not validate such an adoption [vide the Privy Council decision in *Bhagwan Singh* v. *Bhagwan Singh*(1)].

(1) (1899) I. L. R. 21 All. 412, P. C.

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The parties in this case are Kayastha of Gaya district in Bihar. The learned Subordinate Judge holds them to be Sudras upon the ground that according to the decision in *Raj Kumar Lal* v. *Biseshwar Dayal*(1), the Bihari Kayasthas as a class are Sudra, though he says that much stress was laid upon the evidence adduced in that case and that in this case no evidence was given by the parties. The decision in that case was based upon a passage in the Vyavastha Darpana of Shyama Charan Sarkar where it is stated that the Kayasthas were Kshatriyas, but they, at least those of Bengal, have been degraded to Sudradom by using after their proper names the surname " Das " instead of their own Kshatriya epithet " Varma " and also by omitting to perform the Upanayana ceremony. Some recent decisions of the Calcutta High Court have held that so far as the province of Bengal is concerned the Kayasthas are Sudra [*Asita Mohan Ghosh* v. *Nirod Mohan Ghosh Maulik*(2), *Bishwanath Gosh* v. *Srimati Shroshi Bala Dasi*(3) and *Bhola Nath Mitter*, v. *King-Emperor*(4)]. The last two cases have gone so far as to legalise inter-marriages between Kayasthas and Tantis and Domes in Bengal, on the ground that both of them are sub-castes of Sudras. The matter was neither inquired into nor discussed. It was taken as settled and the only authority relied upon is the aforesaid passage in the Vyavastha Darpana referred to above. The first of these cases, *Asita Mohan Ghosh* v. *Nirod Mohan Ghosh Maulik*(2) went to the Privy Council(5) and their Lordships of the Judicial Committee refused to give assent to the decision that the Bengali Kayasthas are Sudras and left the question open in the following words :—

" One contention was as to the rights of succession of persons who were by caste Bengali Kayasthas. It has been found not on evidence, but following some decisions of the High Court at Calcutta, that Bengali Kayasthas are Sudras. Their Lordships do not think it necessary to decide whether or not Bengal Kayasthas are Sudras, or to decide

(1) (1884) I. L. R. 10 Cal. 688.
(2) (1916) W. N. 20 Cal. 901.
(3) (1921) I. L. R. 48 Cal. 626.
(4) (1924) I. L. R. 51 Cal. 788.
(5) (1926) L. R. 47 I. A. 140, 145.

as to the construction of a text of the Dattakchandrika which has been referred to by the courts below as applicable to the Bengali Kayasthas. Their Lordships are of opinion that the rights of the parties depend on the construction of the agreement upon which Kumar Narendra Chandra Roy gave his son Sailendra Mohan Ghosh to Radha Mohan Ghosh in adoption."

The decision referred to in the passage quoted above as the basis of the view of the Calcutta High Court is that given in the case of *Raj Kumar Lal* v. *Biseshar Dayal*(1). The Privy Council decision does not seem to have been referred to in the subsequent decisions of that court.

Thus, the Calcutta High Court decisions as to the Bengali or Bihari Kayasthas being Sudras are inconclusive and the matter has been expressly left open by their Lordships of the Judicial Committee.

We are in this case concerned with the decision of *Raj Kumar Lal* v. *Biseshwar Dayal*(1) relied upon by the learned Subordinate Judge for his decision that the Bihari Kayasthas are Sudras.

Field J., who delivered the judgment in that case observed as follows :—

"We think that the whole question has been fairly summed up in the following passage of Babu Shyama Charan Sarkar's Vyavastha Darpana :— 'There is therefore a preponderance of authority to evince that the Kayasthas of Bengal or any other country were Kshatriyas but since several centuries past the Kayasthas at least those of Bengal have been degenerated and degraded to Sudradom not only by using after their proper names the surname 'Das' peculiar to the Sudras and giving up their own which is 'Varma' but principally by omitting to perform the regenerating ceremony Upanayana hallowed by the Gayatri."

According to the Vyavastha, the Kayasthas were Kshatriyas. Assuming for the sake of argument that the reasons given therein would entail degradation of a Kshatriya to Sudradom, it does not say that the Kayasthas of Bihar call themselves 'Das' or have given up the performance of Upanayana ceremony. Field, J., also does not find it as a fact that the Kayasthas of Bihar have adopted the surname of

(1) (1884) I. L. R. 10 Cal. 688.

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'Das' and, as a matter of fact, the parties in that case did not bear the surname of 'Das'. As regards the ceremony of Upanayana also his finding is only that the usage of wearing sacred thread and performing certain other ceremonies of Kshatriyas amongst the Kayasthas of Bihar as a class is not uniform. He applied the Vyavastha (opinion) of Babu Shyama Charan Sarkar simply upon the assumption that the Kayasthas of Bihar are not distinguishable from the Kayasthas of Bengal. In this view he discarded the evidence of the Pandits and the Vyavasthas of Benares to the effect that the Kayasthas of Bihar are Kshatriyas, holding that the Kayasthas of Bihar are different from those of Upper Provinces and Benares. Thus, Field, J., has differentiated the Kayasthas of Bihar from those of Upper Provinces and Benares. No reason has been given nor has any evidence been quoted for this view; it has simply been assumed. With great respects to his Lordship the view is not in consonance with the actual facts.

The social position, religious observances, customs and manners of the Kayasthas of Bihar are the same as those of the United Provinces and Oudh. Their marriages take place in the Kayastha families of the United Provinces and they dine with each other. They do not marry in the Kayastha families of Bengal, and in fact have no concern with the Kayasthas of Bengal in matters social or religious. The Kayasthas of Bihar like those of the United Provinces are governed by the same School of Hindu Law, namely, the Mitakshara law of Benares as distinguished from the Dayabhaga which governs the Bengali Kayasthas. Benares is looked upon as an authority in all religious and social matters by the Kayasthas of Bihar just as by the other communities of that province. The territorial division is only for the purpose of administration. A large portion of the Shahabad and Saran districts in Bihar was for a long time in the United Provinces, and the district of Benares was at one time in Bihar.

Mr. Risley of the Indian Civil Service in his book " The Tribes and Castes of Bengal ", 1891 edition, page 443, referring to the Kayasthas or Lalas of Bihar says that they

" trace the mythical parentage to Chitragupta, the scribe or recorder of Yama, the regent of the dead, and pique themselves on being wholly distinct from the Kayasthas of Bengal,"

and observes that

" The physical characters of the Bihar Kayasthas afford some ground for the belief that they may be of tolerably pure Aryan descent."

Mr. W. Crooke, in his book " Tribes and Castes of the North-Western Provinces and Oudh ", volume III, edition 1896, page 185, while quoting the aforesaid passage from Risley, remarks that the Bihari Kayasthas are identical with those of the North-Western Provinces and Oudh.

The correctness of the Calcutta High Court decision was doubted by the Full Bench of the Allahabad High Court consisting of Sir John Edge, C.J., Straight, Brodhurst, Tyrrell and Mahmood, JJ. The observation of Mahmood, J., who delivered the leading judgment in *Tulsi Ram* v. *Bihari Lal*(1) is weighty. Says his Lordship :—

" Notwithstanding the ruling of a Division Bench of the Calcutta High Court in *Raj Kumar Lal* v. *Biseshwar Dayal*(2), I entertain considerable doubts as to the soundness of the view which seems to have been adopted by both the courts below that the literary caste of Kayasthas in this part of the country to which the parties belong falls under the category of Sudras as understood in the division of mankind in the institute of Manu or elsewhere in authoritative texts of the Hindu law. The question is one of considerable difficulty not only ethnologically but from a legal point of view, so far as the administration of the Hindu law to the important section of the population is concerned."

(1) (1890) I. R. R. 12 All. 328, 334, F. B.
(2) (1884) I. L. R. 10 Cal. 688,

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His Lordship further observed that the Kayasthas of lower Bengal " may be distinguishable from the twelve castes of Kayasthas in Upper India, such as the North-Western Provinces and Oudh." The latter portion of the observation of his Lordship will apply to the Kayasthas of Bihar, inasmuch as they like the Kayasthas of North-Western Provinces and Oudh belong to the twelve sub-castes of Kayasthas and are descendants of the same common ancestor Chitragupta.

The learned Subordinate Judge to whom the judgment of Mahmood, J., was quoted felt himself bound by the Calcutta High Court decision. It seems that his attention was not drawn to the decision in the Privy Council case(1) which left the point open. It is remarkable that Sir John Edge, who delivered the Privy Council judgment was a party to the Full Bench decision of the Allahabad High Court in *Tulsi Ram* v. *Bihari Lal*(2).

The view taken in the Vyavastha Darpana or in the Calcutta decision based upon it has not been accepted by Hindu lawyers of eminence and authority. Referring to the recent decision of the Calcutta High Court, Golap Chandra Sastri in his book on Hindu Law (1924), at page 143, says that it has come as a surprise to the Hindu community. Sarvadhikari in his book " The Principles of Hindu Law of Inheritance " (1923), at page 835, says that the decision is not correct and that it has given a rude shock to the whole Kayastha community in Bengal. Similar is the view of Jogendra Chandra Ghosh in his book " The Principles of Hindu Law " (1917), at page 1006. These lawyers have not accepted the view that the Kayasthas who were admittedly Kshatriyas have become Sudras, nor the view that their giving up the sacred thread or assuming the epithet of ' Das ', even if this is a fact, would cause degradation. On this

(1) (1920) L. R. 47 I. A. 140. (2) (1890) I. L. R. 12 All. 328, F. B.

point Sarvadhikari in his learned work 'The Tagore Law Lectures' of 1880, at page 830, 1923 edition, says—

"Even the wearing of the sacred thread, the well-known badge of the regenerate classes, cannot furnish in many cases an indubitable test in this vexed question. There are many Thakurs and Banias who though they are universally recognized as members of the regenerate classes do not put on the sacred thread. The only safe rule to follow in all cases where the determination of the caste of a person is in question is to ascertain the custom and usage by which the social conduct of the person given is regulated. The remarriage of widows and equal rights and privileges of legitimate and illegitimate sons and similar customs and usages are marks by which Sudras can be distinguished."

The learned author in the succeeding pages 831 to 835 of the book examined the question closely with reference to the texts of Srutis, Smritis and Puranas, judgments of subordinate courts, authoritative gazetteers, the Darpanas of the Pandits of the Sadar Dewani Adalat, Agra, Yajnavalkya and its commentary, the Mitakshara which governs the Kayasthas of Bihar, North-Western Provinces and Oudh and has held that the Kayasthas belong to the regenerate class, are Kshatriyas and are by no means Sudras. He seriously questions whether the non-observance of some of the practices can permanently degrade people belonging to a high class into a lower one and says that suppose the people of this caste again resume their former practices, as many Kayasthas in Bengal have done in recent years, what would be their status. The question in the Calcutta case, he says, was neither argued nor decided and the opinion of Shyama Charan Sarcar in his Vyavastha Darpana was regarded as decisive on the point. He says the Kayasthas of Bengal cannot be Sudras.

The cases relied upon by the Calcutta High Court for upholding a marriage between a Kayastha and a Sudra woman were those in which the parties were

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from their origin different sections of Sudra caste. Those cases should not have been applied to the Kayasthas who by their origin are Kshatriyas even if they are degraded Kshatriyas. A person belonging to a regenerate class does not lose his right of being governed by the rules of that class though he might be socially looked down upon.

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As regards the Kayasthas of North-Western Provinces and of Bombay (this will include the Bihar Kayasthas), Sarvadhikari says that they justly say that they should be governed by the same laws by which the regenerate classes are governed. Similar is the view of Golap Chandra Sarkar both in his book on Adoption and on Hindu Law. He also closely examined all the texts and authorities on Hindu Law: Vyas, Vishnu, Vrihata, Prasara, Padama, Skanda and Bhavishya Puranas, Yajnavalkya and Mitakshara. He is emphatic in his opinion that the Kayasthas are Kshatriyas and that the non-observance of the ceremonies would not degenerate a higher caste into a lower one so as to affect his civil rights. He says that the caste of a person did not originally depend on heredity but on the occupation and possession of characteristic merits under the texts of Manu, but by lapse of time it has become a matter of heredity and merit or no merit the son gets the caste of the father. By non-observance of ceremonies no regenerate class has been degraded. If that were so, there will be no caste among the Hindus now except the Sudra, as there are very few of the regenerate classes who can say that they and their ancestors did all the duties imposed on the caste. Why then the Kayasthas of all the regenerate castes should be degraded into the category of Sudras for want of orthodoxy? He further says that it should be noted that in all other respects the Kayasthas observe the rules enjoined upon the Kshatriyas.

Mr. J. C. Ghosh is also of the same opinion. Referring to Vyavastha Darpana of Shyama Charan he disputes its correctness and its applicability to the Kayasthas of North-Western Provinces who have got

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the sacred thread. He says that the distinction of caste being based on the nature of occupations of classes the Kayasthas who are Judicial and Revenue officers, administering the laws of the Rishis and the Vaidyas, who were physicians in the Hindu times, could not be regarded as Sudras.

The aforesaid Hindu lawyers base their opinion upon the Srutis, Smritis and Purans, and the social position and occupations of the Kayasthas as well as upon the custom and usages regulating the marriages and other religious rites and ceremonies. The decision of the Calcutta High Court is based solely upon the Vyavastha Darpana of Shyama Charan Sarkar. The correctness of the decision has been doubted by the Full Bench of the Allahabad High Court. The recent decision of the Privy Council left the point open. The question is important, not only ethnologically but from the legal point of view so far as the administration of the Hindu law to this important section of the population is concerned, as observed by Mahmood, J., in the case already referred to. Hence the question needs an early solution. Its determination will materially affect the law which will govern adoption, marriage, rights of legitimate and illegitimate children to succeed, etc., inasmuch as the Hindu Law with regard to these matters is different for the three regenerate classes and the Sudras.

The Smritis of the Rishis, such as, Manu, Yajnavalkya, Narada, Vyas, Vasishta, etc., have divided menkind into four castes: Brahman, Kshatriya, Vaisya and Sudra. Manu in Chapter X, sloka 4, says that there is no fifth caste. Therefore, the Kayasthas have to be located in one of these four castes. The Mahabharata asserts that at first there was no distinction of classes, but that these have subsequently arisen out of differences of character and occupation. According to Dr. Muir (Sanskrit Text, volume I, page 159 onwards)

"The members of every political society are divisible into four classes corresponding to the four castes of the Hindus. Those distinguished by

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intellectuality, learning and religion are the real leaders of the society: next in importance are the royal class, the warriors on whom the protection and the very existence of the State depend, and who are characterised by physical agility, courage, administrative capacity and intelligence. Then come those concerned in production of wealth by agriculture, trade and cattle breeding or cattle tending, requiring intelligence and a lower standard of morality. And lastly the labourers serving the preceding three classes or practising the mechanical or other similar arts, distinguished by their capacity for physical labour and spirit of dependence. The virtues and qualities requisite for distinction in these occupations as well as their importance to society are taken into consideration for fixing the relative rank of the four classes; and the common story of their origin is nothing more than an allegory representing society and the different classes of its members, as one human body and its limbs respectively. The fact that there are as many castes as there are occupations proves the origin of the institution."

Dr. Muir gives a similar explanation of the mixed classes mentioned in the Smritis. According to him the origin of the mixed classes by intermarriage between the four tribes is imaginary and allegorical. He says,

"Where the abstract qualities of any two of the four tribes were thought requisite for filling a particular occupation, persons following that occupation were supposed to be descended from the offspring of an intermarriage of a man belonging to the one tribe, with a woman appertaining to the other."

He illustrates this by referring to Ambasthas or the physician class of Bengal who combine in themselves the culture and learning of Brahmans and the commercial instincts of Vaisyas. The higher instinct is supposed to be derived from the superior class represented in the Smritis as the father and the lower instinct from the lower order represented by the mother. Thus he says,

"The principle of heredity underlies the system, and gained considerable support from the state of early society."

The scientific way of dividing the members of a society according to character and occupation laid down by Dr. Muir has been expressed in the form of allegory by the Dharma Sastras of Manu and other Rishis. It is sufficient to refer to Manu for all the Smritis and Puranas agree therein.

Manu says that for the furtherance of the good of the world the God Brahma created Brahman,

Kshatriya, Vaisya and Sudra from his mouth, arms, thighs and legs, according to the relative sacredness of these parts of the body. The Brahman was produced from the mouth for the reason of being the repository of Vedas, the ruler of all the creation and one who lays down the duties of all the social orders; the Kshatriya from the arms for the protection of the subjects; the Vaisya from the thighs or loins for the purpose of production of wealth by agriculture, trade, etc., and Sudra from the legs for the service of the three classes (Manu, Chapter I, slokas 31 and 88 to 92).

Manu then deals with the mixed classes by inter-marriage between the four castes according to the occupation requiring mixed qualifications of the principal four castes and lays down rules for the location of them among the four classes according to their heredity. The general principle is that the offspring of an inter-marriage between two castes is lower than the caste of his father and higher than that of the mother. His caste is that of his father though inferior in rank due to the mother being of a lower order. When none of these tests applies, Manu would have the class determined in accordance with the occupation, act or conduct of the party. The names of castes and sub-castes etymologically denote the occupations of the various castes and sub-castes. The origin of a caste is attributed to a particular limb of the God Brahma to mark the distinctive occupation and status of that caste in society. In this all the Smritis of Manu and others as well as Dr. Muir agree. These allegories and legends as to the origin of particular castes are important to show the character and occupation which originally were attributed to them, the social position, the physical and mental capacity which they were originally supposed to possess and the light in which they were regarded by other castes. Therefore they afford very important tests for determining the caste of a particular community. I would, briefly refer to them in connection with the Kayasthas whose caste we have to determine.

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According to the Hindus, the souls of men after death receive rewards and punishments according to their sins and virtues, and hence it is believed that good and bad deeds of men are not destroyed. The souls of men after death go to Yamapuri which is presided over by deities called Yamas who keep records of men's actions and accordingly give them their dues. The principal Yama is called Yamaraja or Dharmaraja, that is, the ruler of Yamapuri or the King of Laws.

The Yama Samhita which is an extract from the 9th chapter of Ahilya Kamdhenu, a work of Hindu Law, says that Dharmaraja complained to Brahma about his difficulties in performing his most responsible duties of keeping records of the deeds of men and doing justice to them. Brahma went into meditation. Chitragupta sprang from his body and stood before him bearing an inkpot and a pen. The God Brahma (Creator) said "Because you are sprung from my body (kaya) therefore you shall be called Kayastha and as you existed in my body unseen I give you the name of Chitragupta." He then assumed charge of Yamapuri. Dharma Sharma married his daughter Irawati to Chitragupta and Manuji, son of Surya (the Sun) married his daughter Sudhakhina to him. Chitragupta had eight sons from the former and four from the latter and these twelve sons became the progenitors of the twelve subdivisions of the Chitraguptavansi Kayasthas, namely, Mathur, Gaur, Nigam, Ashthana, Kulshretha, Suryadwaja, Balmika, Bhatnagar, Srivastava, Ambastha, Saksena and Karana.

In Padam Purana, Uttar Khanda, it says that Chitragupta had twelve sons by two wives. They were all invested with the sacred thread and were married to Nagakanyas. They were the ancestors of the twelve subdivisions of the Kayasthas. The story also says that the Kayasthas are Chitravansi Kshatriyas and never Sudras. They are entitled to all the sanskars.

The same legend with some slight difference is given in most of the Puranas. Padma Purana after stating the legend says " Chitragupta was placed near Dharmaraja to register the good and evil actions of all sentient beings, that he was possessed of supernatural wisdom and became the partaker of sacrifices offered to the gods and fire. It is for this reason that the twice-born always give him oblations from their food. As he sprang from the body of Brahma he was called Kayastha of numerous gotras on the face of the earth." Vide W. Crooke's Tribes and Castes, North-Western Provinces and Oudh, 1896 edition, volume 3, pages 184-213.

In Shristhi Khanda the same Purana says that the sacrificial rites and study of the Kayasthas should be like the Dwijas and their occupation like that of the Kshatriyas.

Bhavishya Purana states that God, the Creator, gave the name and duties of Chitragupta as follows :

" Because you have sprung from my body, therefore, you shall be called Kayastha and shall be famous in the world by the name of Chitragupta. Oh my son, let your residence be always in the region of the god of justice for the purpose of determining the merits and demerits of men and receiving my irrevokable order you should observe the Dharma, law and usages of the Kshatriya tribe according to Sashtras."

Vignana Tantra says the same thing, adding that the descendants of Chitragupta are Kshatriyas by caste, and not Sudras by any means.

The same is the enjoinment of Brahma to Chitragupta according to Brihat Brahma Khanda quoted by Kamalakar Bhatta. He was named Kayastha Kshatriya having sprung from the body (kaya) of Brahma. He was directed to perform the sanskars of Kshatriyas, to marry Kshatriya girls and to have writing as his profession.

The story of Chandraseni Kayasthas as having descended from Chandra Sen, a Kshatriya Raja, is well-known and has been reported in the Puranas and

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also in the modern treatises on tribes, such as of Sherrings, volume II, Chapter II, page 181, 1879 edition, and Steel's Law and Customs of Hindu castes in the Deccan Province, page 94, 1868 edition. For a detailed account, vide Skanda Purana Renukamahatamya. On account of contest between the Brahmans and the Kshatriyas with respect to their relative rank in society a fierce war broke out between them in which Parsuram the Brahmanic hero is said to have twenty-one times extirpated the Kshatriya race (Sarkar's Hindu Law of Adoption). His father was killed by a Kshatriya Raja; he pursued in his thirst for Kshatriya blood the pregnant wife of Chandra Sen into the hermitage of Dalabhaya Rishi. The child in the womb was saved through the entreaties of the Rishi, who when born was called the Kayastha and though deprived of the martial profession was directed to carry on the profession of reading and writing which appertained to the Kshatriyas. He was attached to the Court of Kings, was initiated into the sanskars of the Kshatriyas and was taught Vedas. His descendants are the Kshatriyas in the Deccan and are known as Parbhu Kayasthas.

Skanda Purana in another place as quoted in Bachaspatya, page 2943, gives an account of Raja Chitra also called Vivaswan, Aditya or Mitra, the blessed and purest, having performed for a long time Tapasya (austerities) obtained from God Surya the boon of becoming sarvagya (omniscient), possessed of divine intellect and supernatural powers. Dharmaraja finding his duties of keeping records of the deeds of men and doing justice according to their merits and demerits too onerous managed to remove Raja Chitra to Dharmapuri to assist him in his duties. Chitra having thus disappeared from the mortal world was called Chitragupta. He became one of the fourteen Yamarajas or ruler of Yamapuri (Daksha Smriti).

Garuda Purana describes the imperial throne of Chitragupta in Yamapuri holding his court and

dispensing justice according to the deeds of men and maintaining their record, in the following words:

धर्म राजोचित्रगुप्तः श्रवणोभास्करादयः
कायस्थं तत्पश्यन्ति पापंपुण्यं च सर्वदः

(There Dharmaraja, Chitragupta, Sravana and others see all sins and virtues which remain concealed in the bodies of men.)

Vyoma Samhita quoted in Shabda-Kalpadrum says

ब्रह्मकायसमुद्भूतो कयस्थो ब्र [illegible]क्षः
कलौहि क्षत्रियस्तस्य जपयेज्ञचुराजनम् ॥

The Kayasthas have sprung from the Kaya or body of Brahma. They are similar in rank to Brahmans, but in Kaliyug their religious observances and duties have been prescribed to be those of Kshatriyas. Brahma himself is said to have ordained them to perform the duties of Kshatriyas. Similarly, Apastamba Shakha of the Veda quoted in Shabda-Kalpadrum, 2nd part, page 228, Shabda 20, under Kshatriya, states that Kayasthas are Kshatriyas. Chitragupta who reigns in heaven and his sons Chaitrarath who was light of the family, meritorious and of illustrious deeds, ruled on earth for a long time as king of Chitrakoot, Allahabad.

Neru Tantra quoted in Shabda-Kalpadrum under the word ' Kshatriya ' supports the same view.

The Mahabharata (Anusasan Parva, Chapter 130) recites the teaching of Chitragupta requiring men to do virtuous and charitable acts and performing Yagya, saying that men are rewarded or punished according to their good or bad deeds.

These allegorical descriptions of the origin of Chitragupta and the Kayasthas having sprung from God Brahma in meditation and, as Risley puts it, from his inner consciousness for the purpose of

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managing the business affairs, performing literary work, administering justice, punishing and rewarding the deeds of mortals and keeping records thereof, indicate the status and position of the Kayasthas in society and their occupation as appertaining to the three higher or regenerate classes and that they could not be classed as Sudras whose origin is said to be from the lowest part of Brahma indicative of the servile duties requiring absolutely no mental activity.

The name Kayastha etymologically denotes the occupation and social position of the Kayasthas. According to Shabda-Kalpadrum, a dictionary of high authority, and Brihat Bidhan, Kayastha is defined as

काय + स्था + क

कायेषु तिष्ठतीति = कायेषु सर्वभूतशरीरेषु

अन्तर्यामी यथा तिष्ठतीति

that is, one who lives in the body of everybody and thus comes to know of the inner life of men, that is, their deeds and misdeeds, merits and demerits. The word "Chitra" (चित्र:) is defined by Shabda-Kalpadrum as follows :

चित्रयति पाप पुण्य विचारात्चित्रं करो ति लिखतीत्यर्थः

यमविशेष: यर्थातथ्या दिन्तेव

one who pictures, records and considers the sins and virtues of men and who is one of the Yamas, so as to give the mortals their dues after death.

Turning to the Smritis, Vishnu in Chapter VII, verse 3, says that a document attested by the king is one which is written or prepared by a Kayastha, an officer of the court appointed by the king and stamped with the fingerprints of the head of the department. The words are

राजधिकरणे तन्नियुक्त कायस्थ कृतं तदध्यक्षाक्षर चिन्हित राजसाक्षिकम् ।

Virihat Prasara in Chapter X, sloka 10 says

लेखकानपि कायस्थान् लेख कृत्यहितैषिण: ।

Kayasthas should be appointed as writers being expert in the art of writing.

Again in Chapter I, sloka 235, he says that Danda-dhrita (दराडधृत), the Magistrates and Judges of the courts should be (dharmagya) persons versed in laws and good administration, Kayasthas who are versed in the art of writing (लेखकानपि कायस्थान्)

Similarly, Shukraniti in Chapter XXII, sloka 420 describes Kayasthas as Lekhaks (कायस्थो लेख स्तथा), and in Chapter II, verse 178, says that the accountant and lekhak knew the Vedas, Smritis and Puranas.

Brihaspati quoted in Prasara Madhava and Vyas cited in Vaijayanti say that " a Lekhak and Ganak (writer and accountant) must be a person who has command over languages (literally who knows particulars about words), is pure in mind (mind and body), has control over his temper, is not covetous, is truthful and can write clearly and in a lucid style." Vyas says that the writer and the accountant should be श्रुताध्ययन सम्पन्नं that is versed in Mimansa (Srutis) and Vedas (adhyayana) as explained by Mitakshara in commenting upon Yajnavalkya, Chapter II, sloka 2, which says that the king's counsellors should be versed in the sacred books of Mimansa and Vedas, expert in law, truthful and impartial.

Slokas 10 to 12, Chapter I of Vyas and slokas 32-34, Chapter VIII of Usana are either interpolations as some say, or, do not apply to the Chitraguptavansi Kayasthas who have been described by Vyas as writers and accountants, versed in Vedas and Smritis and councillors and courtesans of kings, as Shyama Charan Sarkar himself says.

Yajnavalkya in slokas 317 to 320 describes how the edicts of the king should be written, sealed and

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promulgated. Apararka in his commentary upon these slokas quotes from Vyas and shows that these edicts should be written by Lekhaks, the ministers of war and peace (sandhi vigraha kari), and that they should be promulgated to the gentry and officials among whom Kayasthas have been mentioned.

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Similarly, Vijnaneshvara in his Mitakshara commenting upon these slokas says

"He (king) should cause it to be recorded by that officer of his, who is in charge of war and peace (i.e., by a Kayastha), and not by anybody else. As says a Suriti: 'That officer of his, who is sanuhi-vigraha-kari or the officer in charge of peace and war should be its writer (lekhak)."

Yajnavalkya uses the word "Kayastha" in slokas 335-36, Chapter I. Commenting upon this, Mitakshara says that Kayasthas are accountants and writers (कायस्थागणका लेखकाश्च). He makes the word "Kayastha" synonymous with accountants and writers. Similarly, Apararka says that Kayasthas were revenue-collectors (kar-adhikrita).

The author of the Viramitrodaya makes the following comment on the text of Vyas already quoted and proves that the Kayasthas are a twice-born class.

"The accountant must be twice-born, because it is declared that he should be a person who has studied the Vedas which none but a twice-born can do; so also the writer must be twice-born, because they go together."

The accountants and scribes constitute one of the ten parts of a judicial proceeding (Jolly's translation of Narada, page 6, section 16). Brihaspati says the same thing, as quoted in Prasara Madhava, Vyohara Kanda.

Yajnavalkya in sloka 335 (numbered 334 and 336 in some books) enjoins the king to protect his subjects from the oppression of the Kayasthas especially. Mitakshara gives the reason that they being the favourities of the king (Rajvallabha) and officers of the court as ministers of war and peace, councillors and writers and accountants are more likely to take

advantage of their position and oppress the subjects. This view is in accordance with Manu who in Chapter VII, verse 123, says that the king's servants connected with the government of the realm may become exacting and deceitful and the king should protect his subjects from such officials.

According to the Smritis, the officers of the realm, such as, ministers of peace and war, courtesans and councillors, governors and headmen of villages should be men versed in the Sastras, valorous and born of noble family, pure, intelligent, affluent in wealth and of tested virtue and comprehensions: Manu, Chapter VII, verses 54 to 121; Yajnavalkya, Chapter I, verse 312.

The officers of the court must be twice-born who are preferable to Sudras even if they are by name twice-born. A Sudra, the Smritis say, should in no circumstances be associated with the court: Manu, Chapter VIII, verse 20; Vyas, Chapter I, verse 6; Vasistha, Chapter XVI. The realm of a king wherein a Sudra official administers justice is destroyed under his very eyes like a cow merged in the mire (Manu, verse 21, Chapter VIII).

Thus, according to the Smritis and the commentaries thereon, notably of Apararka, Vigneshwara called the Mitakshara and Viramitrodaya the recognized authorities in the Benares School, the Kayasthas were officers of the court, ministers of war and peace, writers and accountants and were required to study the sacred Vedas and the Dharma Sastras. Had they been Sudra, they would not have been allowed these privileges which appertain exclusively to the regenerate classes.

By origin the Kayasthas were of pure regenerate descent. Even if they be of mixed origin, as some say, they cannot be Sudra as shown below.

Yajnavalkya in Chapter I, sloka 92, calls a son begotten by a Vaisya (twice-born) on a Sudra woman

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a Karan. Some commentators make Karan synonimous with Kayasthas. Yajnavalkya himself does not say so. The confusion has probably arisen on account of Karan being one of the twelve sub-castes of Kayastha which has nothing to do with the offspring of mixed marriage mentioned either in Manu or Yajnavalkya. This is clear from Shabda Ratnakar which gives several meanings of the word " Karan ", such as,

" Cause, body, war, son of a Vaisya by a Sudra woman and a subdivision of the Kayasthas."

These are different uses of the word; one has nothing to do with the other. Karan sub-caste of the Kayasthas descended from Arun one of the twelve sons of Chitragupta is not to be confounded with the offspring of a Vaisya husband and a Sudra wife. Even if Karan be Kayastha he will not be a Sudra, for according to Manu he will retain the caste of the father though he may not have the same respect on account of inferiority of the mother (सदृशानेव तानाहुर्मातिदोष विर्गाहतान्) the reason for this given by Manu in Chapter X, sloka 72, being that the seed of the father is of greater importance in an act of fecundation. In sloka 41 of the Chapter he clearly states that the sons begotten by twice-born ones on wives of their own caste or on wives belonging to an inferior caste have the rights and privileges of the twice-born, that is, of being initiated with the thread, etc., and that he will not be a Sudra. Thus, even if Karan be the offspring of a Vaisya on a Sudra woman, he will be a twice-born, and not a Sudra. In any case Karan is only a sub-caste of Kayastha and cannot embrace the whole community. It is undisputed that if Kayastha is the offspring of a Kshatriya by a Vaisya woman, as given by Wilson in his glossary, he will be a twice-born called Mahishya according to Manu and Yajnavalkya, because both the father and mother are such. If he is the offspring of a Kshatriya by a Sudra wife he will be an Ugra Kshatriya both according to Manu and Yajnavalkya, and an Ugra Kshatriya is

not a Sudra as held in *Sri Gajapaty Hari Krishna Devi Garu* v. *Sri Gajapaty Radhika Patta Maha Devi*(1), *Brindavana* v. *Radhamani*(2), *Jwala Singh* v. *Sardar*(3), and *Chuoturya Run Murdum Syn* v. *Sahub Purhulad Syn*(4), where the Vyavastha of the Pandit of Sadar Dewani Adalat was not accepted and the Rajput was held to be a Kshatriya. These authorities have examined the texts carefully and have gone so far as to hold that even an illegitimate son of a twice-born retains the caste of his father and does not become Sudra.

Thus, even if Kayastha is an offspring of intermarriage he will be a twice-born. Even Shyama Charan Sarkar whose Vyavastha is the basis of the decision under review does not accept that a Kayastha is the offspring of a mixed marriage or that he is Karan. He is decidedly of opinion that the Kayasthas are Kshatriyas and this is so according to the Smritis and the Puranas. He, however, says that they have degraded themselves to Sudradom by omitting to perform the Upanayana ceremony. This will not cause their degradation to Sudradom, as Manu himself in Chapter X, verse 20, definitely lays down that twice-born ones devoid of the rights of initiation with the thread are Vratyas (broken vowed ones) called Vratya Brahmans, Vratya Kshatriyas and Vratya Vaisyas respectively. Among Vratya Kshatriyas he mentions the name of Karan in sloka 22. So if Karan is synonymous with Kayastha as some commentators say, then Kayastha will be Vratya Kshatriya, that is, Kshatriya by origin and descent but of broken vows. Yajnavalkya in Chapter 2, sloka 38, says that they will be Vratyas

"so long as they do not perform the sacrifices called Vratyastoma",

and Mitakshara, commenting upon this, says,

"performing which (Vratyastoma) they again become entitled to Upanayana."

(1) (1865) 2 Mad. H. C. R. 369.
(2) (1889) I. L. R. 12 Mad. 72, 78.
(3) (1919) I. L. R. 41 All. 629.
(4) (1857) 7 Moo. I. A. 18.

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Mitakshara and Balambhatta both explain Vratya as devoid of sacrement, that is, excluded from performing the religious ceremonies. They do not say that such a twice-born will lose the civil rights of succession, marriage and adoption. Sarvadhikari, as already observed, emphatically expressed it and asked the question, "What would happen if the Kayasthas, who are Kshatriyas and who accordnig to Shyama Charan Sarkar omitted to perform Upnayana and thus degraded themselves to Sudradom, would again begin, as many are doing, to wear the sacred thread?" It is not clear whether Shyama Charan Sarkar means by degradation to Sudradom that they become Sudra in all respects and will be governed by the laws of Sudras. Perhaps he means to say what Yajnavalkya and Mitakshara have held that they will be devoid of sacrement only, while retaining their rights as Kshatriyas by birth.

Sirisa Chandra Vidyarnava in his translation of the Mitakshara at page 214, 1918 edition, upon the authority of Balambhatta, says that the Chandraseni Kayasthas or Parbhus of Bombay and the Chitragupta Kayasthas are Kshatriyas. So far as the Kayasthas of Upper India, Bihar and the Deccan are concerned, the matter is concluded by the authorities of Mitakshara and Viramitrodaya, which govern them, that the belong to the regenerate class. By profession assigned to them from time immemorial they must be regarded as Kshatriyas, for according to Amar Kosha, Kshatriya verga, slokas 16-17, writing is one of the duties of Kshatriyas.

The careful research of the modern writers of authority shows that the position assigned to the Kayasthas of the aforesaid provinces is still retained by them by occupation and observance of religious rites and ceremonies.

W. Crooke of the Bengal Civil Service in his book on the Tribes and Castes of the North-Western Provinces and Oudh, volume III, pages 184 to 213, deals with the Kayasthas. He gives the Puranic legends of

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their original growth already referred to. Their common ancestor was Chitragupta. He had twelve sons: Bhanoo, Vibhanu, Vishwabhanu, Virjawan, Charu, Sucharu, Chitra, Matiman, Himavan, Chitracharu, Arun and Atindriya. The twelve sub-castes of Kayasthas have descended from these twelve sons: Srivastava from Bhanoo, Surajdhwaja from Vibhanu, Asthana from Vishwabhanu, Balmiki from Virjawan, Mathur from Charu, Gaur from Sucharu, Bhatnagar from Chitra, Saksena from Matiman, Ambastha from Himavan, Nigram from Chitracharu, Karan from Arun and Kulasrestha from Atindriya. Bhanoo, the ancestor of Srivastava immigrated to Kashmere where he became Raja of Srinagar and obtained the title of Rajadhiraja from Chandragupta the Raja of Magadh (South Bihar). Vibhanu, the ancestor of Surajdhwaja obtained this title from Raja Sursena of the Ikshwaku race because he helped him in performing a sacrifice. Vishwabhanu the ancestor of Asthana was honoured by the Raja of Benares and presented to him astha or eight kinds of precious pearls and hence he was called Asthana. Virjawan, the ancestor of Balmiki, gained the name of Balmiki on account of his austerities and devout meditation in God. Mathurs, the descendants of Charu are so called on account of their having settled at Mathura. The Gaur Kayasthas, descendants of Sucharu, are called from Gaur or Gauda, the old capital of Bengal. The Sena dynasty was furnished by this sub-caste; their ancestor Bhagadutta is said to have fought in the war of Mahabharata on the side of Duryodhana against Yudhishtara. Raja Lalasena was another famous king among them. The last of that dynasty was Raja Lakshmania. Bakhtiar Khilji deposed the Gaur Kayastha dynasty. The Bhatnagar sub-caste derives the name from the residence on the bank of the Bhat river or the old town of Bhatner the fort of which is of some historical interest having been at various time captured by Mahmud of Gaznavi, Tamur and Kamran son of Humayun. The Saksena sub-caste, literally "friend of the army", was given this title by the

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Srivastava Raja of Srinagar on account of their skill in war. One of their ancestors Surajchandra or Somadutta obtained the title of Kharua as a recognition of his honesty as treasurer to Kusa, one of the twin sons of Rama and Sita; hence the Kharua sect of Saksena sub-caste. The other section called Dusra is so named because one of them accompanied Humayun, father of Emperor Akbar, durng his refuge in Iran after his defeat by Shershah. Ambastha are so called because of their worship of the goddess Ambaji. They have settled at Girnar hill. They are versed in the art of surgery, and there is a colony known as Kothar at Nagram in the Lucknow district, who have a great local repute. The Ambastha sub-sect is also to be found in the Gaya and Patna districts of Bihar. There is a class called Ambastha who are Vaidya or physicians in Bengal. In the Sruti already referred to (Manu X, page 8), Ambastha is mentioned as descended from a Brahman and a Vaisya woman. Some say that this refers to the Ambasta Kayasthas of Bengal. Even then, according to Manu, they would be inferior to Brahman and superior to Vaisya. They will take the caste of their father though of an inferior order; but really the Ambastha referred to in the Smriti is not to be confounded with the Ambastha sub-caste of the Kayasthas who are descendants of Chitragupta through his son Himavan.

The Karan sub-caste, the descendants of Arun, says Mr. Crooke, is a purely Aryan sub-caste, and they traditionally take their name from Karnali on the Narbada. It applies to the indigenous writer class in Orissa called Karan of whom a full account is given by Mr. Risley.

According to the account given by Crooke of the different sub-castes of Kayasthas, they seem to have played a very important part in the history. They founded dynasties, became Rajas and Rajadhirajas, tought on the battlefields, displayed skill in war and were honoured by the kings and the people and occupied a high place in society. Their religious

ceremonies were performed according to the rules prescribed for the higher classes. As to marriage, Crooke says " The Kayasthas follow the highest form of the eight kinds of marriage recognized by Manu in his institute—that known as Brahma. The ceremony is performed according to the rite laid down in the Sanskrit treatise known as the Vivah Paddhati, with the Vedic formulæ (Mantra) as in the case of Brahmans and the other twice-born classes. The essential and binding portions of the ceremony are the Kanyadan or the giving of the girl by her father, the Panigrahna or taking of the bride's hand by the bridegroom, Saptapadi or sevenfold circumambulation of the sacred fire by the pair, and the Sindurdana or application of red powder by the bridegroom to the parting of the hair of the bride. As a rule too, every Kayastha bridegroom must be invested with the sacred thread before or at the time of marriage." The marriage among them is forbidden between sapindas, that is, who are within five degrees of affinity on the side of the mother and seven degrees on the side of the father. No marriage can take place between persons belonging to the same *al* nor can a man marry a woman belonging to the *al* of his maternal grandfather or great grandfather. Polyandry is strictly prohibited and polygamy though allowed is rarely resorted to even though the first wife is barren. Remarriage of widows is absolutely prohibited. They worship Chitragupta, particularly on the second day of the bright fortnight of the month of Kartik known as Yama Dvytiya which is a day for worship for all the Hindus, Chitragupta being one of the fourteen Yamas. The other deities, says Mr. Crooke, are the same as those of the other Hindu castes.

As to social status and occupation, Mr. Crooke says " Notwithstanding the jealousy with which they are regarded by their less esteemed neighbours the social position of the caste is in the main literary ; they have supplied many valuable officers of Gov ment and members of the Bar and educati

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department. There are numerous Sanskrit terms indicating the present occupations of the caste, such as Lekhaka and Ganaka.

To the same effect is the observation of Mr. Risley in his book called the Tribes and Castes of Bengal, 1891, volume I, pages 431 and onwards. At page 452 he says

"Notwithstanding the jealousy with which the less astute neighbours regard them, the social position of the Bihar Kayastha is unquestionably a high one. Popular opinion ranks them next in order to Babhans and Rajputs, and, like these, when they hold land as raiyats, they get their homestead free of rent."

At another place, at page 443, he says,

"The physical character of the Bihar Kayasthas affords some ground for the belief that they may be deliberately of pure Aryan descent."

They claim to be the descendants of Chitragupta who was produced from the inner conscienciousness of Brahma for the purpose of managing the business affairs and to have been invested with the sacred thread marking the twice-born caste, and they claim to be distinct from the Kayasthas of Bengal. He observes,

"Putting tradition aside and looking on the one hand to the physical type of the Kayasthas and, on the other, to their remarkable intellectual attainments it would seem that their claim to Aryan descent cannot be wholly rejected."

He describes the religion and the occupation of the Bihar Kayasthas to be the same as those of the United Provinces and Oudh described by Mr. Crooke. They observe the same marriage rules as are observed by the Brahmans or the other twice-born ones, and the widows do not remarry and exogamy is carefully observed in relation to the *kul* and they have the Brahmanical gotra 'Kasyapa'. He describes the various ancient families in Bihar bearing the Dwija surnames of Panres, Tewaris, Bakshis, Rai, Thakur, Misser, Singh and Sahuliar. No Kayastha in Bihar has been described by him as having the surname of 'Das'. He says that the religious ceremonies of the Kayasthas are performed by the Brahmans with the recitation of Mantras and rituals (this would not have been the case if they were Sudras).

To the same effect is the view of Hastings in his Encyclopedia of Religion and Ethics and of Russel in his book on Tribes and Castes of the Central Provinces, 1916, volume III, page 400 and onwards. Russel in support of his view quotes from Matsya Purana and shows that the Kayasthas who were Lekhaks and writers in Puranic literature were Kshatriyas, versed in the Sastras and faithful to the king. At page 409 he quotes from the Bombay Gazetteer which states that under the arrangements made by the Emperor Akbar the work of collecting the revenues of the 28 districts subordinate to Surat was entrusted to Kayasthas.

Nesfield, in his brief review of the caste system in the North-Western Provinces and Oudh, page 132, (1885), says

"There is no reason to doubt that this caste is chiefly an offshoot from Kshatriyas.....Kayasthas have from time immemorial been allowed to wear the sacred cord and many of them wear it still. The name of thakur or lord, which is by courtesy the title of Chattris, as Pandit or Maharaj is that of Brahmans, is not uncommon among men of the Kayastha caste. Local traditions are not wanting of Kayasthas who have won distinction as warriors and leaders of military bands. It was decreed in certain law books that the Kayastha appointed by the king as his accountant or secretary 'must be one versed in the Shashtras or sacred literature,' which shows that he was not a man of the so-called Shudra or servile class, as his detractors have tried to prove. It is not difficult to conceive that princes and the owners of landed estates generally would prefer to appoint their own younger sons, or nephews, or any other near relatives, to whom they have no land to give, but on whose honesty they could rely, as their estate managers and accountants, and that families or clans engaged in such work for several generations in succession would gradually become detached from the parent caste and found a new one of their own.....The Kayasthas invented the alphabet or character which after them is called Kaithi which is written in a running hand and is derived from Nagri, the character pre-eminently used by Brahmans. This character is prevalent in both the provinces (Northern-Western Provinces and Oudh). Kaithi is in all private transactions more widely used than any other vernacular character both by Hindus and Muhammadans. Registers and accounts used to be written in this character. Government has replaced it in the North-Western Provinces by Nagri or Urdu. In Oudh it is still permitted. Kaithi is the prevalent character in Bihar and Central Provinces also.....The Kayastha has not always served in the humble capacity of village accountant. From the earliest times there was a higher and more ambitious class, who served as secretaries and finance ministers in the courts of kings. In the Smriti, or collection of laws, ascribed to Virhaspati, it is said that 'a king has

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ten constituent parts, viz., himself, the chief justice, the counsellors, the Smriti or laws, the accountant, the writer, the gold, the fire, the water and the attendants.' Now the chief justice and the counsellors were Brahmans, but the accountant and the writers were Kayasthas. In the same Code it is said: 'The accountant makes calculations, and the secretary takes down the proceedings.' The same Code says in another place: The persons must be appointed by the king, a secretary and an accountant, who are skilled in the expounding of words and meanings, adepts at counting, upright and learned in the different dialects."

Bhattacharyaji, in his book on Hindu Castes and Sects, 1896, Chapter IX, pages 175-76, enumerates the high offices, judicial and executive, held by the Kayasthas and the important part played by them in the administration of the country during the time of the Hindu kings, the Muhammadan rulers and the British Government. He refers to Rai Durlabha Ram the Prime Minister of Aliwardi Khan, and Raja Shitab Rai and Ram Narayan were governors of Bihar.

The Oudh Gazetteer published under the authority of Government, volume II, page 378, referred to in Sarvadhikari's Hindu Law, 1922 edition, page 834, says that upon a question being referred by the Maharaja of Benares, the Pandits of Benares, Kashmere, Bengal and Bombay affirmed the view of the Padam Purana that the Kayasthas are descendants of Chitragupta and the offsprings of the grand-daughters of Brahma and Surjya and that the name 'Kayastha' is derived from their having sprung from the kaya or body of Brahma who invested them with the profession of scribe and the duties of Kshatriyas, the pen being substituted for the sword. They also based their opinion upon the similarity of habits and customs and on religious authority. At page 375 it mentions the high posts occupied by Kayasthas as Nizams, Collectors or Captains under the Oudh Government and high titles being conferred upon them and their continuing to hold similar appointments under the British rule. At page 73 it refers to the Kayasthas as warlike and gives instances of their having fought battles, such as, the military deeds of

Triloke Chand. In volumes II and III it gives a number of instances of the military deeds performed by Kayasthas and their having taken part in the battlefields and having thereby acquired large territories and having been invested with titles of Rajas, Thakurs, Subedars, etc. According to the Rajputana Gazetteer, the Kayasthas of Rajputana call themselves Rajdhana.

The research of the modern writers, as shewn above, has led to the conclusion that the Kayasthas are not Sudras but belong to the three regenerate classes.

Sarvadhikari in his book on Hindu Law, 1922 edition, page 833, has referred to Vyavastha no. 60 of 1861 of the Pandit of Sadar Dewani Adalat of North-Western Provinces then located at Agra. This Vyavastha contains the well-considered and authoritative opinion of the Pandit that the Kayasthas are Kshatriyas. We have been referred to the Kayastha Ethnology of the late Munshi Kali Prasad Srivastava, 1877, which quotes a number of Vyavasthas of the Pandits of Kashmere, Kasi, Mathura, Poona, Mithila, Agra, Oudh, Central Provinces and Bengal given from time to time and extending over a large period. The book also refers to a number of decisions of the subordinate courts of the United Provinces, Oudh and Bihar (Patna), showing that the Kayasthas were held to belong to the regenerate class, wear the sacred thread and perform the marriage and other ceremonies according to the rules that govern the regenerate classes; widows do not re-marry and illegitimate children do not inherit.

I would, however, prefer to rest my judgment on the Smritis, the Puranas and other authoritative works and the independent research by eminent writers which I have already referred to. It is, however, important to notice that no contrary view of any court in the United Provinces and Bihar has been referred to us. This shows that it has been accepted without any controversy that the status of the Kayasthas as belonging to the twice-born caste has been

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accepted in those provinces. Even Shyama Charan Sarkar whose Vyavastha is the basis of the solitary decision in the case of *Raj Kumar Lal* v. *Biseshwar Dayal*(1) admits that the Kayasthas whether of Bengal or any other country are Kshatriyas. There is, therefore, no controversy that by origin the Kayasthas are Kshatriyas. Shyama Charan Sarkar, however, says that they were degraded to Sudradom by non-observance of the Upanayana ceremony and by assuming the Sudra epithet of ' Das ' instead of their own Kshatriya ' Varma '. It has already been shown that his opinion does not relate definitely to the Kayasthas of Bihar and other provinces except that of Bengal and that, as a matter of fact, this is not so so far as the Kayasthas of Bihar are concerned. Even if it were so, these lapses referred to above would not cause any actual degradation or the loss of rights of the Kayasthas in matters of inheritance, marriage and adoption. The Sastras do not entail any such result by such deviation from the orthodox practices. The Dharma Sastras have laid down the rules of conduct, rites and ceremonies in the Acharya and Vyahara Kanda. If any twice-born fails to pay due regard to the precepts of Acharya and Vyahara Kanda or commits a breach thereof he can purify himself by the rules of expiation laid down in the Prayaschitta part; so long as he does not do so he may only be looked down upon but cannot be degraded to Sudradom or the status of a Sudra so far as his civil rights are concerned. His caste for civil matters is that which he acquires by birth; he retains the caste of his father even if his mother be of an inferior caste. In the case of *Bhagwan Kuer* v. *Jogendra Chandra Bose*(2) it was held that a Hindu does not cease to be so merely by occasional lapses in matters of diet and ceremonial observances from orthodox Hindu practice. The principle will equally apply where the question is whether the members of a regenerate class have ceased

(1) (1884) I. L. R. 10 Cal. 688.
(2) (1904) I. L. R. 31 Cal. 11; L. R. 30 I. A. 249.

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to belong to it by reason of such lapses. If the omission to wear the sacred thread were to cause degradation, the Banias and Thakurs who do not put on the sacred thread would have become Sudra whereas they admittedly belong to the Dwija class. As already shown by reference to Yajnavalkya, Mitakshara and Balambhatta, such an omission will only deprive a twice-born of his sacremental rights and he can regain that right by performing the Vratyastoma ceremony.

It is not necessary to pursue the matter further. The reasons given by Shyama Charan Sarkar in his Vyavastha cannot cause degradation of the Kayasthas to Sudradom and in any case the Bihari Kayasthas are not Sudra, and I respectfully differ from the view taken in the case of *Raj Kumar Lal* v. *Biseshwar Dayal*(1).

The Kayasthas of Bihar are the descendants of Chitragupta and belong principally to the sub-castes of Srivastava and Ambastha; there are a few who belong to the other sub-castes. All of them came down from Upper India and are governed by the laws and customs which prevail there [*Parbati Kumari Devi* v. *Jagdish Chandra Dhabal*(2) and *Rutcheputty Dutta Jha* v. *Rajunder Narain Rae*(3)]. According to Mitakshara and Viramitrodaya, whose authority has been recognized by the Privy Council, they belong to the Dwija or regenerate class. Therefore, the rule prohibiting an adoption of a daughter's son, mother's sister's son and sister's son among the three regenerate classes will apply to them. The evidence in this case, particularly on behalf of the defendant, indicates that the family in question has been observing the ceremonies in connection with marriages, deaths and births according to the Vedic rites that obtain in the case of the regenerate classes and priests of high order officiate those ceremonies. In the absence of direct evidence to the contrary the learned Subordinate Judge

(1) (1884) I. L. R. 10 Cal. 688. (2) (1902) I. L. R. 29 Cal. 483, P. C.
(3) (1839) 2 Moo. I. A. 132.

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was not justified in holding that the parties belong to the Sudra caste and in refusing to apply the above rule prohibiting the adoption of a daughter's son. The general rule of Hindu law cannot be disputed, but it may be varied by family custom. The plaintiffs did not specifically raise this legal objection to the validity of the adoption of Newazi Lal by Hemnath, the maternal grandfather, and the defendant was thus precluded from pleading custom varying the rule. There was no issue raised upon the point and the plaintiffs therefore cannot rely upon the general principle of prohibition [*Lalrup Narain* v. *Gopal Devi*(1)]. The only issue raised was

"Did Hemnath adopt Newazi Lal as his son as contemplated by the Hindu Law?" (Issue no. 9).

This is an issue regarding the factum of adoption, and the plaintiffs say that Newazi Lal was not adopted according to the Sastras. On the other hand, the defendant asserts that Newazi Lal was duly adopted.

Newazi Lal is said to have been adopted at the time of his marriage which was performed by Hemnath in 1804. On 26th May, 1804, Hemnath executed a deed of tamliknama appointing Newazi Lal as successor to his properties after his death. He died in January, 1805, leaving his widow Dulari Kuer, his daughter Nand Kuer and three grandsons by his daughter, namely, Newazi Lal, Dharam Lal and Ridhnath. In his own paternal family his brother Bishwanath and his nephews Mohan, Sohan, Tirloke Chand and Jagannath Sahay, sons of his predeceased brother Raghunath Singh who had died in 1793 were alive. Bishwanath died on 17th March, 1806, leaving his widow Gharbaro Kuer and a daughter married to Mahadeo Dutt. Soon after the death of Bishwanath, Tirloke Chand and others, sons of Raghunath, instituted Suit no. 59 in the Provincial Court of Azimabad against Musammat Gharbaro Kuer, widow of Bishwanath, Musammat Dulari Kuer, widow of Hemnath

(1) (1909) I. L. R. 36 Cal. 780, P. C.

and Newazi Lal, alleging that the properties in dispute were acquired by the three brothers Hemnath, Bishwanath and Raghunath, father of the plaintiffs, and that they were jointly held by them, but that the defendants on the death of Bishwanath on 13th Chaitra, 1213 wrongfully took possession of the properties and refused to give any share to the plaintiffs in that case.

Newazi Lal contested the suit on the ground that the properties were acquired by Hemnath and he had a right to those properties as his adopted son.

The Provincial Court by its judgment (Exhibit H), dated the 12th December, 1812, dismissed the plaintiffs' suit upon the ground that it was not proved that the plaintiffs or their father Raghunath were co-parceners with Hemnath and had jointly acquired the properties in dispute. As to the plaintiffs' claim to succeed as a reversionary heir of Bishwanath, the court observed that so long as the adoption and the tamliknama set up by Newazi Lal were not set aside the latter had a preferential claim. The court, however, did not determine the question of adoption on the ground that the matter was directly pending in another suit in the Provincial Court of Azimibad instituted by Newazi Lal against Mahadeo Dutt, son-in-law of Bishwanath on the 13th September, 1809. In that suit Newazi Lal sought to set aside a deed of gift, dated 2nd Baisakh, 1216 (2nd April, 1809), executed by Gharbaro Kuer, widow of Bishwanath after the death of the latter. Newazi Lal claimed the properties as an adopted son of Hemnath, asserting that the properties belonged to Hemnath and that Bishwanath was merely a farzidar for Hemnath and hence the widow had no right to execute the deed of gift in favour of her son-in-law. The court by its judgment (Exhibit H-1), dated the 6th May, 1813, upheld the contention of Newazi Lal and decreed his claim. Newazi Lal had instituted several other suits in which he claimed properties which stood in the names of various persons on the ground that they were mere

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farzidars of Hemnath. These cases were also decided in his favour and were along with the aforesaid case of Mahadeo Dutt taken in appeal to the Sadar Dewani Adalat and were decided by the judgment of that court, dated 3rd December, 1818 (Exhibit H-2) in favour of Newazi Lal. The Sadar Dewani Adalat differing from the Provincial Court held that the properties were jointly acquired and Bishwanath had one-third interest therein. It, however, agreed with the Provincial Court in holding that the deed of gift executed by the widow of Bishwanath in favour of her son-in-law Mahadeo Dutt was a forged document and observed that the claim to the one-third share of Bishwanath would be adjudicated upon when it would be made by a proper heir of Bishwanath. The Sadar Dewani Adalat dismissed the appeal.

Mahadeo Dutt then appealed to the Privy Council, but subsequently withdrew the appeal and filed a deed of relinquishment, dated the 19th April, 1826, as set forth in the Rubkari (Exhibit H-3) of the Sadar Dewani Adalat, dated the 22nd August, 1826. By this deed Mahadeo Dutt waived his claim to the properties in dispute admitting that they were the self-acquired properties of Hemnath and were purchased in the farzi name of Bishwanath and that Newazi Lal was adopted by Hemnath. He also stated that Newazi Lal remitted his claim for wasilat and costs and hence he filed the deed of relinquishment.

The judgment of the Sadar Dewani Adalat (Exhibit H-4), dated the 20th January, 1838, shows that Nand Kuer, daughter of Hemnath was alive and in fact is said to have given Ridhnath her son, the defendant's ancestor, in adoption to Newazi Lal in Chaitra 1230 (1830) long after the aforesaid litigations. The widow of Hemnath was a party to the aforesaid litigation. The plaintiffs, therefore, contend that during the lifetime of Dulari Kuer and Nand Kuer, the mother and grandmother respectively of Dharam Lal, Newazi Lal and Ridhnath, they had no

right to the properties of Hemnath, nor were Dharam Lal and Ridhnath, the respective ancestors of the plaintiffs and the defendant, parties to those litigations, and hence they are not bound by the result of those litigations or anything said or done by the parties thereto.

As regards the judgments (Exhibits H-1 and H-2), dated the 6th May, 1813 and 31st December, 1818, of the Provincial Court of Azimabad and of the Sadar Dewani Adalat respectively, it is urged that these decisions do not prove any actual adoption attended with necessary ceremonies, and, on the other hand, they show that proper ceremonies were not performed and the actual giving and taking, which is essential for a valid adoption, had not taken place. The judgment of the Provincial Court does not refer to the ceremonies at all. The judgment of the Sadar Dewani Adalat refers to it in the following words :—

" Although it is not clear if all the necessary ceremonies in connection with the adoption of Rai Newazi Lal were performed according to the Sastras, yet from a perusal of the depositions of the witnesses as well as from the other circumstances of the case it is evident that Rai Hemnath Singh took Newazi Lal in his lap and adopted him in the presence of the audience, specially his near relatives, Rai Bishwanath Singh and others. As a matter of fact, on the death of Rai Hemnath Singh, Rai Bishwanath Singh placed the turban of succession on the head of Newazi Lal and the necessary ceremonies connected therewith were performed by Bishwanath himself as well as other relations and castemen. The sapindi karam and kiria (after death ceremonies) of Rai Hemnath Singh and Bishwanath Singh were also performed by Rai Newazi Lal respondent. Hence there remains no doubt about the fact if Rai Newazi Lal has been adopted by Rai Hemnath Singh or not. With a view to the above facts there appears to be no reason to alter the decision of the Senior Judge of the Provincial Court of Azimabad, dated the 5th May, 1814."

As to what actually took place at the time of adoption it is to be found in the evidence of Tula Ram (Exhibit 1-2) who was examined as a witness in both the aforesaid litigations :—

" The mother of Newazi Lal had been at first sitting behind the purdah (curtain) along with other ladies. At that time Hemnath Sin called her and obtained her permission, saying that he was going to ado Newazi Lal as his son and that he had already obtained the permissio

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of Choa Lal (father of Newazi Lal). The mother of Newazi Lal replied that she gave her consent out of her own free will."

At another place he said,

"He took the bride (the girl to be married on the occasion to Newazi Lal) as well as Newazi Lal, the bridegroom on his lap in janvasa (place where the bridegroom's party stops) and said that he adopted Newazi Lal as his son and addressed the audience and told them to be aware thereof.....I did not see Choa Lal under the Mandwa at the time when Rai Hemnath Singh adopted Nawazi Lal as his son, on the performance of the ceremony in which kus (grass) and water are used. It is possible that he may have come later on..... .....He may have gone there after the performance of the ceremony in which kus and water are used."

The plaintiffs rely upon the case of *Mahashaya Srinath Ghosh* v. *Srimati Krishna Sundari Dasi*(1) and *Srimati Krishna Bhamini Dasi* v. *Srimati Broja Mohini Dasi*(2), and contend that a mere declaration by the adoptive father is not sufficient to create a valid adoption and that the actual giving and taking is essential for a valid adoption whether the parties belong to the three regenerate classes or are Sudra. They say that the evidence of Tula Ram, who was an accredited servant of Hemnath and was in charge of all important affairs and in fact properties were also purchased by Hemnath in his farzi name, and his presence at the adoption show that Hemnath simply obtained permission of the mother of the boy, took Newazi Lal on his lap in the janvasa (marriage canopy) and declared that he had adopted him as his son; that Choa Lal, father of Newazi Lal, was not present at the time and neither he nor his wife actually performed the ceremony of giving and that the permission given by the wife is not valid in law during the lifetime of her husband. Upon the evidence of Tula Ram given soon after the adoption the plaintiffs contend that the actual giving and taking was not proved and that the Sadar Dewani Adalat did not hold that a proper giving and taking ceremony had taken place but it only held that Hemnath took Newazi Lal on his lap and adopted him. It is conceded that it would

(1) (1867) 7 Moo. I. A. 250. (2) (1921) 25 Cal. W. N. 403, 408.

not be reasonable to expect direct evidence of adoption and all the necessary ceremonies having been performed after a lapse of long time; but it is contended that this would not apply to the present case where the adoption was investigated and evidence was given when it was quite fresh and that evidence showed that the essential ceremony of actual giving and taking had not taken place. Accordingly, the plaintiffs contend that Newazi Lal did not become a legally adopted son of Hemnath and he did not cease to be the son of his own father Choa Lal. The plaintiffs also rely upon the tamliknamah of 1804 (Exhibit Q) executed by Hemnath and contend that had Hemnath adopted Newazi Lal he would not have appointed him to be his successor after his death, for upon a valid adoption Newazi Lal would have become the son of Hemnath from the moment the adoption took place and would have become a co-parcener with him as his aurasa or a natural born son.

The plaintiffs further contend that their ancestor Dharam Lal was not a party to that litigation and that no title to the property had accrued to him at that time, inasmuch as both the widow and the daughter of Hemnath were living and hence the plaintiffs or their ancestor are not affected by any finding of the court in that case.

These contentions are sound. The fact, however, remains that Newazi Lal took possession of the estate of Hemnath and remained in possession till his death on 24th Asin, 1243 (1st October, 1835) and that Sona Kuer, his widow entered into possession and occupation of the properties. This led to another litigation. Ridhnath the youngest brother of Newazi Lal alleged that he was adopted by Newazi Lal in Chait, 1230 Fasli (1823) and set up a deed of inheritance, dated 9th Jamad-us-sani, 1251 A. H. (October, 1835) said to have been executed by Newazi Lal. He obtained a rubkari in December 1836 from the Sadar Amin in respect of a certain sum of money which stood in the

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name of Newazi Lal. This was upheld by the District Judge. Accordingly, Sona Kuer instituted suit no. 220 of 1836 in the Civil Court of the district of Bihar for declaring the adoption and deed of inheritance set up by Ridhnath to be false and invalid. The court by its judgment, dated the 20th January 1838, Exhibit H(4), held that the deed of inheritance set up by Ridhnath was spurious and his alleged adoption by Newazi Lal was false; that the adoption had not taken place; that the mother of Ridhnath had no power to give him in adoption without having an authority from her deceased husband Choa Lal and that the necessary ceremonies, such as the performance of Hima, the recitation of Mantras, pouring of water and taking the child in the lap of the adopter, were not performed. The court set aside the rubkari, dated the 17th November, 1836, and decreed the suit of Sona Kuer, the plaintiff.

Ridhnath appealed to the Sadar Dewani Adalat. The appeal was disposed of on compromise. Both Sona Kuer and Ridhnath filed ekrarnamas, Exhibits J(37) and J(38), dated the 19th August, 1839, in the said appeal, agreeing that both of them would jointly remain in possession of the properties and after the death of Musammat Sona Kuer, Ridhnath and his descendants would remain in sole possession thereof. Accordingly, both of them remained in possession of the properties, and after the death of Sona Kuer, Ridhnath remained in sole possession.

Dharam Lal was not a party to the litigation, but he intervened in the appeal in the Sadar Dewani Adalat and admitted both the adoptions: (1) of Newazi Lal by Hemnath and (2) of Ridhnath by Newazi Lal and disclaimed all connections with the properties. He, however, was not a party to the compromise between Ridhnath and Sona Kuer.

On behalf of the defendant it is urged that Dharam Lal having renounced his claim to the properties, he or his descendants the plaintiffs are

stopped from claiming them. They are also estopped from disputing the adoptions, inasmuch as Dharam Lal admitted it in that case. The plaintiffs dispute this contention. They urge that Dharam Lal had no title to the properties at that time and his mother Nand Kuer being alive there was nothing which he could disclaim. The adoption was in spite of the admission set aside, and it was held that the adoption had not taken place. His admission was against truth and he or his descendants the plaintiffs are not estopped from relying upon the true fact that adoption had not taken place. He was not a party to the compromise entered into between Ridhnath and Sona Kuer. He was, therefore, not bound by the statement of Sona Kuer in that case.

Briefly the plaintiffs' contention is that the aforesaid litigations and the adoption set up by Newazi Lal and Ridhnath did not effect the right of Dharam Lal to succeed to the properties after the death of their grandmother and mother. They also say that during their lifetime the possession of Newazi Lal or Ridhnath did not affect the right of the plaintiffs' ancestor which accrued only after the death of their mother and grandmother. This is true. But the possession of Ridhnath and his descendants would be adverse to Dharam Lal and his descendants the plaintiffs after the death of the mother and the grandmother when the succession opened to the grandsons of Hemnath. The exact dates of the death of the widow and the daughter of Hemnath are not known. All that is known is that the widow of Hemnath was alive during the litigation between Tirloke Chand, herself and Newazi Lal which terminated with the judgment (Exhibit H), dated the 12th November, 1812. Since then her name has not appeared in any litigation.

Nand Kuer, the daughter of Hemnath, is mentioned in the judgment (Exhibit H-4), dated the 20th January, 1838, as having given her son Ridhnath in adoption to Newazi Lal. This is all that is known.

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about her. She had at least three sons in 1805 when her father Hemnath died. One of the sons was married in 1804. She must have been much over 60 years in 1838 during the aforesaid litigation and, therefore, when the present suit was instituted in 1918 both she and her mother must have died when several twelve years had elapsed.

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Now, Dharam Lal knew that Newazi Lal and Ridhnath set up their exclusive title to the properties based on their respective adoption. In fact, he admitted the adoption of the latter in the litigation with Sona Kuer which ended in 1839. He also knew that they were in possession of the properties by virtue of a claim adverse to him. Ridhnath and his descendants were solely recorded in the Government registers in respect of the properties in dispute; they have been dealing with the properties as their own and have been in possession thereof as sole owners; the documents are too numerous to mention.

Therefore, unless the plaintiffs prove that they and their ancestors were jointly in possession of the properties along with Ridhnath and his descendants their claim to a partition of the properties and to recover possession of their share therein is long barred by time. In fact, the plaintiffs or their ancestor could not succeed without having the adoptions of Newazi Lal and Ridhnath set aside and the suit for setting aside such adoptions is barred by limitation even if the said adoptions are invalid [vide *Mohesh Narain Munshi* v. *Taruck Nath Moitra*(1), *Jagadamba Chowdhrani* v. *Dakhina Mohan*(2) and *Vaithialinga Mudaliar* v. *Srirangath Anni*(3)]. In order to prove their joint possession the plaintiffs set up an ekrarnama or agreement (Exhibit 1), dated the 14th November, 1811, entered into between the three brothers Newazi Lal, Dharam Lal and Ridhnath declaring their title

(1) (1893) I. L. R. 20 Cal. 487, P. C.
(2) (1886) L. R. 13 I. A. 84.
(3) (1925) I. L. R. 48 Mad. 883, P. C.

to the properties and their joint possession and agreeing that Newazi Lal and after him Ridhnath would be in possession of the properties as karta or manager on behalf of Dharam Lal and his descendants.

The plaintiffs' case is that, as a matter of fact, neither Newazi Lal was adopted by Hemnath nor was Ridhnath adopted by Newazi Lal, but that the adoptions were set up in order to prevent the properties from going to the brother and nephews of Hemnath. Accordingly, the plaintiffs say that Dharam Lal supported the adoption of Ridhnath and with a view to his not being permanently deprived of the inheritance the ekrarnama in question was executed. The plaintiffs' case, therefore, entirely rests upon the ekrarnama.

The court below has held that the ekrarnama is not genuine and has given good reasons for this view. The court says that the signature and seal of Newazi Lal on this document do not agree with his signatures and seal on the admitted documents on the record; that the documents of 1811 were all written in the Persian language, but the ekrarnama is written in Urdu; that the description of the district as Zila Gayaji in the document is false, inasmuch as Zila Gaya did not come into existence until 1865 prior to which the district was called Zila Bihar. No good reason has been given for differing from the view taken by the court below as regards this document.

Thus, the ekrarnama not having been proved, the plaintiffs have no other evidence to prove that they or their ancestors were in joint possession of the properties with Ridhnath or his descendants. Admittedly, for the last several generations the defendant and his ancestors have been in possession of the properties and their names have been successively recorded in public and private documents. The plaintiffs have failed to prove their possession over the

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properties in dispute and consequently their claim for partition or for recovery of actual possession must fail.

As to their claim for receiving allowances from the estate, it is not denied that for the last several generations they received allowances. The plaintiffs say that they and their ancestors used to receive maintenance allowances from the estate on account of the arrangement arrived at between Dharam Lal and Ridhnath, the ancestors of the parties. The defendant admits that they used to receive money and help, but denies that this was done on account of any arrangement between the parties or as a matter of right but that the plaintiffs and their ancestors received money and help on ceremonial occasions in their family on account of their being servants of the estate.

The parties through the able assistance of their legal advisers and the suggestions made by the court have arrived at a satisfactory solution by means of an amicable settlement. The defendant has allowed the plaintiffs to get property yielding a net income of Rs. 1,200 yearly after deducting Government revenue, cesses and collection charges. The terms of the settlement have been set forth in the sworn petition filed on behalf of the parties. The points involved in this case are, as this somewhat lengthy judgment will show, complicated. They were argued at great length and with ability at the Bar. We are satisfied upon a careful consideration of those points that the settlement arrived at is for the benefit of all the parties concerned and notably of the minor plaintiffs appellants, and accordingly we accord our sanction to it as being for their benefit. We direct that the appeal be decreed in terms of the compromise petition which will be embodied in the decree of this court as a part thereof.

An objection has been taken as to the item in the decree of the court below regarding the court-fee to be paid by the plaintiffs. This was the subject of issue no. 2 in the court below. The court below assessed

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ad valorem court-fee upon the value of the properties in suit and accordingly directed the plaintiffs to pay the deficiency. The plaintiffs appealed to this court, but ultimately withdrew the appeal in view of the fact that they were permitted to sue in *forma pauperis*. They were also allowed to appeal as paupers. The litigation having terminated as indicated above, the question has been raised as to the correctness of the decision of the court below regarding the court-fee payable by the plaintiffs. It would seem that the view taken by the court below is incorrect. The learned Subordinate Judge held that reading the plaint it was a suit pure and simple for partition and the court-fee originally paid by the plaintiffs was sufficient. Upon the objection, however, of the defendant and in consideration of the ekrarnama (Exhibit 1) the court changed its view and held that *ad valorem* court-fee was leviable. In my opinion the court-fee is leviable upon the construction of the plaint alone and consequently the plaintiffs were liable to pay court-fee as in a partition suit. Accordingly, the plaintiffs, who were allowed to sue as paupers, are directed to pay the court-fee calculated as above.

BUCKNIL, J.—I agree.

Appeal decreed.

CRIMINAL MISCELLANEOUS.

Before Mullick and Scroope, JJ.

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March, 8.

LOKA MAHTON

v.

KALI SINGH.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 145 *and* 526(8)—*Dispute regarding possession of immovable property—Proceeding under section* 145—*application for transfer—whether applicant entitled to postponement.*

A party to a proceeding under section 145 of the Code of Criminal Procedure, 1898, is not entitled under section 526(8) to a postponement for the purpose of enabling him to move the High Court to transfer the case.

* Criminal Miscellaneous Case no. 23 of 1927.

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

H. L. Nandkeolyar, for the petitioners.

Sultan Ahmed, Government Advocate (with him *S. Saran*), for the Crown.

MULLICK, J.—The petitioners are the first party in a case under section 145 of the Code of Criminal Procedure before the Subdivisional Magistrate of Monghyr, Mr. Shams-ul-Huda. On the 8th February, 1927, the Subdivisional Magistrate held a local investigation, and he admits that in the course of that local investigation he rather lost his temper with the petitioners and used certain words with regard to some of them which perhaps were not altogether justifiable. Then on the 14th February he called upon the second party to proceed with the cross-examination of the first party's witnesses. The second party asked for a stay of proceedings under section 526, clause (8) of the Code of Criminal Procedure and stated that they desired to move the High Court for a transfer. The learned Magistrate refused the prayer holding that it was not *bona fide* and proceeded with the trial. The petitioners declined to cross-examine the witnesses on the plea that they were unprepared. The case was adjourned till the 18th and then till the 19th on which date under compulsion, it is alleged, the second party addressed the court with regard to the merits of their case and judgment was reserved. In the meantime application had been made to this court for action under section 526 of the Code of Criminal Procedure and on the 21st February an order was issued by this court directing the Magistrate to stay further proceedings. It appears that when the order was communicated to the learned Magistrate he had already written his judgment and signed it and that he was about to deliver it in court. Very properly he stayed further proceedings and did not deliver the judgment.

It now appears that the Magistrate has been transferred from the district and the question is

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whether we should direct some other officer to deliver the judgment or order a retrial of the case from the stage at which it was left on the 14th February.

We think on the whole that the proper course will be to direct the officer who has succeeded the learned Magistrate, or such officer as may be selected for the trial of this case by the District Magistrate, to recall the two witnesses whom the second party declined to cross-examine on the 14th August and to proceed with the trial from that stage according to law.

A point has been taken as to whether clause (8) of section 526 of the Code of Criminal Procedure applies to proceedings under section 145 of the Code of Criminal Procedure. The clause as amended makes it clear that a case within the meaning of the clause includes a proceeding under section 145; but as the clause directs that the application to the trial court is to be made either by the public prosecutor or the complainant or the accused, it would seem that the parties in a proceeding under section 145 cannot take advantage of the clause. That clause would seem to apply only to cases arising out of an offence under the criminal law and probably the legislature thought that proceedings which are quasi civil in nature such as inquiries into the possession of land, do not require the exercise of the very summary power which clause (8) confers. Nevertheless I think that although the learned Deputy Magistrate was right in holding that the application under clause (8) was not competent before him, still in the circumstances he would have exercised a proper discretion in giving the first party time to cross-examine the second party's witnesses.

The result, therefore, is that the application for transfer being no longer necessary is dismissed, but the case is remanded to the District Magistrate in order that it may be disposed of in the manner directed in this judgment.

SCROOPE, J.—I agree.

Case remanded.

APPELLATE CIVIL.

Before Adami and Allanson, JJ.

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Jan., 5, 6; Feb., 11.

JNANENDRA NATH BAGCHI

v.

SURES CHANDRA ROY.*

Arbitration without the intervention of the Court—Code of Civil Procedure, 1908 (*Act V of* 1908), *Schedule II, paragraphs* 20 *and* 21—*some properties left undivided—implied condition in the submission that all matters shall be disposed of, whether can be waived by agreement—construction of will, whether can be referred to arbitration.*

In the case of an arbitration without the intervention of a court, there is an implied condition in the submission of the parties to the arbitration that the award shall dispose of all matters referred; but this condition may be waived by the consent of the parties before the arbitrators.

Makund Ram Sukal v. *Saliq Ram Sukal* (1), followed.

Kunjlal v. *Banwari Lal* (2), referred to.

Where, therefore, the partition of a joint estate consisting of different properties had been submitted to arbitration out of court, and the parties agreed to a division by stages and asked that the properties remaining undivided should be the subject of a further award to be made by the same arbitrators, and the arbitrators followed the direction of the parties but were unable themselves to perform the work of partitioning the remaining properties in a separate award,

Held, that it was competent to the parties to agree before the arbitrators to the division being made by steps and that, therefore, the partition as to the property divided was final.

A party or an executor can refer pure questions of law or the construction of a will to the decision of an arbitrator.

Soundamani Ghosh v. *Gopal Chandra Ghosh* (3), referred to.

*Appeal from Original Order no. 247 of 1925, from an Order of Maulvi Najabat Husain, Subordinate Judge of Bhagalpur, dated the 22nd May 1925.

(1) (1894) I. L. R. 21 Cal. 590, P. C. (2) (1919) 4 Pat. L. J. 394.
(3) (1914-15) 19 Cal. W. N. 948.

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Where, therefore, under the terms of the reference, the arbitrators were asked to construe a will, wherein there was a direction that a donee was not to enjoy a vested share in full until he attained a particular age, and the parties further agreed that the wishes of the testator with regard to the postponement of the bequest should not be observed, and the arbitrators, on the construction of the will, found that the donee had an absolute interest and, accordingly, made over possession of his share in the property,

Held, that the award was valid as it was within the competence of the arbitrators to find whether the interest was limited or absolute.

Appeal by the defendant.

This was an appeal against an order of the Subordinate Judge of Bhagalpur passed under paragraph 21 of Schedule 2 to the Code of Civil Procedure directing an award to be filed and a decree to be passed in accordance therewith.

Babu Upendra Nath Bagchi, a Vakil of Bhagalpur, died on the 4th September, 1911, leaving him surviving, besides his wife and daughters, six sons. By his will dated the 30th August, 1911, after making provision for his wife and daughters and his son Birendra Nath Bagchi, he directed that his estate should be divided in equal shares between his other five sons, Harendra Krishna, Narendra Nath, Jnanendra Nath, Manindra Nath and Dhirendra Nath. With regard to Dhirendra Nath he directed that until he reached the age of 35, the executors should pay to him only the income of his one-fifth share and that when he reached the age of 35 if his brothers agreed that he was of good behaviour he should take possession of the share. Harendra Krishna, Narendra Nath and one Suresh Chandra Ray were appointed executors. They took out probate in the High Court at Calcutta. In 1920, Jnanendra Nath filed a suit for partition in the High Court, Calcutta, and this caused an agreement between the brothers to settle their disputes as to the property by arbitration. On

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the 14th June, 1921, they executed a deed of agreement for reference to arbitration but the arbitrators they appointed failed to act and so, on the 1st April, 1922, another deed of agreement was drawn up, referring the disputes to arbitration. The points referred to arbitration by that agreement which were material in the present case were the following:—

Clause (7).—"That the arbitrators shall also have power to construe the testator's will."

Clause (8).—"That Dhirendra Nath Bagchi is now of good conduct and behaviour and all the parties to this deed have no objection and will not object to Dhirendra Nath Bagchi's share being made over to him, and with a view to carry out the division by metes and bounds, without however otherwise altering the shares defined in the said will or disturbing the other provisions thereof the arbitrators shall be competent to make over at once to him his share in the estate as well as the management thereof, all provisions in that behalf notwithstanding in the said will contained. And after the partition of his share he will not in future raise any objection to the award or partition made by the arbitrators or set up any claim owing to his share in the estate being contrary to the provisions in the will being given to him before completion of his 35th year or on any account whatsoever."

Clause (9).—"That the arbitrators shall also ascertain in the first instance what the estate of the said testator consisted of at the time of his death and what the same now consists of together with accumulations and accretions thereto and thereafter proceed to partition by metes and bounds all the movable and immovable properties according to the respective shares of the parties therein and shall allot such shares to each of them as they are entitled to ".

Clause (12).—"That the parties agree, when effective meetings are held, to pay and to contribute in proportion to the respective shares that they are entitled to receive in the testator's estate, the daily sum of Rs. 16 to each of the arbitrators as his remuneration and in like manner to bear and pay all costs and expenses of and incidental to this reference to the arbitrators."

Clause (13).—"That all questions regarding the award of cost other than those herein before provided and the costs in connection with the said High Court suit incurred by the parties which shall be paid out of the estate in the first instance, shall be decided by the arbitrators as they think proper."

Clause (17).—"That there is a partition suit pending between some of the parties to this deed and Sachindra Nath Bagchi, minor son of Hemendra Nath Bagchi, deceased, in the Calcutta High Court regarding premises no. 25, Prasanna Kumar Tagore's Street, Calcutta, and it is hereby agreed that during the pendency of that suit the arbitrators hereby appointed will not give any decision with respect to that property and the property will be dealt with by the arbitrators according to the terms of this deed after the final disposal of the said suit by the Hon'ble High Court."

The arbitrators proceeded to ascertain the estate of the testator which consisted of the house in Calcutta, properties in north Bhagalpur and in south Bhagalpur, and also in Monghyr, and also residential properties in Bhagalpur as well as cash and other moveable properties. They decided that for the upkeep of the family idol and for the payment of annuities to Dhirendra Nath and Pramala Bala Devi, the daughter, it would be necessary to keep joint the properties in south Bhagalpur known as Taluka Mahespur.

On the 19th March, 1924, a letter was addressed by the five sons and the executor Suresh Chandra Roy to the arbitrators, asking that the partition of their house in Calcutta should be effected by the senior Assistant Valuer of the Calcutta Improvement Trust. The letter proceeded—

"We also pray that award in connection with all other matters including partition of all other properties, except the said premises no. 25, Prasanna Kumar Tagore Street, Calcutta, and our north Bhagalpur zamindari property, Mahal Dhamseha, bearing tauzi no. 3990, be given at one time and a separate award partitioning the said two properties to wit (1) premises no. 25, Prasanna Kumar Tagore Street, Calcutta, (2) Mahal Dhama, bearing tauzi no. 3990, within the Bhagalpur Collectorate be given afterwards within six months or within such other extended times as would be necessary, not exceeding six months."

On the strength of that letter, the arbitrators forbore to partition the properties mentioned in that letter. They partitioned the properties falling within Bhagalpur town and also the Monghyr properties; they drew up a map and marked out the blocks which each of the brothers was to receive; they also divided between the brothers all the moveable properties.

With regard to Dhirendra Nath and paragraph 8 of the reference, they stated in the award that—

"The case of Dhirendra Nath was, it seems to us, troubling the testator, he did not in any way like to disinherit him he being the youngest son. The testator bore some suspicion as to his future conduct and behaviour from the past. Hence the testator did not like to allow possession with regard to 1/5th share of his properties to remain in the hands of Dhirendra Nath till he completes his 35th year. We are of opinion that the said 15th share vested in Dhirendra Nath on the death of the testator, but actual possession thereof was deferred till a

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certain period and the said possession was left in the hands of the executors for that period. The testator being the father and the well-wisher of his son always wished for the welfare of his son. With a view to maintain the property in his son the testator directed that Dhirendra Nath will enjoy the unsufruct of his share till that period but he can never wish that the other brothers would usurp that share on any pretext whatsoever. Having thus found that the said 1/5th share has vested in Dhirendra Nath on the death of the testator we are of opinion that the last clause in paragraph of the will that is

> If Sriman Dhirendra Nath die before being vested with absolute rights in 1/5th share my four sons Harendra Krishna, Narendra Nath, Jnanendra Nath and Manindra Nath shall get the said 1/5th share of the property in equal shares

can only mean that in case the said Dhirendra Nath die unmarried or without any legal heir his share would pass on to his brothers other than Barendra. The testator in the latter part of his will made provisions for the marriage of his said son Dhirendra Nath and is it possible the testator intended that in case Dhirendra Nath would die before he completes 35th year leaving behind his widow and children even then the brothers would get his share and not the widow and children of Dhirendra Nath? Thus we have no hesitation in construing the will as we do in determining that each of the five brothers Harendra Krishna, Narendra Nath, Jnanendra Nath, Manindra Nath and Dhirendra Nath to have equal one-fifth share of the properties left by the testator vested in him absolutely."

And later the award stated—

"We may say herein that Dhirendra Nath is now aged 33 years and odd months and that under the term of the will the possession is to be deferred till his 35th year, when with the approval of his brothers, he is to get possession if his conduct be found satisfactory, but as the parties including the executors certify that he bears a good character and that as the parties want to make over possession of his one-fifth share we do not like to stand in the way and we fully approve the delivery of possession of the divided share over the properties which is left by us as not divided by metes and bounds between the parties."

With regard to the division of costs, the arbitrators stated—

"There was some discussion before us by the parties" regarding costs in connection with the High Court incurred by the parties. "Babu Jnanendra Nath claimed Rs. 1,300 as costs. He also showed his attorney's bill and a number of correspondence and a receipt showing payment of the dues of the attorney in part. Babu Harendra Krishna stated that the matter of attorney's bill was settled at Rs. 500 which was denied by Babu Jnanendra Nath. The account shows Rs. 700 as paid to the attorney, Mr. Birendra Nath Mitter, while Babu Harendra Krishna showed a letter from the said attorney wherein the attorney admitted the receipt of Rs. 500 and claimed Rs. 500 or so as his out-standing dues. Babu Harendra Krishna wanted us to decide this matter of cost but Babu Jnanendra Nath remonstrated by a letter, dated the 16th July 1924, stating that we would be going out of our way in case we wo[illegible]cide the same. We think the contention of Babu Jnanendra N[illegible]und in view of the wordings in the reference. Hence we have re[illegible]om deciding that point."

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The arbitrators signed their award on the 24th August, 1924. In the concluding paragraph they stated, referring to the joint letter of the parties dated the 19th March, 1924, that they were unable to accede to the request of the parties that they should proceed separately to partition the house in Calcutta and the properties of Mahal Dhamseha. They recommended the parties to select arbitrators by a separate registered deed to carry out the formal work of partition of these remaining properties.

On the 10th September, 1924, Babu Suresh Chandra Roy, the executor, who had been a party to the reference, applied before the Subordinate Judge under paragraph 20 of Schedule 2 to the Code of Civil Procedure, asking that the award might be filed and a decree passed in accordance with its terms. The present appellant Babu Jnanendra Nath Bagchi then, on the 2nd December, 1924, filed a petition of objection against the filing of the award. Many grounds were put forward by him which were considered by the Subordinate Judge. The grounds which were material in this appeal and were urged before us are the following:—

"*First*, that the award is void because the arbitrators did not decide the question of costs as agreed in clause 13 of the reference:

Secondly, that the award is void because the arbitrators had not decided all the matters referred to them:

Thirdly, that the award is void because it contravenes the provisions of the will: and

Fourthly, that the award is void because a suit was pending in the High Court and yet reference was made without the intervention of that Court.

S. M. Mullick, *G. N. Mukherji*, *N. C. Ghosh*, for the appellant.

C. C. Das (with him *S. C. Mazumdar*), for the respondents.

Cur. adv. vult.

Feb., 11 1927.

ADAMI, J. (after stating the facts set out above, proceeded as follows): With regard to the last objection, Mr. Sushil Madhab Mullick, on behalf of

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the appellant, withdraws the objection admitting that the suit in the High Court had been dismissed previous to the filing of the award.

We have to consider the three other objections.

With regard to the first objection that the question of costs was not decided by the arbitrators, I have cited above both the clause in the reference and the decision of the arbitrators thereon. It appears that the appellant Jnanendra Nath wrote to the arbitrators asking them not to come to a decision upon the costs in his letter dated the 16th July, 1924. Babu Jnanendra Nath Bagchi on the 21st July, 1924, a short time before the award was signed, wrote to the arbitrators complaining that he had not yet been paid his costs in the High Court and demanding that the arbitrators should pay to him the sum of Rs. 1,300 with interest at 12 per cent. per annum from the date of the signing of the deed of reference. He threatened that, if he were not paid this amount within 24 hours, he would move the court for an injunction directing the arbitrators to refrain from giving their award. The arbitrators replied on the 9th August, that the question of costs was to be decided by them and that the costs would be paid out of the estate in the first instance. The arbitrators did consider a certain travelling allowance bill submitted for journeys by Janendra Nath to Calcutta and his claim for travelling allowance was allowed. It is clear that the arbitrators were considering the question of costs and decided that the costs were to be paid out of the estate. If no more definite decision was come to it is clear that it was due to the letter written by the appellant on the 10th July, 1924. Under the circumstances I do not think that Babu Jnanendra Nath had any cause for complaint; the arbitrators decided the question so far as they could.

The next objection is that the arbitrators failed to divide all the properties by metes and bounds, and, therefore, the award was not complete. Mr. Sushil

Madhab Mullick points out that in the case of an arbitration without the intervention of a court if the arbitrators leave undetermined any of the maters referred to arbitration or determined any matter not referred to arbitration, the court must refuse to file the award. He refers us to the wording of paragraph 21 of Schedule 2 and points out the difference between an award without the intervention of the court and an award made in a suit. Under clause (*a*) of paragraph 14 the court may remit the award for reconsideration where a matter has been undetermined or there is the determination of a matter not referred to arbitration. He relies on a decision of this court in *Kunjlal* v. *Banwari Lal* (1) and contends that in the present case this Court is bound to find that the award could not be filed since matters had been left undetermined. The matter left undetermined is the partition by metes and bounds of the north Bhagalpur properties and the house in Calcutta. The arbitrators have given their reason for leaving this partition undetermined, the reason being that all the parties, including the appellant, by their letter dated the 19th March, 1924, to which I have referred above, requested the arbitrators to postpone the partition of those properties and to first pass an award as to the partition of the other properties. In *Makund Ram Sukal* v. *Saliq Ram Sukal* (2) their Lordships of the Privy Council ruled that the ground for holding an award to be invalid on account of its not disposing of all the matter referred appears to be that there is an implied condition in the submission of the parties to the arbitration that the award shall dispose of all; this condition may be waived by the consent of the parties before the arbitrators. Where the partition of a joint estate consisting of different properties had been submitted to arbitration and the parties agreed to a division being made by steps and that each division should be final without any condition that the award should not be final while a part remained undivided,

(1) (1919) 4 Pat. L. J. 394. (2) (1894) I. L. R. 21 Cal. 590, P. C.

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it was competent to the parties to agree before the arbitrators to the division being made as it had been and the partition as to the property divided was final.

It is quite clear that in the present case the parties did agree to the partition by stages and asked that the properties remaining undivided should be the subject of a further award to be made by the same arbitrators. The arbitrators followed the direction of the parties but were unable themselves to perform the further work of partitioning the remaining properties in a separate award.

In the present case, I do not think that, under the circumstances, the arbitrators failed to carry out the duties imposed as agreed to by the parties in their letter of March, 1924.

The last objection seems to be a more serious one. Though the will is not before us, it appears that the testator directed that Dhirendra Nath should not have possession of his share until he reached 35 and only then if the brothers consented that he was of good behaviour and conduct.

Under the terms of paragraph 8 of the reference, it is quite clear that the parties to the reference, including the appellant, agreed that the wishes of the testator with regard to the postponement of the bequest should not be observed. It is contended by Mr. Sushil Madhab Mullick that the reference was bad by reason of this opposition to the terms of the will and that the award must also be bad. He relies on the case of *Soudamani Ghosh* v. *Gopal Chandra Ghosh* (1). In that case it was found that the executors authorised the arbitrators to substitute for the provisions of the will which might seem to them indefinite or illegal other provisions agreeably to what might have been imagined to have been the intention of the testator: in other words the executors in their submission authorised the arbitrators to make a new will for the

(1) (1914-15) 19 Cal. W. N. 946.

testator. It was there laid down—" But it is equally plain that an executor cannot make a reference to arbitration with the avowed purpose that the terms of the will may be modified and arrangements made for the management and distribution of the estate contrary to the directions of the testator.....The arbitrators are no doubt asked to construe the will; and it need not be disputed that pure questions of law may be referred to the decision of an arbitrator [*Staff* v. *Andrews* (1), *Ching* v. *Ching* (2) *Young* v. *Walter* (3), *Mathew* v. *Davis* (4) and *Gulam Jilani* v. *Mohammed Ahmed Husan* (5)]. But the arbitrators are here authorised to do something more than a construction of the will which as their Lordships of the Judicial Committee said in *Venkata* v. *Partha-sarathi* (6) does not mean an addition to the terms of the will; they are not empowered to alter the terms of the will. This plainly was not within the competence of the executors. "

Now, under the reference, the arbitrators had power to construe the terms of the will. Where " there is a direction in the will that a donee is not to enjoy a vested gift in full until he attains a particular age, then unless there is in the will or some codicil to it a clear indication of intention not only that the donee is not to have the enjoyment of the gift until attaining that age but that some other person is to have that enjoyment, or unless the property is so clearly taken away from the donee up to the time of attaining that age as to induce the court to hold that as to the previous income there is an intestacy, the court on the application of the donee, if he is entitled to give a discharge for the gift, or the person deriving title under him, will strike that direction out of the will " [Halsbury's Laws of England, Volume 28,

(1) (1816) 2 Madd. 6.
(2) (1801) 6 Ves. 281.
(3) (1804) 9 Ves. 364.
(4) (1842), 1 Dowl. N. S. 697.
(5) (1901) I. L. R. 29 C. 167; L. R. 29 I. A. 51.
(6) (1913-14) 18 Cal. W. N. 554.

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paragraph 1161]. The case of *Gosling* v. *Gosling* (1) is relied on.

Mr. Sushil Madhab Mullick does not deny that an interest vested in Dhirendra Nath under the will, but he contends that he had not an absolute interest subject as it was to the condition that a certain age was reached and the brothers gave their consent.

Now the executors evidently knew the law and they examined the will to find out whether the interest granted was an absolute one or not. The arbitrators' finding on the matter shows that they held that it could not be conceived that the testator meant that if Dhirendra Nath died before reaching the age of 35 his share was to vest in his brothers. They held that the testator meant that if Dhirendra had a wife or children and died before the age of 35, the share would belong to his wife and children. They found definitely that the interest vested in Dhirendra absolutely. The reference gave them power to find this construction. They found indeed practically that in spite of the terms of the will Dhirendra could have claimed possession of his share at once. That being so, in my opinion, the award cannot be found to be invalid by reason of the arbitrators directing that Dhirendra should get his share at once. It has to be remembered that the appellant himself was a party to the reference and that he consented that Dhirendra's conduct fitted him to get the share. Further Dhirendra is now over 35 years of age and the condition of his reaching that age has been fulfilled and it will be idle now to set aside the award on the ground that the property was given into his possession before he reached the age of 35.

I cannot find in any of the grounds put forward by Mr. Sushil Madhab Mullick any reason why the award should be set aside, and I would therefore dismiss the appeal with costs.

ALLANSON, J.—I agree.

Appeal dismissed.

(1) (1859) John 265.

REVISIONAL CIVIL.

Before Adami and Scroope, JJ.

UGAM PRASAD PANDEY

v.

KING-EMPEROR.*

1927.

March, 4.

Legal Practitioners Act, 1879 (Act XVIII of 1879), section 36(1), Explanation—Tout—evidence of general repute —resolution of a committee of Bar Association insufficient.

A resolution of a small committee appointed by a Bar Association declaring a person to be a tout is not evidence of the general repute of such person within the meaning of the Explanation to section 36(1) of the Legal Practitioners Act, 1879, as amended by the Legal Practitioners (Amendment) Act, 1926.

To bring a person within the definition of " tout " in section 3(*a*) of that Act it must be shown that a legal practitioner has either paid such person for his services in procuring work for him or that such person has proposed to the legal practitioner, or to some person interested in any legal business, to procure the employment of the legal practitioner on condition that the latter will pay him something as a reward for bringing him a client.

A person who frequents the precincts of courts, railway stations, etc., in order that he may persuade intending litigants to employ certain practitioners, is not a "tout" within the definition given in section 3(*b*) unless his purpose and intention is to exact remuneration from the legal practitioners who by his advice and persuasion are to be employed.

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

Manuk (with him *S. P. Varma, Bhagwan Prasad* and *J. N. Moitra*), for the petitioners.

Sultan Ahmed, Government Advocate, for the opposite party.

*Civil Revision no. 599/600 of 1926, from an Order of J. G. Shearer, Esq., I.C.S., District Magistrate of Motihari, dated the 5th October 1926.

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ADAMI, J.

ADAMI, J.—These two applications which have been heard together are directed against the orders passed by the District Magistrate, Motihari, under section 36 of the Legal Practitioners Act, 1879, declaring the applicants to be touts and directing that their names be entered in the list of touts.

It appears that the District Magistrate when dealing with applications for the grant or removal of cards to mukhtars' clerks, suggested to the Criminal Bar Association at Motihari that the Association should consider and report whether the various applicants for cards were touts or not, since there was reason to believe that some notorious touts were masquerading in the guise of registered clerks.

The Criminal Bar Association which consists of some 22 members appointed a Sub-Committee of seven members, and the Sub-Committee reported that the two applicants were touts. The applicants, in two separate proceedings were called upon to show cause why they should not be proclaimed to be touts. Evidence was taken to show that the two applicants were generally regarded to be touts, and in showing cause the applicants examined a number of witnesses to prove that they were not so. The learned Magistrate on the strength of the oral evidence and the evidence of general repute afforded by the report of the Sub-Committee, decided that the applicants were touts and passed the orders complained against.

Mr. Manuk, on behalf of the applicants, has taken two main grounds for setting aside the order. The first ground is that the District Magistrate was not entitled to use the report of the Sub-Committee as evidence of general repute. The second ground is that on the face of the order of the District Magistrate in each case, there is no evidence to show that the applicants are touts within the definition of "tout" contained in the Act.

With regard to the first ground, the *Explanation* to sub-section (*1*) of section 36 of the Act as amended

by the Legal Practitioners (Amendment) Act, 1926 (XV of 1926), runs as follows:—

"The passing of a resolution declaring any person to be or not to be a tout, by a majority of the members present at a meeting, specially convened for the purpose, of an association of persons entitled to practise as legal practitioners in any court or revenue office shall be evidence of the general repute of such person for the purposes of this sub-section."

The resolution in the present cases was a resolution of a Sub-Committee of only seven members out of an Association of about 22 members, and therefore it was not a resolution by a majority of the members of the Criminal Bar Association present at a meeting. In fact it appears that at a subsequent general meeting several members disagreed with the finding of the Sub-Committee. It is clear then that the report or resolution of the Sub-Committee could not be used as evidence of general repute under the *explanation* to sub-section (*1*) of section 36.

With regard to the second ground, the definition of "Tout" in section 3 of the Act, as amended by Act XV of 1926, is—

"'Tout' means a person—

(*a*) who procures, in consideration of any remuneration moving from any legal practitioner the employment of the practitioner in any legal business; or who proposes to any legal practitioner or to any person interested in any legal business to procure, in consideration of any remuneration moving from either of them, the employment of the legal practitioner in such business; or

(*b*) who, for the purposes of such procurement frequents the precincts of Civil or Criminal Courts or of revenue offices, or railway stations, landing stages, lodging places or other places of public resort."

Mr. Manuk urges that the learned District Magistrate has lost sight of this definition or at any rate of the essential ingredient necessary for the constitution of a "tout" that is to say the procurement of the engagement of the legal practitioner in consideration of remuneration moving from the legal practitioner or a proposal for such procurement in consideration of remuneration moving from the legal practitioner, or from a person interested in any legal business. In fact it must be shown that a legal practitioner has either paid the tout for his services

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in bringing work to him, or that the tout has proposed to the legal practitioner or to some person interested in the legal business to procure the employment of the legal practitioner on condition that the legal practitioner or such person will pay him something as a reward for bringing him a client. Mr. Manuk argues that the mere fact that a person makes it his business to act as general agent and to find legal practitioners for those who want legal aid, without being bound as clerk or otherwise to any one legal practitioner, does not constitute such person a "tout". Such person may make his livelihood from fees taken from the clients in consideration of the help rendered in procuring a legal practitioner for them, but this will not constitute him a tout within the definition; to render him a tout it must be proved that he has taken remuneration from the legal practitioners whose employment he has secured, or that he has proposed to the legal practitioner or to some person interested in the legal business that he should be given remuneration by the legal practitioner or such interested person. And if it is shown that a person frequents the precincts of the courts, or railway stations, ghats, lodging houses and other places of public resort in order that he may persuade intending litigants to employ certain legal practitioners it must also be shown that the purpose and intention is to exact remuneration from the legal practitioner who by his advice and persuasion is to be employed.

I have carefully read through both the orders and it is clear that the learned District Magistrate did not direct his mind to the essential point to be determined. It is true he states that the witnesses deposed that the applicants are "touts". In the case of Ugam Prasad Pande he says "They have justified their opinion mainly on the ground that he has not, except for a short period, ever been the registered clerk of any practitioner; that he does not work with any one mukhtar or pleader, and he takes clients to and engages different pleaders and

mukhtars ". He does not say that from all this he infers that Ugam Prasad received remuneration from legal practitioners, or proposed that he should receive it. In the case of Ragho Lal, applicant, the learned District Magistrate says that the witnesses have supported their opinion by reference to Ragho Lal's behaviour in court, and that Ragho Lal, through a mukhtar's clerk was in the habit of securing the employment of pleaders other than his own employer. The inference stated is that Ragho Lal acted " not as a bona fide clerk but as a tout ". There is no inference stated that Ragho Lal received remuneration from the pleaders he engaged.

The learned Government Advocate contends that there is evidence on the records of the cases which would satisfy the court that the applicants fall within the definition of " tout " in section 3; on the other hand Mr. Manuk and Mr. Varma deny that there is any evidence that the applicants ever received or asked for remuneration from legal practitioners. The evidence is not before this court in revision and as it is clear that the learned District Magistrate misconceived the essential points to be determined and as there may be evidence on the record showing that remuneration moved from legal practitioners, or giving rise to a reasonable inference that it so moved, it is right that the District Magistrate should consider the evidence, and come to a finding whether the applicants are touts within the definition contained in section 3 of the Act as amended. He will not take into consideration the resolution of the Sub-Committee as evidence of general repute.

The order of the District Magistrate in each of the two cases must be set aside and the records must be sent back to him in order that he may consider the evidence as directed and come to a finding.

SCROOPE, J.—I agree.

Cases remanded.

REVISIONAL CRIMINAL.

Before Adami and Scroope, JJ.

1927.

March, 7, 8.

NATHUNI NONIA

v.

KING-EMPEROR.*

Jury, Trial by—charge to jury—misdirection—suggestion by judge of an alternative aspect of the case not put forward by prosecution or defence—charge—addition to common object orginally stated—jury not asked which object proved, whether amounts to misdirection.

Where the petitioners were charged with rioting with the common object of looting the paddy stored in the khalihan in a certain basti, and this was denied by the accused persons, one of whom had lodged a saneha at the thana from which it appeared that the complainant's party might have attacked the party of the petitioners in a khesari khet belonging to the petitioners and situated a quarter of a mile away from the khalihan, *held*, that it was not a misdirection on the part of the judge to suggest for the jury's consideration, as a third alternative, an intermediate state of facts, namely, that the party of the accused having been worsted by the complainant's party at the khesari khet fled into the basti, and, having reinforced themselves there, advanced to meet the other side near the khalihan.

Banga Hadua v. *King-Emperor* (1), distinguished.

Samaruddi v. *Emperor* (2), followed.

Where the common object of the unlawful assembly of which the petitioners were members was originally stated in the charge to be "to loot the paddy crops lying in the khalihan" and, after some of the witnesses for the prosecution had been examined, the judge added to the charge the words " and to assault the landlords' man Karu Gope and others ", *held*, that the charge as amended did not state two alternative

*Criminal Revision no. 78 of 1927, from an order of J. A. Sweeney, Esq., I.C.S., Sessions Judge of Patna, dated the 27th January 1927, affirming the decision of P. L. Sen, Esq., Assistant Sessions Judge of Patna, dated 1st October, 1926.

(1) (1910) 11 Cal. L. J. 270. (2) (1913) I. L. R. 40 Cal. 867.

common objects and, therefore, it was not necessary for the judge to ascertain from the jury as to which part of the common object they found the petitioners guilty of.

Samaruddi v. *Emperor* (1), followed.

The Assistant Sessions Judge of Patna, in agreement with the verdict of the majority of the jury, convicted the petitioners Ajodhya Dubey, Dhanukdhari Dubey, Nathuni Dubey, Jehal Mahton, and Nathuni Nonia under section 148 of the Indian Penal Code and sentenced them to six months' rigorous imprisonment and two and a half years' rigorous imprisonment under section 304; Mosafir Dubey and Thakur Nonia were sentenced to six months' rigorous imprisonment under section 148 and to one year's rigorous imprisonment under section 304 read with section 149; the rest of the petitioners were sentenced to four months' rigorous imprisonment under section 147 and to one year's rigorous imprisonment under section 304 read with section 149.

It appeared that there was trouble between the landlords of village Basta and their tenants. In August, 1925, the tenants, including some of the petitioners, filed applications for commutation under section 40 of the Bengal Tenancy Act, and then in November of the same year the landlords filed applications for division of the crops under section 69 of the Bengal Tenancy Act. In January, 1926, the tenants wanted to remove the crops and both sides were preparing to use force when the Sub-Inspector visited the village. In spite of the Sub-Inspector's warning, the tenants removed crops from 2 bighas of the land and the Magistrate issued notices under section 144 of the Criminal Procedure Code, both against the landlords and the tenants. An amin was deputed to get the crops reaped and stored in a khalihan in village Basta.

It happened that several of the tenants had transferred portions of their holdings to others without

(1) (1913) I. L. R. 40 Cal. 367.

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the consent of the landlords, and, when the landlords made applications under section 69, they named the original tenants as the persons against whom they proceeded, ignoring those who had purchased portions of the holdings. The result was that the original tenants, against whom applications had been made under section 69, at the instigation of the landlords took advantage of the fact that they had been named as tenants and sought to take the crops which had been grown by those to whom they had sold a portion of their holdings.

On the 21st March, 1926, the petitioner Tota Nonia went to the police-station at Chandi and gave information that Chakauri Nonia, who had sold $1\frac{3}{4}$ bighas to him 10 or 12 years before, was now preventing him from reaping the khesari crop at the instigation of the amla of the landlord, and was making preparations to fight.

On the 22nd March, 1926, at 9-30 A.M. Ganesh chowkidar gave information at the police-station similar in effect to that given by Tota the day before. He said that the amin had got paddy cut and stored in the khalihan, and that Chakauri and another went to Tota's khesari field to cut the crop and Tota Nonia obstructed him; men were being collected by Tota and lathis were being carried by both sides.

The case for the prosecution was to the effect that when the amin and a daffadar and chowkidar and three watchmen were at the khalihan a mob of some 200 or 250 men advanced to the khalihan from Basta village and proceeded to remove bundles of the crops stored there. Karmu Goala, one of the watchmen, obstructed them, and thereupon the petitioner Ajodhya Dubey gave orders to beat the watchman and thereupon the petitioners Jehal Kurmi, Nathuni and Dhanukdhari struck Karmu on the head with swords; he ran away and was pursued and fell near a siris tree 40 paces north-west of the khalihan, and there Ajodhya speared him in the stomach with a bhala and Nathuni speared

him with a barcha on the body and others of the mob also struck him. Karmu's brother Karu remonstrated and thereupon he was struck with a sword by Nathuni. Karu fled and went towards the police-station. He met the Head Constable at a place called Bhatahar and lodged information.

After injuring Karmu and Karu, the mob dispersed. Karmu died from the injuries he received and Karu was seriously injured. The Head Constable sent information to the Sub-Inspector and himself proceeded to Basta where he arrived at 12-30 P.M. and found paddy scattered outside the khalihan and brickbats inside and outside. He found blood leading from the khalihan to the siris tree. Karmu was hardly conscious and died sometime afterwards. At about 5-30 P.M. the Head Constable found Gopal Nonia and Bairo Nonia injured, and Gopal made a statement to the Head Constable to the effect that that morning Chakauri Nonia with others had come to cut Tota's khesari and had threatened to beat them when Chakauri caught Tota by the wrist and began to drag him. Gopal and Bhairo went up and remonstrated. Thereupon the gomashta of the landlord brought a mob of 100 to 125 men from the north-east and gave orders to beat Tota. In the mob Gopal recognised Karmu and Karu Goala. The mob ran to beat Gopal and Tota, and so they fled towards the basti to the south of the field chased by the mob. In the field of Badhu Nonia, the mob caught up Gopal, and Chakauri assaulted him with a lathi, while Jodha Nonia also beat him with a lathi. The mob then took away bundles of khesari. An investigation was held and the police sent up the 13 petitioners and others for trial on the information given by Karu.

In the original charge drawn up against the accused, so far as the offence of an unlawful assembly was concerned the common object was stated to be to loot the paddy crops lying in the khalihan for division under section 69 of the Bengal Tenancy Act. After

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examining seven or eight witnesses the Assistant Sessions Judge made an addition to the charge with the words

"and to assault the landlord's men Karu Gope and others."

The petitioners produced no evidence in defence other than the saneha (Exhibit A) which had been lodged by Tota on the 21st of March.

After hearing all the evidence, the jury by a majority of 3 to 2 found the petitioners guilty under the sections I have mentioned above. An appeal was made to the Sessions Judge of Patna on the ground that there had been several misdirections in his charge to the jury by the Assistant Sessions Judge. The Sessions Judge, however, found that in none of the points put forward was there any misdirection and he dismissed the appeal.

S. Sinha (with him *A. L. Nandkeolyar*), for the petitioners.

C. M. Agarwala (Assistant Government Advocate), for the Crown.

8th March 1927.

ADAMI, J. (after stating the facts set out above, proceeded as follows):

Mr. Sachchidananda Sinha has confined himself before us to three points on which he urges that there has been a misdirection to the jury.

His first point is that the Assistant Sessions Judge in charging the jury placed before them an absolutely hypothetical case not warranted by the evidence on record and thus misled the jury. It is to be noticed that the prosecution evidence made no mention of any occurrence on the field of Tota Nonia; it was the prosecution case that the petitioners and others had come in a mob up to the khalihan to loot the paddy and get back their crops and also to assault Karu and others. After pointing out that many witnesses had given evidence that the mob advanced from the Basta basti and came up to the khalihan and

thereafter the assault commenced at the khalihan, the learned Assistant Sessions Judge charged the jury to the following effect :—

" In this connection you should look to the defence story appearing from the evidence of the Writer Head Constable, the First Information Report Ext. 13, the statement of Gopal Nonia and the written statement in the record. You will consider whether a reading together of all these documents does or does not show that Tota Nonia and his party being worsted by the party of Chhakauri Nonia at the 3 kathas plot of khesari khet represented by the figure 4 in the plan fled into the basti, and whether the same does or does not indicate that thereafter they reinforced themselves in the basti and advanced to meet the other side. If you accept as true the prosecution evidence on the point you will be in a position to say that the assailants advanced from the basti to the place of occurrence. You will however have to consider what the immediate occasion was for the said advance of the mob. The defence suggests that the assault on the said Karmu was the sequel to the looting of khesari by Chhakauri Nonia with the aid of the landlord's men from plot no. 229 represented by the figure 4 in the plan. The evidence on the side of the prosecution also goes to show that an incident preceeded the advance of the mob towards the khalihan."

Later on the learned Assistant Sessions Judge said—

" If you find that the said Chhakauri Nonia, with the help of the landlord's men, not only removed the khesari from the above plot but assaulted the men of Tota Nonia, you will have to consider whether the party of Tota Nonia would calmly submit to or highly resent the high-handedness of their opponents and would at the earliest opportunity gather their supporters and advance to teach the said opponents a sound lesson."

Now Mr. Sinha objects that it is no part of the prosecution case that there was an occurrence on the field of Tota a quarter of a mile north of the khalihan, nor is there any evidence that, after such occurrence, the petitioners went to the basti and came back to wreak vengeance, and therefore the case made out by the learned Assistant Sessions Judge is a creation of his own mind and hypothetical. That being so, he was wrong in putting that case to the jury and thus misled them.

The case of *Banga Hadua* v. *King-Emperor* (1) is relied on by Mr. Sinha. There it was laid down that in cases of rioting it often happens that the court may consider that the story told by the prosecution is

(1) (1910) 11 Cal. L. J. 270.

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false in some of its details but is nevertheless sufficient to prove the guilt of the accused; but it is not permissible to base a conviction upon a hypothetical state of facts, which is quite unsupported by evidence, which was never put forward by the prosecution and was never suggested to the accused as being the case they had to meet.

Now in that case it was found that the story put forward by the prosecution must be false because it was found that the prosecution party were not in possession of the land as they claimed. The Sessions Judge in that case formed an alternative case that there was not one riot but two riots and that at first the decree-holders went out and drove out the judgment-debtors, and that subsequently the judgment-debtors, assembled in large numbers and attacked the other side. Stephen and Carnduff, JJ., found that this second story was altogether unsupported by evidence and had never been put forward by the prosecution.

The present case, however, is a different one. Here there was material before the court and before the jury to show that there may have been an occurrence on Tota's field a quarter of a mile away. The court had before it the information given on the 21st March and also the information given by Gopal Nonia on the 22nd. There was also the report of the Chowkidar Ganesh Prasad given on the 22nd at 9-30 A.M., as also the statement of the petitioner Tota Nonia in court. The evidence also showed that the mob had come up from the Basta basti; and according to the learned Assistant Sessions Judge no paddy was looted from the khalihan. It was then necessary to find some motive for the mob having attacked the men at the khalihan. It cannot be said that there was nothing to support the case suggested by the Assistant Sessions Judge to the jury, and I cannot see that the jury were in any way misled by the suggestion. The prosecution had carefully avoided mentioning this previous occurrence in Tota's field, for it would seem that two

men had been injured and naturally the prosecution witnesses would not like to admit having caused those injuries.

As against the case relied on by Mr. Sinha, we have the later case of *Samaruddi* v. *Emperor* (1). There it was held that the Judge was not wrong in asking the jury to consider as an alternative case an intermediate state of facts, namely, that the comlpainant's party went to turn the accused's party out of possession, was resisted and driven back, and that the latter then followed after and assaulted the former. The case put forward there was very much like the case put forward here. Chitty and Richardson, JJ., referred to the case of *Banga Hadua* v. *King-Emperor* (2) and also the cases of *Queen* v. *Sabid Ali* (3) and *Wafadar Khan* v. *Queen-Empress* (4) and distinguished them.

The learned Assistant Sessions Judge in this case left it open to the jury whether they would accept the suggestion he made, and it cannot be held that, if the suggestion was not accepted, the prosecution case must fail. In my opinion the Assistant Sessions Judge has made a very fair charge to the jury and the suggestion he made was a suggestion which would occur to the mind of any person who heard the facts put forward by either side. In my mind, there is no misdirection to the jury on this point.

The next point urged by Mr. Sinha is that the petitioners were sent up on a charge of an unlawful assembly with the common object of looting paddy stocked in the khalihan and that the addition of the words " and to assault Karu and other persons in the khalihan " amounted to an alternative charge. As the Assistant Sessions Judge did not put to the jury the question on which of the two common objects they found the petitioners guilty and did not direct them to find which common object actuated the mob there was a misdirection. He urges that the Assistant Sessions Judge was still influenced by his theory that

(1) (1913) I. L. R. 40 Cal. 367. (2) (1910) 11 Cal., L. J. 270.
(3) (1873) 20 W. R. C. 5. (4) (1894) I. L. R. 21 Cal. 955.

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the first occurrence was on Tota's field, then there was a return to the basti followed by the attack on the khalihan, such attack being made in vengeance for what had happened on Tota's field; and it was owing to this theory that the addition was made to the charge. He points out that there was not sufficient evidence to show that the assault happened inside the khalihan, or that paddy had been looted, and therefore also it was necessary to make the addition to the charge. He was leading the jury to discard the charge of loot and believe the charge of assault and he ought to have put it definitely to the jury to come to a finding what the actual common object was.

Mr. Sinha speaks of the additional words in the charge as an alternative charge; but in this he is not correct, for the words were not " or to assault " the landlord's men but " and to assault" · it was not in fact an alternative charge.

The case on which Mr. Sinha relies, *Wafadar Khan* v. *Queen Empress* (1) is a case of a very different nature. There the common object originally stated in the charge was

" to use criminal force on Mir Azad and his party ".

Thereafter the words

" or else to punish Khan Ghalib for having enticed the wife of one Sher Ali "

were added. It was obvious that the common object added there was an absolutely unconnected common object and it was an alternative common object. In the present case the assault would be made as part of the transaction of looting the crop.

The case of *Samaruddi* v. *Emperor* (2) may again be referred to. There the common object originally stated in the charge was to take forcible possession of the complainant Panda's land and hut. Afterwards the words " and to assault Pandab, Jojdeb, Chandra Kishore and Karam Ali " were added. It was held that the addition in no way vitiated the

(1) (1894) I. L. R. 21 Cal. 955. (2) (1913) I. L. R. 40 Cal. 367.

trial, nor was there any misdirection. One common object was alleged throughout and it could not be suggested that the accused did not know exactly what they had to meet. There is no force in the contention of Mr. Sinha that it was the duty of the Judge to find from the jury on which common object they were depending.

The learned Assistant Sessions Judge clearly pointed out to the jury that even if the common object as to loot could not succeed, there still remained the common object to assault. He stated to the jury,

> " You will have to determine whether the object of the assembly was to loot crops and assault the landlord's men or the one or the other. In any case you will have to say that the object was illegal."

He also said,

> " You will consider whether the mention of the first information Ex. 7 of the alleged looting of paddy crops from the khalihan may not be due to this circumstance that the mob advanced to the vicinity of the khalihan. The evidence shows that, as a matter of fact no crops whatever were taken away and that the marpit did not take place within the khalihan.

He further stated,

> " I should tell you that there are two limbs in the common object as put forward by the prosecution, and that, if you find that one of the said limbs has not been, but the other has been, made out, that will suffice. What I mean to say is this that if you find that the allegation that the mob advanced to loot the crops gathered at the khalihan is not proved, but that if at the same time you find that the object of the mob was to assault the landlord's men, you will have to say that the mob was actuated by an illegal object."

In my opinion the learned Assistant Sessions Judge put the position very clearly and well to the jury and the objection cannot succeed.

The last point put forward by Mr. Sinha is that the theory formed by the Assistant Sessions Judge influenced him in charging the jury with regard to the right of private defence and that he still suggested to the jury that the purpose for which the mob advanced to the khalihan was to wreak vengeance for what had happened in Tota's field.

The learned Assistant Sessions Judge explained what the right of self-defence is to the jury and

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pointed out that if the story of the prosecution that the mob advanced to the khalihan to commit assault was believed, the petitioners could not fall back upon the plea of the right of private defence and he pointed out that there was no evidence on the record to show that the assault took place on plot 229 which is Tota's field. He stated to the jury that the evidence was that no blood marks were found in Tota's field. Mr. Sinha points out that it was never the defence case that the assault took place on Tota's field, the defence case was that the assault was in the field of Budhan Nonia which is not so far from the khalihan. I cannot see that this makes much difference. There was no evidence to prove that an assault happened in the field of Budhan Nonia though blood was found there; no defence evidence was called. What the learned Assistant Sessions Judge told the jury was that the defence had failed to prove that any assault had happened when they were defending their rights. It was pointed out by the learned Assistant Sessions Judge that there was no evidence to prove that the men of Tota Nonia followed Chakauri and his party and that in the course of the pursuit the assault took place. It is true that the prosecution does not explain the finding of blood in Budhan's field, but that does not help the defence to show that they had a right of private defence. It is true that we have sanehas and informations given by Gopal, Ganesh and Tota but those alleged occurrences are not proved by evidence and the learned Assistant Sessions Judge was quite right in directing the jury that there was no evidence to prove the right of self-defence.

I can see no good reason to find that the learned Assistant Sessions Judge, who delivered a very careful and explicit charge to the jury, misdirected the jury in any way.

I would, therefore, reject the application.

SCROOPE, J.—I agree.

Rule discharged.

REVISIONAL CRIMINAL.

Before Mullick and Scroope, JJ.

MUSAMMAT GULJANIA

v.

KING EMPEROR.*

1927.

March, 9.

Code of Criminal Procedure, 1898 (*Act V of* 1898, *section* 239(*f*)—*Receivers of stolen property, joint trial of—Penal Code*, 1860 (*Act XLV of* 1860), *section* 411.

Where several articles stolen at one theft are received by different persons, all or any of the receivers are triable jointly for the offence of receiving stolen property.

The facts of the case were as follows.

The petitioner Musammat Guljania and her sister Sarjania were maid-servants in the service of the Maharanis of Darbhanga till August 1925. In February 1926 Sarjania was living in her own house in Darbhanga while Guljania was living in a house belonging jointly to herself and Sarjania at Pahi Tola which is sixteen miles from Darbhanga. The third accused in the trial court was a man named Bouku Jha who lived in a village five miles from Darbhanga and was till a year before the theft, which formed the subject-matter of the present proceedings, in the service of one of the Maharaja of Darbhanga's relatives. In December 1925 the Maharaja and the Maharani Saheba went from Darbhanga on a visit to Calcutta. They returned on the 21st January. At the time of their departure for Calcutta there was in the palace at Darbhanga an almirah full of clothes, the key of which was entrusted to one Bhagwan Dutt Jha. Bhagwan Dutt went to his own home the same day the Maharaja left for Calcutta and returned four or five days after him. On the 5th February he

*Criminal Revision no. 76 of 1927, from a decision of J. A. Saunders, Esq., I.C.S., Sessions Judge of Muzaffarpur, dated the 10th January 1927, modifying a decision of Maulavi Muhammad Yusuf, Magistrate, 2nd Class, of Darbhanga, dated the 22nd September, 1926.

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tried to open the almirah and found that the lock had been tampered with. The almirah was then broken open and it was discovered that it was empty and the clothing the value of which was Rs. 4,000 had been removed. Some other articles belonging to the Maharaja had also been taken.

On or about the 16th February in consequence of information received, the houses of Sarjania, Guljania and Bouku Jha were searched. In the house of Sarjania at Darbhanga were found a lady's coloured silk reticule and a large wooden box with two brass handles; in the house occupied by Guljania at Pahi Tola was found a large tin trunk containing 37 articles of clothing; and in the house of Bouku were found a green chaddar and two highly ornamental silk caps and four new betel-nut crackers. It was alleged that all these articles were stolen from the palace of the Maharaja between the 2nd December 1925 and the 5th February 1926.

The petitioners were put on their trial jointly for an offence under section 411 of the Indian Penal Code and were convicted by the second class Deputy Magistrate of Darbhanga.

In appeal the Sessions Judge of Muzaffarpur, to whom the case was transferred after some proceedings in the High Court, acquitted Sarjania and Bouku, but he convicted Guljania of the offence charged and sentenced her to rigorous imprisonment for six months and a fine of Rs. 100.

S. Sinha (with him *S. V. Verma* and *H. P. Sinha*), for the petitioner.

Sultan Ahmad, Government Advocate (with him *S. Saran*), for the Crown.

MULLICK, J.—The first point urged before us to-day is that the joint trial of the three accused was bad in law and a very careful argument has been submitted to us by learned Counsel on behalf of the

petitioner on the meaning of clause (*f*) of section 239 of the Code of Criminal Procedure.

It is urged that this clause contemplates that receivers of stolen property cannot be tried jointly unless they received the goods from the thief by one act of transfer. It is urged that the words "in respect of stolen property the possession of which has been transferred by one offence" refer to the transfer of possession from the thief to the receivers and not to transfer of possession from the true owner to the thief. The section has not been very clearly drafted; but we think, on the whole, that it refers to transfer of possession from the true owner to the thief.

The following cases may arise when stolen property is found in the possession of different receivers. There may be one theft and the several receivers may have received the property jointly, i.e., at one and the same time; there may be one theft and the several receivers may have received the property at different times; there may be two or more thefts and the several receivers may have received the property jointly; there may be two or more thefts and the several receivers may have received the property at different times.

It was clearly unnecessary for the legislature to legislate for the joint trial of persons to whom property has been transferred jointly, that is to say, when one receiver receives the property as the agent of another. In such a case whether there is one or more than one theft, the receipt of the goods is the act of one person and a joint trial is clearly permissible. Nor is it conceivable that the legislature intended to enact that there should be a joint trial of receivers who have received at different times goods stolen at different thefts. There is no community of purpose between the receivers and there is no reason for providing for the joinder of parties in such a case.

But the case in which there is one theft and the property has passed to the several receivers at

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different times required legislation, because it had been held in several High Courts that a joint trial was illegal. It was thought a multiplicity of trials should be avoided and therefore clause (*f*) was inserted into the Code of 1923. The statute practically declares that the different acts of receipts are one and the same transaction if the transfer of possession from the owner to the thief was made by one and the same act. Whether the word " transfer " is appropriate to the change of possession in such a case may be open to argument but I think this is the only construction which can be reasonably given to the statute.

In this view of the case the joint trial of Musammat Sarjania, Guljania and Bouku was legal provided there was prima facie evidence to support the case that the articles were stolen in the course of one and the same theft. Now it has been urged by the learned Counsel that there is no express finding to this effect. The learned Sessions Judge expresses the opinion that although no direct evidence has been adduced on the point the probabilities are that the articles were stolen at one and the same time. At any rate there is nothing to indicate the contrary. The steel trunk and the wooden box and the other articles were all in the palace when the proprietor left it in December. The smaller articles could have been removed and were in fact found in the boxes, and we agree with the learned Judge that the removal was made in the course of a single theft. Upon the evidence the trial court was right in holding a joint trial.

The next point urged is that there is no clear evidence that the properties alleged to have been found in the possession of Guljania were in her exclusive possession. Now, it is true that in the trial court she claimed that some of the articles of clothing had been given to her by her mistress; but that defence does not cover the steel trunk and some of the other valuable articles found in the trunk.

Her defence with regard to them is that while she was living in the house at Pahi Tola some men in the service of the Maharaja of Darbhanga brought the trunk and the clothing contained therein to her house and saying that the Maharani had sent them, put the articles into the room ordinarily occupied by Sarjania. Evidence was given in the trial court that Sarjania was living at Darbhanga and that she only goes at intervals to her house at Pahi Tola and that during her absence the room in which the articles were found and which had only a thatch door was not used. The question whether the articles were in the joint possession of Sarjania and Guljania or in the separate possession of Guljania does not require discussion because Guljania's case is that she alone was in the house at the time when the trunk arrived and that the goods were forced upon her and that she had no idea that the articles which had not been given to her were in the box. No attempt has been made to show that the steel trunk was sent, as alleged, by the Maharani of Darbhanga and left in her house against her will or that she was in any way deceived into accepting the box and its contents. It is an unlikely story in itself and the finding of the court is that she was well aware that both the box and its contents were stolen property.

There can be no doubt that she dishonestly retained property knowing it to be stolen.

Finally, a point was taken that the petitioner was prejudiced in her trial, because she was not permitted to examine as witnesses the two Maharanis of Darbhanga. I is said that she desired to prove that some of the articles in the box had been given by the Maharanis to her as presents in the course of her service. That defence, however, would not cover the case of the steel trunk and some of the other articles of clothing, and her defence with regard to these articles could not have been in any way improved by the examination of the ladies. The learned Sessions Judge has taken the view that the application for the

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examination of the ladies was made for the purpose of vexation and delay. We think there is some reason for such a view. In any event, so far as the material part of the charge is concerned, namely, the steel trunk and the valuable items of clothing, it has not been shown that there has been any prejudice by the omission to enforce the attendance of the Maharanis of Darbhanga.

The result, therefore, is that the conviction and sentence must be affirmed and the application dismissed.

SCROOPE, J.—I agree.

Rule discharged.

APPELLATE CIVIL.

Before Mullick and Scroope, JJ.

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MAHARAJ BAHADUR SINGH.

v.

RAI BAHADUR P. C. LAL CHAUDHURY.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 54—*Execution of decree—Notice of sale, whether publication necessary in every mauza to be sold—Proceeding to set aside sale—question of valuation may be raised.*

Where a large number of mauzas are to be put up for sale in execution of a decree it is not necessary that notice of the sale should be published in every mauza.

Krishna Pershad Singh v. *Moti Chand* (1), distinguished.

In a proceeding to set aside an execution sale on the ground of irregularities in publishing and conducting it, the judgment-debtor is not precluded from raising the question of valuation merely because the question has already been decided when the sale proclamation was settled.

Mahadeo Singh v. *Dhobi Singh* (2), doubted.

*Appeal from Original Order no. 103 of 1926, from an order of Babu Harihar Charan, Subordinate Judge of Purnea, dated the 22nd April, 1926.

(1) (1913) I. L. R. 40 Cal. 635. (2) (1923) I. L. R. 2 Pat. 916.

Appeal by the judgment-debtor from an order refusing to set aside an execution sale on the ground of irregularity in publishing and conducting it.

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

C. C. Das (with him *B. N. Mitter* and *G. N. Mukherji*), for the appellant.

Sultan Ahmed (with him *A. H. Fakhruddin*), for the respondent.

MULLICK, J.—This appeal arises out of an application to set aside a sale which was held on the 4th June, 1925. The Subordinate Judge found that there had been no irregularity in publishing and conducting the sale and dismissed the application. The sale was held in execution of a rent decree passed on the 20th June, 1920, by the Subordinate Judge of Purnea in favour of the respondent Rai Bahadur Pirthi Chand Lal Chaudhury against the appellant Babu Maharaj Bahadur Singh for the rent of a patni taluk for the years 1325 to 1327 Mulki (corresponding to 1918 to 1920). The taluk has been the subject of considerable previous litigation. The former proprietor of the estate was one Dhanpat Singh, the father of the appellant and under him the patni was at one time held by one Babu Chhatarpat Singh. Dhanpat Singh sold the proprietary interest to the respondent and in 1913 a suit was brought by Chhatarpat Singh against the respondent to set aside a sale of the patni taluk which had been held on the 16th November, 1912. That suit succeeded and the sale was set aside.

We find next that after Dhanpat Singh's death his trustees Babu Indra Chandra Bothra and others and the appellant Maharaj Bahadur Singh sued Chhatarpat Singh for some rent which had accrued before the transfer of the proprietary right to the respondent and obtained a money decree which was

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put into execution in the year 1912. In that execution the decree-holders Indra Chandra Bothra and others purchased the patni mahal for a sum of Rs.39,000 on the 8th March, 1915, and thereby became talukdars under the respondent Pirthi Chand Lal Chaudhury.

We next find that P. C. Lal Chaudhury brought a suit against Chhatarpat Singh for rents which had accrued before the 8th March, 1915 and obtained a decree and brought the taluk to sale on the 27th March, 1916, and that Rani Mina Kumari, the mother of the appellant, purchased it for a sum of Rs. 41,000.

The taluk was again in arrears and was sold under the provisions of the Patni Regulation VIII of 1819 on the 16th November, 1916, and was purchased by one Mouji Lal for a sum of Rs. 10,000.

To set aside this last sale Maharaj Bahadur brought a suit on the 1st December, 1916, and valued the property at Rs. 39,000.

Mina Kumari also brought a suit to set aside the same sale on the 30th March, 1917, valuing the property at Rs. 41,000.

In the execution proceedings which resulted in the sale now under consideration, the property was valued by the Subordinate Judge on the 24th January, 1925, in the presence of the parties to the suit, and the Subordinate Judge, after considering the documents relating to the proceedings referred to above and the oral evidence adduced by the parties, found that the property should be valued at Rs. 41,000. The sale proclamation was then published upon the footing of this valuation and the property was purchased at the sale by the decree-holder Rai Bahadur P. C. Lal Chaudhury for that sum.

One of the questions to be decided by us will be whether this price was inadequate and whether it

was the result of the irregularities in the sale alleged by the judgment-debtor.

But the first question is whether there was any irregularity at all. The provisions of law applicable to the sale are contained in Order XXI, rules 54, 66 and 67, of the Code of Civil Procedure read with Chapter XIV of the Bengal Tenancy Act.

Now the property comprises forty mauzas which are situated in thanas Forbesganj, Purnea, and Raniganj in the district of Purnea. It is alleged by the decree-holder that the notices of attachments and the proclamations of sale were published in fourteen mauzas by two Civil Court peons Hossaini and Mahabir on the 26th April, 27th April, 28th April and 29th April, 1925. Hossaini made the services in mauzas Hingna and Lachmipur in thana Forbesganj and in mauzas Kharhat, Parmanpur and Kopari in thana Raniganj. The other peon Mahabir made the services in mauzas Raghopur, Mirzapur, Bishtaria, Kajra, Pachira, Tamghati, Pahasra Basaiti and Jhunni. The decree-holder also alleges that service was duly made in the thana buildings at Purnea, Raniganj and Forbesganj. Also a notification was published in the Government Gazette on the 29th April. And finally remembering his previous difficulties in connection with this property the decree-holder took the precaution of engaging the services of Babu Ashutosh Moitra, a photographer of Katihar, who went with the peon Hossaini to mauza Kharhat and with the peon Mahabir to mauza Raghopur and was present at the time the service was made in those mauzas and took a photograph of the persons assembled there. The first proofs of these photographs were signed by the photographer on the 27th April, 1925, and were produced before the Subordinate Judge in the inquiry under Order XXI, rule 90, of the Code of Civil Procedure.

In support of the allegations with regard to the services made by Hossaini, the decree-holder has

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called the peon himself. He has also examined the drummer Bhadai, the identifier Bhagwat and five villagers named Tulsi, Jagap, Santokhi Mandal, Chulhai Mandal and Sumrit Mandal. Hossaini has attested his signature upon the reports made by him with regard to the services and it is admitted that there is a discrepancy between his evidence in court and the reports. Hossaini's reports show that he made the services on the 26th and 27th April; but the date on which he submitted the reports to the Subordinate Judge was the 2nd May. In court he says that he wrote the reports on the spot at the time of service and, therefore, there is a discrepancy between his two statements on this point. It would seem that he wrote out the service return after he go back to headquarters; but his evidence on the whole has been accepted by the learned Subordinate Judge, and I think that the discrepancy is due to defect of memory, particularly so as there is a large amount of evidence corroborating the service of notice in the mauzas. The drummer and the identifier are of course the decree-holder's men, but the villagers who support Hossaini have no interest in deposing falsely, and I think they were rightly believed by the learned Subordinate Judge. Then, there is no question that service was duly made at the police-stations, and having regard to the fact that a notification was also published in the Gazette, I can see no reason why the decree-holder should have brought false evidence for the purpose of supporting the peon.

The most remarkable corroboration however of the peon's statement is supplied by the photograph taken in mauza Kharhat. There is no reason for distrusting the photographer who says that he accompanied the peon and took the photograph in which some of the persons who have given evidence in this case have been marked by the letters C, C1, C5 and C6. This photograph shows that there was a gentleman named Saroda Babu who was looking

after the interests of the decree-holder and that the party assembled at the place where service was made comprised among others Hossaini, Bhadai, Bhagwat and Chulhai.

With regard to the services made by Mahabir the evidence is equally satisfactory and clear. Mahabir is supported by the drummer Bhadai and by the identifier Chhatar and six villagers, Bansi, Wazir Ali, Bahoran Gossain, Adhin Lal Mandal, Bazrangi Lal and Chulhai Mandal and by the photographer Ashutosh Moitra. The reports submitted by Mahabir have been proved by him in court, and there is no material discrepancy between the evidence given by him and either his own reports or the evidence given by the other witnesses. There is also a group taken at Raghopur signed by the photographer on the 27th April, 1925. This photograph shows Saroda Babu standing by a horse which he had evidently been riding and also the peon and Bahoran Gossain and Adhin Mandal marked respectively by the letters C2, C3 and C4.

The evidence shows that the notices were served in one mauza on the 26th April, in eight mauzas on the 27th, in four mauzas on the 28th and in the last mauza on the 29th. The reports, as has already been stated, were submitted by the two peons on the 2nd May and the 11th May.

The learned Subordinate Judge saw the witnesses and believed them and in my opinion he was fully justified in holding that there had been no irregularity in publishing and conducting the sale.

A point was attempted to be made before us on behalf of the appellant that as the properties comprised forty mauzas publication should have been made in more than fourteen mauzas. It is clear that the law does not require that publication should be made in every mauza. *Krishna Pershad Singh* v. *Moti Chand* (1) was cited, but that case has no

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application. In that case the execution court in terms directed that the sale proclamation should be served in every mauza and as there was a gross contravention of the orders of the court, it was held by their Lordships of the Privy Council that the sale was bad; but there is no justification for the contention that in every mauza comprising an estate or a tenure a separate proclamation is to be served.

TYRRELL, J. Rule 54 of Order XXI of the Code of Civil Procedure requires that the order shall be proclaimed at some place on or adjacent to the property by beat of drum and that a copy of the order shall be affixed on a conspicuous part of the property and also upon a conspicuous part of the court-house and at the office of the Collector of the district where the land is situated, and it is clear that in this case these provisions were substantially complied with. It appears from a reference to the district map that the mauzas are all situated close together and that the places where the services were made constitute some of the largest villages within the taluk. From the fact that services were made in several mauzas on one and the same date, it is clear that they were not separated from each other by great distances, and in the circumstances, there can be no doubt that the provision regarding service in or upon a conspicuous part of the taluk was complied with. With regard to the other requirements of the law, no arguments have been addressed to us, and upon the question of fact whether or not service was made as alleged we are in complete agreement with the learned Subordinate Judge and we hold that no irregularity has been proved.

This makes it unnecessary for us to enter into the question of inadequacy of price, but as the parties have adduced documentary evidence and also some oral evidence upon the point in the court below and the court has gone into the question at some length, we will record a finding on that point also.

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MULLICK, J.

We have to observe at the outset that the learned Subordinate Judge was in error if he thought that the judgment-debtor was precluded from raising the question of valuation in the inquiry before him simply because the question had already been decided when the sale proclamation was settled. There was no estoppel in the matter at all. The learned Judge relies upon *Mahadeo Singh* v. *Dhobi Singh* (1). But in that case a notice was issued upon the judgment-debtor informing him that the court had valued the property at a certain figure and he was called upon to show cause why that value should not be entered in the sale proclamation. The judgment-debtor declined to appear. The property was eventually brought to sale and when the judgment-debtor made an application to set aside the sale it was held that the principle of res judicata must be applied and that he was precluded from raising the question again. It is also to be observed that *Mahadeo Singh's* case has been overruled though on another point and it is doubtful if the decision regarding the valuation which was really obiter is binding. But in effect, the learned Subordinate Judge's error has not affected the result. The judgment-debtor examined altogether fourteen witnesses. After thirteen witnesses had been examined, he called a witness to give oral evidence with regard to the value of the property and at that stage the court expressed the opinion that further evidence on the point should not be given. But the documentary evidence was already in and the learned Subordinate Judge upon that documentary evidence, eventually recorded a finding that the value of the property was about Rs. 41,000 and that there had been no inadequacy of price in the sale.

Now in 1914 in the suit brought by Chhatarpat Singh against Rai Bahadur P. C. Lal Chaudhury (Exh. 7) to which reference has already been made, the court valued the property at Rs. 60,000 without contest. In the judgment (Exh. 8) which relates

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to the sale of the 8th March 1915 referred to above the court thought that Rs. 39,000 was a fair valuation taking into account the fact that a sum of Rs. 27,000 was due for arrears rent. In the two plaints filed respectively by Maharaj Bahadur Singh on the 1st December, 1916 (Exh. 1) and Mina Kumari on the 30th March, 1917 (Exh. J), the valuations given are Rs. 39,000 and Rs. 41,000 respectively. It must be assumed, till the contrary is shown, that the plaintiff in each of the suits complied with the provisions of the law and gave the true market value. The learned Subordinate Judge has relied on these two plaints in arriving at the finding that the property could not at the end of 1916 and at the beginning of 1917 have been worth more than Rs. 41,000. The learned Counsel for the appellant suggests that the true value was not given because the plaintiff was allowing for the outstanding charges on account of rent; but there is no evidence to support this explanation. I cannot, therefore, say that, in the circumstances, the learned Subordinate Judge was wrong in holding that the value of the property was about Rs. 41,000.

It is, however, contended that even if the value was Rs. 41,000 in 1917 there were five darpatni tenures in the estate which have since been cancelled and that consequently the value of the patni interest has gone up. That argument is correct but there is no evidence to show what is the income of the property, nor at how many years' purchase the property should be valued. Without documentary evidence of the income it is difficult to arrive at a satisfactory valuation of the present value of the patni.

But even if the value of the property is Rs. 60,000 as was held in 1914, I do not think that Rs. 41,000 can be considered to be an inadequate price in view of the fact that it was the price fetched at a forced sale. Further it appears that at the time when the decree-holder purchased the property on the 4th June, 1925, a sum of Rs. 56,000 was due on

account of arrears of rent, and it is probable that bidders at the sale were influenced by this fact. It is impossible also to expect the full market value of a property to be realised by a sale in court and, in the circumstances, I am unable to say that there has been an inadequacy of price.

In any event, if there was any inadequacy, the appellant is not entitled to any relief because the sale was duly and properly published and conducted.

The appeal, therefore, must be dismissed with costs.

SCROOPE, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Dawson Miller, C. J. and Kulwant Sahay, J.

DHATURI SINGH

v.

KEDAR NATH GOENKA.

Court-fees Act, 1870 (Act VII of 1870), section 8—suit, valuation of, whether can be enhanced for the purpose of jurisdiction.

Under section 8, Court-fees Act, 1870, the valuation for the purposes of jurisdiction and court-fee must be the same; and a party is not entitled, where the valuation of the suit can be correctly ascertained, to enhance it merely for the purpose of jurisdiction.

Plaintiffs sued the appellant for arrears of rent amounting to Rs. 3,593-10-9. In the same suit they claimed enhancement of rent. Under the Court-fees Act the valuation of such a claim is based upon the amount of one year's rent, which, in the present case, was Rs. 718-11-9. The value of the suit for the purposes of court-fee was Rs. 4,312-6-6. For the purposes of jurisdiction, however, the value of the suit was stated to be Rs. 5,100. The suit having been decreed, the defendants appealed to the District Judge, who returned the

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memorandum of appeal on the ground that he had no jurisdiction to hear the appeal. The defendants, therefore, presented the memorandum to the High Court.

Held, that the valuation of the suit for the purpose of jurisdiction should have been Rs. 4,312-6-6, and that the proper forum for the appeal was the Court of the District Judge and not the High Court.

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

S. Dayal, for the appellant.

DAWSON MILLER, C.J. AND KULWANT SAHAY, J.— The appellant in this case is in the unfortunate position of having had his memorandum of appeal rejected by the learned District Judge on the ground that he had no jurisdiction to hear the appeal and when he presented his memorandum of appeal in the High Court the learned Registrar decided that the High Court had no jurisdiction to hear the appeal but that the proper court was the district court and the matter has been referred to this Bench for final orders. The case stands thus. The plaintiffs brought a suit against the appellant claiming arrears of rent which were valued at Rs. 3,593-10-9. In the same suit they claimed an enhancement of rent and under the Court-fees Act the valuation of such a claim is based upon the amount of one year's rent, in this case Rs. 718-11-9. The total amount claimed therefore was Rs. 4,312-6-6 which amount we are informed was actually stated in the plaint for the purpose of estimating the court-fee. In the same document, however, the value of the suit was stated to be Rs. 5,100 for the purposes of jurisdiction. It is quite clear that the plaintiffs in the suit were wrong in giving one valuation for the purpose of court-fees and another valuation, which appears to be a purely arbitrary valuation, for the purposes of jurisdiction. It is provided in section 8 of the Suits Valuation Act that valuation for the purposes of jurisdiction and court-fee shall be the same. The learned District Judge when the matter went before

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him merely referred to the fact that the suit had been valued for the purposes of jurisdiction at Rs. 5,100 and, if that were right, it was clear that he had no jurisdiction to hear the appeal but that the High Court was the proper tribunal. When the matter came before this court, and the appellant who was the defendant had no option in the matter, the Registrar pointed out that the proper valuation both for the purposes of jurisdiction and or the purposes of court-fee was the lower valuation, namely Rs. 4,312-6-6 and that in these circumstances the proper court was the Court of the District Judge and not this court. The matter has been referred to us and we think that the learned Registrar was right in the conclusion at which he arrived. A party is not entitled, where the valuation of the suit can be correctly ascertained as in this case, to put a purely fancy value on the suit for the purpose of jurisdiction. Where the value can be ascertained as in this case he cannot enhance the value merely for the purpose of jurisdiction. The result is that we must return this memorandum of appeal for presentation in the proper court which is the Court of the District Judge and at the same time we must set aside the order of the District Judge dated the 21st January, 1927, refusing to try the case on the ground that he had no jurisdiction.

Order set aside.

APPELLATE CIVIL.

Before Dawson Miller, C. J. and Kulwant Sahay, J.

JAGDESH CHOWDHURY

v.

RADHA DUBEY.*

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March, 22

Court-fees, refund of—High Court, inherent power of—second appeal dismissed on the ground of non-maintainability—court-fee, whether should be refunded.

*Second Appeal no. 97 of 1927.

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The High Court has inherent power to make an order directing the Taxing Officer to issue the necessary certificate to enable an appellant to apply to the revenue authorities to obtain a refund of any excess court-fee paid on a memorandum of appeal.

Chandradhari Singh v. *Tippan Prasad Singh* (1), followed.

But where, however, the High Court dismisses a second appeal on the ground that no second appeal lay from the decision appealed agains t the court-fee paid on the memorandum of appeal cannot be refunded.

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

L. N. Singh, for the appellants.

A. B. Mukherji, Government Pleader, for the Crown.

DAWSON MILLER, C.J. AND KULWANT SAHAY, J. This is an application on behalf of an unsuccessful appellant to recover the court-fee filed with his memorandum of appeal in a second appeal to this court. Apparently at first the appellant was under the impression that the appeal was an appeal from an order and he was proposing to pay a court-fee of Rs. 4, but on further consideration he in fact paid a sum of Rs. 382-8-0 which was the proper court-fee payable upon an appeal in such a case. When the matter came before this court his appeal was dismissed on the ground that in the circumstances no appeal lay from the decision of the lower appellate court. The appellant now asks that the court should refund the court-fee of Rs. 382-8-0 upon two grounds. In the first place he says that the Stamp Reporter, when he was about to file his appeal and pay the court-fee of Rs. 4, advised him that this was not an appeal from an order but really an appeal from a decree, and that therefore he had better pay the Rs. 382-8-0 and the appellant took that advice. It was purely optional to the appellant whether he paid the Rs. 382-8-0 or whether he took a firm stand and supported

(1) (1918) 8 Pat. L. J. 452.

his own opinion, if he really ever had any strong opinion in the matter, that the proper appeal open to him was an appeal from an order. He might have insisted upon paying the fee of Rs. 4 and prosecuting his appeal as one from an order. Of course he would take the risk of having it dismissed on the ground that it was not in fact an appeal from an order. He however thought better of it and it does not seem to us, merely because the Stamp Reporter had given him some friendly advice about the matter which he took without question, that that is any ground for refunding the fee. The matter was entirely one for the discretion of the appellant himself.

The second point urged is that in fact he might have treated this case as one in revision and applied in revision for an order setting aside the decision of the lower appellate court and, had he done so, in that case the only fee he would have had to pay would have been a fee of Rs. 3. It seems to us that the short answer to the case is that he did not treat the case as one in revision. He did not apply in revision and there is no reason to suppose that had he done so he would have been any more successful than he was in fact by going before the court in appeal from appellant deliberately chose to bring an appeal from a decision of the lower appellate court. The question was one for him. Having instituted his appeal he was entitled to have it treated as an appeal and to raise all the points which might be raised in an appeal and not only the points which might be raised in a case of revision. In the latter case the question would be restricted to one of jurisdiction. In an appeal the points open to him would include not only jurisdiction but all questions of law. He chose that course and he alone is responsible for it and he alone must bear the consequences if he fails. We have been referred to the case of *Chandradhari Singh* v. *Tippan Prasad Singh* (1) where it was laid down that the High Court has inherent power to make an order directing the Taxing Officer to issue

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the necessary certificate to enable an appellant to apply to the revenue authorities to obtain a refund of an excess court-fee paid on a memorandum of appeal. We do not for a moment wish to question in any way the propriety of the decision in that case to which one of us was a party and we have no doubt whatever that the court has inherent power in proper cases. This, however, does not seem to us to be such a case. The application for revision must be dismissed.

Application dismissed.

APPELLATE CIVIL.

Before Dawson Miller, C. J. and Kulwant Sahay, J.

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March, 22.

JANAK PRASAD

v.

ASKARAN PRASAD:*

Court-fees—appeal, dismissal of, on the ground of non-payment of deficit court-fee—fee already paid, whether can be refunded—sum of money paid into court, whether can be a court-fee—Registrar, power of, to order deposit of money as condition precedent to the case being tried.

When an appeal has been dismissed on the ground that a deficit in the court-fee ordered to be paid has not been paid the amount of court-fee deposited with the memorandum of appeal or during the hearing of the appeal is not liable to be refunded.

A sum deposited in court as a court-fee is nevertheless a court-fee although it is not converted into the shape of a stamp.

The Registrar of the High Court has no power to direct an appellant to deposit any sum of money in court as a condition precedent to having his case tried.

The facts of the case material to thus report are stalid in the judgment of the court.

*Miscellaneous Judicial Case no. 149 of 1926.

(1) (1918) 3 Pat. L. J. 452.

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JANAK PRASAD v. ASHARAN PRASAD.

S. N. Rai, for the appellant.

A. B. Mukherji, Government Pleader, for the crown.

DAWSON MILLER, C. J. AND KULWANT SAHAY, J. This is an application on behalf of the appellant asking us to vary or set aside an order of the Registrar dated the 31st January last refusing the appellant's application for a refund of a sum of Rs. 900 paid into court under an order of the Registrar passed on the 27th April, 1926, in lieu of a court-fee payable in the appeal. The facts of the case are a little involved but, shortly put, it appears that the appellant applied to appeal in forma pauperis from the judgment of the lower appellate court which was against him. That application was dismissed. Thereupon he proceeded to appeal in the ordinary way. The appeal was valued at Rs. 2,24,000 made up as follows:—Rs. 2,06,000 the value of the property which he claimed and Rs. 18,000 the estimated value of the mesne profits. The fee payable upon the valuation was something approaching Rs. 3,000 and the appellant, when his application to appeal in forma pauperis was rejected, was allowed time in the first place up to the 10th February, 1926 to deposit the requisite court-fee. Subsequently he was granted further time and still did not deposit the fee. Then in April he petitioned the court to be allowed to claim the property only and not the mesne profits. He further claimed that the value of the property should be taken not as its actual value but as 20 times the Government revenue which would amount to Rs. 14,000 the fee upon that valuation being a sum of Rs. 900. His reason for this was that he contended that the suit was not a declaratory suit with consequential relief, but merely a suit for possession. That matter, however, was decided against him and in the meantime he was asked by the Registrar to deposit the sum of Rs. 900 which was the court-fee payable even upon the assumption that his own valuation was correct. The

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Registrar directed that the record should be sent for from the lower court and that the Stamp Reporter should make a report and to that order he added these words :—

"In the meantime the appellant do deposit Rs. 900 by to-morrow."

Obviously what the Registrar meant by that order was that the appellant should pay a court-fee of Rs. 900 by the following day. The appellant, however, read the order literally and instead of himself purchasing a stamp of the value of Rs. 900 he deposited Rs. 900 in cash in court. Subsequently, the Stamp Reporter having reported against his claim to have the property valued at 20 times the Government revenue, he was directed to pay the deficit court-fee. This he did not do and in spite of the fact that time was extended from time to time still he did not pay the court-fee. Finally an order was passed that if he did not pay the court-fee by a certain date his appeal should be dismissed. The court-fee was not paid and the result was that his appeal was dismissed.

He now asks that the sum of Rs. 900 deposited by him on the 28th April should be refunded and the only question is whether that is to be regarded as the deposit of a court-fee, although an insufficient court-fee, or whether it should be regarded as a deposit merely to enable the appellant to have the question decided as to what was the actual court-fee to be paid. We may state at once that the Registrar had no power to direct the appellant to deposit any sum of money in court as a condition precedent to having his case tried. The only power he had was to direct the appellant to pay the requisite court-fee. If the appellant subsequently convinced the court that the fee was greater than he was bound to pay he could no doubt have got a refund under the provisions of the Court-fees Act. Assuming that this sum of Rs. 900 had been paid into court as it ought to have been in the form of a stamp then there is no provision in the Court-fees Act, or indeed anywhere else, for refunding a court-

fee which has been deposited with the memorandum of appeal, or during the hearing of the appeal, when the appeal has been dismissed on the ground that a deficit in the court-fee ordered to be paid has not been paid. It is clear therefore that if this sum of Rs. 900 is to be treated as a court-fee the appellant has no right to claim it back, nor has the court any power to order it to be refunded. We think that the order of the Registrar dated the 27th April must be taken as an order directing the appellant to pay, at all events, the court-fee which he was contending was the proper court-fee, because up to that time no court-fee had been paid at all and he had been directed on several previous occasions to pay the court-fee within a definite time and he had failed to do so. In our opinion it can make no difference whatever that the sum deposited in court undoubtedly as a court-fee was not converted into the shape of a stamp. That ought to have been done before the sum was deposited in court by the appellant himself. It might have been done by the Registrar or some official in the office the moment the sum was deposited in court because it ought to have been in the form of a stamp, and the suggestion that this was merely a direction that the appellant should give a sort of security amounting to Rs. 900 as a condition precedent to having his case heard at all seems to us to be an argument which we cannot accede to. The Registrar had no power to pass such an order and although when literally read his order might appear to be that the appellant should deposit a sum in cash of Rs. 900 there can be no doubt whatever that he meant that the appellant should deposit the court-fee which he himself was claiming was the proper court-fee, and we think that this money paid into court must be treated as the court-fee and cannot be treated as anything else. In these circumstances we are of the opinion that this application fails and that the order of the learned Registrar must be affirmed.

Application dismissed.

APPELLATE CIVIL.

Before Das and Scroope, JJ.

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March, 31.

NABIN CHANDRA GANGULI

v.

MUNSHI MANDAR.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule I, Articles* 62, 97 *and* 116—*Lease—possession not obtained by lessee—suit for refund of salami—Transfer of Property Act*, 1882 (*Act IV of* 1882), *section* 108.

Where a lessor fails to put the lessee in possession of the property demised a suit by the latter for recovery of the salami paid for the lease is governed by Article 116 of the Limitation Act, 1908, if the lease is in writing registered.

Hanuman Kamat v. *Hanuman Mandur* (1), *Ardesir* v. *Vajesing* (2), and *Tuksiram* v. *Murlidhar Chaturbhuj Marwadi* (3), referred to.

Appeal by the defendant.

This appeal arose out of a suit instituted by the respondents in substance for recovery of a certain sum of money from the defendants first party. There was a claim as against the defendants second party in relation to certain lands which were the subject-matter of a lease by the defendants first party in favour of the plaintiff, but that claim failed and the plaintiff was satisfied with the decision of the court below on that point.

The case of the plaintiff was that on the 16th December, 1915, the defendants first party, who were then represented by the Court of Wards, demised certain lands to him and that at the time of the lease the plaintiff paid to the landlords Rs. 156-5-0 as

*Appeal from Appellate Decree no. 1282 of 1924, from a decision of W. H. Boyce, Esq., I.C.S., District Judge of Bhagalpur, dated the 16th June 1924, confirming a decision of Babu Krishna Sahai, Additional Subordinate Judge of Bhagalpur, dated the 31st January 1924.

(1) (1892) I. L. R. 19 Cal. 123 P. C. (2) (1901) I. L. R. 25 Bom. 598. (3) (1902) I. L. R. 26 Bom. 750.

salami. By the lease he undertook to pay certain rent for the demised land. The plaintiff alleged that when he went to take possession of the demised land he was resisted by the defendants second party who were already in possession of those lands. He went on to assert that he called upon the Court of Wards to put him in possession of the demised lands but that the Court of Wards did not do so. The 11th paragraph of the plaint was as follows—

"That the plaintiff further begs to state that if by any reason he may not be entitled to get possession of the lands sued upon with mesne profits, then as he was not put to possession over the settled lands by defendants second party, he is therefore, under such circumstances, entitled to get the salami money Rs. 170-1-0 and Rs. 623-4-9 which he had paid in respect of the certificate with interest. As per account detailed below—Rs. 170-1-0 is the salami money and Rs. 623-4-9 is the certificate money and Rs. 240-14-0 is the interest, in all Rs. 1,034-3-9."

In respect of this demise the Court of Wards issued certificates for the recovery of rent from the plaintiff and in fact recovered Rs. 623-4-9 from him. On these allegations the plaintiff asked that he should be put in possession of the demised lands or that in the alternative he should have a decree for money as against the defendants first party. The court of first instance thought that the plaintiff was not entitled to be put in possession of the demised lands. But in the view which he took he gave the plaintiff a decree for money. The defendants first party appealed and the learned District Judge in the court below affirmed the decision of the court of first instance.

Ram Kishun Jha, for the appellant.

K. P. Jayaswal (with him *B. C. Sinha* and *K. P. Sukul*), for the respondents.

DAS, J.—(after stating the facts set out above, proceeded as follows) :—

In this court it has been urged that the plaintiff's suit for recovery of the salami paid by him to the defendants first party is barred by limitation and so far as his claim for Rs. 623-4-9 is concerned he has no cause of action since that was realised by the landlord in due course of law

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DAS, J.

I will first deal with the question whether the plaintiff's suit for recovery of the salami is barred by limitation. The learned Advocate for the defendant-appellants contends that either Article 62 or Article 97 applies and that in either case the plaintiff's suit is barred by limitation and he relies upon the decision of the Judicial Committee in *Hanuman Kamat* v. *Hanuman Mandur* (1). In that case the facts were these—a member of a joint family in Mithila sold certain properties to the plaintiff; that sale failed on an objection made by the other co-sharer, but not before the purchase money had actually been paid. The plaintiff thereupon instituted a suit to recover the purchase money. The suit was admittedly beyond three years of the date when the purchase money was paid. The Judicial Committee took the view that even if the agreement for sale was not void from the beginning and was only voidable, the consideration failed at all events when the purchaser being opposed found himself unable to obtain possession. On these grounds the Judicial Committee took the view that Article 97 applies as the plaintiff had a right to sue to recover this purchase money upon a failure of consideration when he failed to obtain possession of the disputed property. They pointed out that if the agreement was void ab initio Article 62 would apply, but that whether Article 62 or Article 97 applies the suit was in either case barred by limitation.

Now, this case as well as the case of *Ardesir* v. *Vajesing* (2) was considered by Sir Lawrence Jenkins in *Tulsiram* v. *Murlidhar Chaturbhuj Marwadi* (3). At page 756 that learned and distinguished Judge says as follows—" There is but one remark that we would add before leaving the case: both in *Hanuman* v. *Hanuman* (1) and in *Ardesir* v. *Vajesing* (2) it apparently was assumed that a suit for money had and received, or on a consideration that failed, would

(1) (1892) I. L. R. 19 Cal. 123. (2) (1901) I. L. R. 21 Bom. 593.
(3) (1902) I. L. R. 26 Bom. 750.

lie even where a sale-deed had been executed, and effect was not given to the distinction drawn in *Clare* v. *Lamb* (1). But it has to be observed that the sale deed in *Hanuman's* case (2) was prior to the passing of the Transfer of Property Act, and that in *Adesir's* case (3) was passed at a time when that Act was not in force in this Presidency. We allude to these facts because we desire to guard ourselves against being taken to decide that where the Transfer of Property Act applies there may not be remedies to which a different period of limitation would be applicable". Now, this case is admittedly governed by the Transfer of Property Act and section 108 provides that in the absence of a contract or local usage to the countrary, the lessor is bound on the lessee's request to put him in possession of the property. The question then which I have to consider is whether an action for the breach of duty declared by the express provision of the Legislature as contained in section 108 of the Transfer of Property Act is regulated by section 62 or section 97 if the plaintiff sues to recover the money paid by him as salami. In my opinion it is quite impossible to maintain this view. It seems to me that an action for breach of duty declared by section 108 of the Transfer of Property Act is regulated by section 116 of the Limitation Act if the lease is in writing registered, the obligation being deemed to be embodied in the contract. In my opinion the view taken by the learned Judge in the court below is right and I must affirm his decision on this point.

The next question is whether the plaintiff's right to recover the money which the defendants first party compelled him to pay under process of law is barred by limitation by any provision of the law. Now, section 43 of the Bihar and Orissa Public Demands Recovery Act provides as follows—

" 43. The certificate debtor may, at any time within six months—

(*1*) from the service upon him of the notice required by section 7, or

(1) (1875) L. R. 10 C. P. 334.
(2) (1891) I. L. R. 19 Cal. 123; L. R. 18 I. A. 158.
(3) (1901) I. L. R. 25 Bom. 593.

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(2) if he files, in accordance with section 9 a petition denying liability—from the date of the determination of the petition, or

(3) if he appeals, in accordance with section 60, from an order passed under section 10—from the date of the decision of such appeal,

bring a suit in a Civil Court to have the certificate cancelled or modified, and for any other consequential relief to which he may be entitled."

DAS, J. Pausing here for a moment it is relevant to point out that the plaintiff does say in the 8th paragraph of the plaint that "he filed two objection petitions in respect of both the said certificate cases before the Subdivisional Officer of Madhaipura, but the said objection petitions were disallowed without taking evidence on the 27th May, 1921. Against the said order of rejection the plaintiff preferred an appeal before the Collector of Bhagalpur, but the said appeal was rejected on the 5th August, 1921, as against defendants first party". This suit having been instituted on the 28th September, 1921, the plaintiff clearly brings his case within the general rule as enunciated in section 43 of the Bihar and Orissa Public Demands Recovery Act.

I now pass on to the proviso upon which the learned Advocate for the appellants relies. The proviso is in these terms—

"Provided that no such suit shall be entertained—

(a) in any case, if the certificate-debtor has omitted to file, in accordance with section 9 a petition denying liability or to state in his petition denying liability the ground upon which he claims to have the certificate cancelled or modified, and cannot satisfy the court that there was good reason for the omission."

It is not necessary to cite clause (*b*) of the proviso. As I understand the argument of the learned Advocate for the appellants it is his contention that before the plaintiff can make out a case under the general rule he must establish that the proviso has no operation in his case. Now, in my opinion the contention is unsustainable. The onus of establishing that the case came within the proviso and not within the general law was upon the defendant. It was for him to establish that the general rule had no application but

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that the proviso applied. It is the common case that this has not been done by the defendants, for it appears that the actual objection petitions filed by the plaintiff in those proceedings have not been filed in this case. In my opinion the decision of the court below on this point is right. The appeal fails and must be dismissed with costs.

SCROOPE, J.—I agree.

Appeal dismissed.

CRIMINAL REFERENCE.

Before Ross and Wort, JJ.

1927.

April, 7.

GOKUL CHAMAR

v.

KING-EMPEROR.*

Evidence Act, 1872 (*Act I of* 1872), *section* 27—*confession to police—discovery of fact irrelevant to inquiry, whether makes confession admissible.*

G, who was charged with having murdered *C* by administering poison to him, stated to the police officer investigating the case that he had administered to the deceased a drug in some gur and that he had applied some of the same drug to a sore on the leg of *H*. In pursuance of this statement the officer went to *H* and the latter produced some arsenic as the drug given him by the accused.

Held, that as the fact that the accused had applied arsenic to the leg of *H* was irrelevant to the present inquiry, the fact deposed to as discovered in consequence of the information given by the accused was inadmissible.

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

S. K. Mitter, for the appellant.

Sultan Ahmed, Government Advocate, for the Crown.

*Death Reference no. 4 of 1927 and Criminal Appeal no. 38 of 1927. Reference made by G. Rowland, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, in his letter no. 1013-R., dated the 1st March, 1927, and appeal from a decision of G. Rowland, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 24th February 1927.

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ROSS, J.

Ross, J.—The appellant Gokul Chamar has been sentenced to death on conviction of the murder of a boy Sibcharan Chamar by poisoining him with arsenic.

The case in the first information, which was laid the day after the boy's death by his father Gahana Chamar, was that his son Sibcharan aged 3½ years was playing with his cousin's daughter Sukri and his cousin Jaglal, both young children, when a boy Anupa (aged 8 years) came and asked Sibcharan and Jaglal to come to his house saying that he would give them gur. They went to his house and Anupa gave both the children small quantities of gur. Gokul (the appellant) was sleeping in the house at the time. The children returned and Sibcharan was taken violently ill and died shortly after in spite of the efforts of Gahana Chamar to save him by giving juice of the plantain tree and other remedies. The Doctor who made the post-mortem examination reserved his opinion as to the cause of death until the viscera were examined; but on receipt of the report of the chemical examiner who found arsenic both in the vomitted matter and in the contents of the stomach, he expressed the opinion that the cause of the death was arsenic poisoning.

The learned Government Advocate concedes that the conviction, so far as it rests on the oral evidence, apart from the statement made by the accused himself to the police to which I shall presently refer, cannot be maintained, for this sufficient reason that Gahana in his evidence in court has completely changed the case from what it was in the original statement. It is clear that in the first information there is no case against Gokul Chamar. These persons are all relations. Gokul the appellant is married to a daughter of one Ramdhan whose son is the boy Anupa. Ramdhan has a brother Biswanath and a cousin Barhan whose children are Sukri and Jaglal already referred to. It appears that Biswanath and Barhan

both lost sons recently, in Chait and Sawan, and the case for the prosecution is that they suspected Gahana's mother to be a witch and on account of this enmity the death of Gahana's son was brought about. Gahana is also a relation of this family and they are close neighbours.

Now the case in the first information is that it was Anupa who gave the gur to the deceased as well as to the other little boy Jaglal and that Gokul was sleeping; but at the trial the case was changed. Anupa is said to have called the boys to the house and Gokul is said then to have given them gur to eat. The treatment of the boy after the illness developed is now attributed to Gokul and not to the complainant. It is impossible to rely on this evidence in view of the first information. But for the statement made by the appellant himself to the police which the learned Sessions Judge has admitted and relied upon, the case would be at an end. This statement, as appears from the evidence of the Sub-Inspector, Baidyanath Banerji, was as follows: "Gokul stated that he had given gur and that with the gur he had administered some drug which he had with him and that with the same drug he had made an application for putting on a sore on the leg of Siban Hajam of Adra" Prima-facie this statement is inadmissible, but the learned Sessions Judge has admitted it applying the provisions of section 27 of the Evidence Act, because it appears that in pursuance of the statement the Sub-Inspector went to Siban Hajam and asked him for the medicine which Gokul had given him. That medicine was produced and was sent to the chemical examiner and was found to contain arsenic. Now it seems to me that the fact deposed to as discovered in consequence of the information received from a person accused of an offence, with which section 27 of the Evidence Act deals, must be a fact relevant to the case in which the evidence is sought to be given. The fact that at some previous date the appellant had treated one Siban Hajam with arsenic for a bad leg is not relevant in

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any way to the present charge; and the discovery of that fact in consequence of a statement made by the appellant to the police cannot make this statement admissible. The learned Government Advocate expressed his own doubts about the admissibility of this statement; and if this statement goes out, it is conceded on behalf of the Crown that the charge must fail.

In this view the reference must be discharged and the appeal must be allowed and the conviction and sentence set aside and the appellant acquitted and set at liberty.

WORT, J.—I agree.

Conviction set aside.

APPELLATE CIVIL.

Before Kulwant Sahay and Allanson, JJ.

1927.

Feb., 17.

KUMAR KAMAKSHYA NARAYAN SINGH

v.

KALYAN SINGH.*

Legal Practitioners Act, 1879 (*Act XVIII of* 1879), *section* 28—*agreement for payment of fees for work done in pending cases and in other cases—agreement not in writing and not filed in court—Remuneration not recoverable—Contract Act*, 1872 (*Act IX of* 1872), *section* 79.

The plaintiff, a mukhtar, sued for the remuneration which he alleged was due to him under an agreement by which he was employed by the Court of Wards (*i*) to "build up" certain civil cases with a view to the Government Pleader drawing the pleadings in such cases, and (*ii*) to look after the cases in court after their institution, as a mukhtar.

*First Appeal no. 96 of 1923, from a decision of Babu Phanindra Lal Sen, Subordinate Judge of Hazaribagh, dated the 12th March 1923.

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The agreement provided that the plaintiff should be remunerated for " building up " the cases by a certain percentage of the valuation of the suits, and, for his work in court, in accordance with the ad valorem fees provided by the High Court's rules. The agreement was not in writing but was evidenced by a letter from the Court of Wards to the Deputy Commissioner of Hazaribagh containing a proposal to engage the plaintiff on the above terms and by a letter from the Board of Revenue sanctioning the proposal.

Held, that the agreement fell within the provisions of section 28 of the Legal Practitioners Act, 1879, and, those provisions not having been complied with, the plaintiff was not entitled to any remuneration for services rendered under the agreement.

Hazari Lal v. *Tilok Chand* (1), approved.

Srimati Kamini Debi v. *Khetra Mohan Ganguli* (2), referred to.

It was argued for the plaintiff that in building up the cases he acted as a servant of the Court of Wards and not as a legal practitioner. On the evidence the High Court held that the plaintiff had not been employed as a servant of the Court of Wards for the purpose of building up the cases in respect of which he claimed to be remunerated.

The provisions of section 28 are wide enough to include services rendered in respect of a business done by pleaders, mukhtars or revenue agents even in connection with cases not pending in court.

Game v. *Kye* (3) and *Ishan Chandra Kar* v. *Ram Charan Pal* (4), followed.

Appeal by the defendant.

This was an appeal by the defendant against the decision of the Subordinate Judge of Hazaribagh decreeing the plaintiff's suit for fees for works done by him as a mukhtar on the basis of an agreement. The defendant was a minor and was a ward of the

(1) (1893) P. R. no. 136.
(2) (1912-13) 17 Cal. W. N. 45.
(3) (1913) 19 Ind. Cas. 209.
(4) (1914) 20 Cal. L. J. 445.

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court, and the agreement alleged was entered into by the Manager with the sanction of the Court of Wards.

The plaintiff's case was that he was a mukhtar and that his services were requisitioned for the purpose of " building up " a large number of civil cases relating to resumption of mukurrari grants proposed to be instituted by the Court of Wards as representing the estate of the defendant, for the purpose of enabling the Government Pleader to draw up pleadings and to look after the cases in court as a mukhtar. The agreement set up in the plaint was that the plaintiff was to " build up " the cases, and his remuneration for such work was fixed at 6 annas per cent. on the valuation of each suit, subject to a maximum fee of Rs. 200 for one single case; and as regards the work done in connection with cases in court he was to get ad valorem fee according to the rules of the High Court. He alleged that this agreement was entered into in March 1918, that he did " build up " cases and work in court according to the agreement until March 1920 when his services were dispensed with by the Manager, that in this interval he had finished the building up of a large number of cases, and that in other cases he had well nigh completed the work but could not finish them on account of the work being taken away from him by the Manager. These unfinished cases were subsequently finished by the regular staff in the law department of the estate and were mostly filed in court on the 1st April, 1920. The plaintiff stated that he had submitted his bills for the works done, but that full payments had not been made to him in accordance with the agreement, that as the Manager refused to make the payments inspite of service of notice the plaintiff approached the Deputy Commissioner of Hazaribagh for settlement of his dues who ordered certain payments to be made and the balance to be withheld till the disposal of the cases by court. The sums withheld were, however, not paid, whereupon

he again approached the Deputy Commissioner who disallowed the plaintiff's claim, and an appeal to the Commissioner was also dismissed, that the plaintiff ultimately approached the Board of Revenue and the Board by their Resolution, dated the 4th of July, 1921, refused to make payments according to the bills as regards the completed works, and as regards the uncompleted works the Board directed payment at the rate of Rs. 2 a case which came up to Rs. 316 only. The plaintiff accepted payment of the sum of Rs. 316 under protest and then instituted the present suit. The plaintiff gave an account of the sums, which he claimed to be due to him, in two schedules attached to the plaint. Schedule 'A' set out the sums due to him on account of bills for completed works, the total amount under these bills came up to Rs. 3,054-5-6, out of which he gave credit for a sum of Rs. 2,109-12-9 being the amount already paid to him, and he claimed a sum of Rs. 944-8-9 as the balance under those bills. Schedule 'B' contained an account of sums due for works done in uncompleted cases. He stated that in the absence of materials which were in the custody of the defendant he was unable to give the correct account of the sum due to him for these cases, but he estimated the amount at Rs. 3,000. Upon these sums of Rs. 944-8-9 and Rs. 3,000 he claimed damages by way of interest, and his total claim came up to Rs. 4,444-8-9. The plaint was subsequently amended as regards the claim for uncompleted cases in schedule 'B', and the amended claim under this schedule was for Rs. 3,987-7-6. He added a sum of Rs. 1,086-0-9 on account of his claim under schedule 'A' principal with damages, and the total claim came up to Rs. 5,073-8-9.

The defence of the defendant was that the plaintiff was not entitled to anything on account of fees, that whatever work was done by the plaintiff was done in the capacity of a lawyer, and the agreement set up by the plaintiff was not enforceable in view of the provisions of the Legal Practitioners Act. The

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defendant further alleged that the expression "build up civil cases" meant and included all work to be done by the plaintiff till the cases were decided by the court, that the sanction given by the Court of Wards was a temporary one remaining in force till the end of December 1918, and that after the expiration of the period for which the sanction was given, fresh proposals had to be made to the plaintiff which were never accepted by him, that the claim in respect of the cases referred to in schedule 'B' of the plaint was untenable inasmuch as it had not been specified what amount of work had been actually done in those cases, that the only work done by the plaintiff in those cases was to issue notices, and that for such work he had been amply compensated by the payment of Rs. 316.

Various issues were raised, and the Subordinate Judge decided them in favour of the plaintiff. He made a decree for the entire amount claimed under schedule 'A', and as regards the claim under schedule 'B' he made a decree for three-fourths of the amount claimed. He further allowed interest at the rate of 0-8-0 per cent. per month, and accordingly made a decree for a sum of Rs. 3,986-0-9. Against this decision the defendant appealed to the High Court.

Sultan Ahmad (with him *A. B. Mukerji*, *S. M. Mullick*, *B. C. De* and *Bindeshri Prasad*), for the appellant.

N. C. Sinha and *S. N. Roy*, for the respondent.

KULWANT SAHAY, J. (after stating the facts set out about, proceeded as follows): The most important point for consideration in this appeal is, whether the plaintiff is entitled to enforce the agreement alleged by him in view of the provisions of section 28 of the Legal Practitioners Act. This section provides that no agreement entered into by any pleader, mukhtar or revenue-agent with any person retaining

or employing him, respecting the amount and manner of payment for the whole or in part of any past or future services, fees, charges or disbursements in respect of business done or to be done by such pleader, mukhtar or revenue-agent shall be valid unless it is made in writing signed by such person, and is, within fifteen days from the day on which it is executed, filed in the District Court or in some court in which some portion of the business in respect of which it has been executed has been or is to be done. The agreement relied upon by the plaintiff was admittedly not in writing signed and filed in court as required by section 28. The evidence of the agreement consists of a letter (Ex. 1), dated the 28th January, 1918, from the Manager, Ramgarh Wards Estate, to the Deputy Commissioner of Hazaribagh, in paragraph 4 whereof it was proposed that the plaintiff, Babu Kalyan Singh, mukhtar, should be employed on a graduated scale of fees: he will be paid 6 annas per cent. as remuneration on the value of the suits built up by him subject to the maximum of Rs. 200 per case, besides under the High Court Rules he will share 15 per cent. of the pleader's fees along with the Government Pleader. This proposal was ultimately sanctioned by the Board of Revenue in their letter (Ex. 1a), dated the 19th of March, 1918, and information of this sanction was in due course conveyed to the plaintiff. The provisions of section 28 of the Legal Practitioners Act have, therefore, admittedly not been complied with.

The learned Subordinate Judge was, however, of opinion that the work done by the plaintiff in building up cases for the defendant was done as a servant of the defendant and not as a legal practitioner as defined in the Legal Practitioners Act, and that, therefore, section 28 of the Act had no application to the agreement set up by the plaintiff. In my opinion the view taken by the learned Subordinate Judge is incorrect. From the correspondence between the plaintiff, the Manager, the Deputy Com-

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KULWANT SAHAY, J.

missioner, the Commissioner and the Board of Revenue it is apparent that the employment of the plaintiff was in his capacity as a mukhtar and not as a servant. The letter (Ex. 1) of the Manager to the Deputy Commissioner makes it clear that the plaintiff was employed as a mukhtar, he had to build up cases in order to enable the Government Pleader to draw up the plaint and had to look after those cases when instituted in court. In his plaint the plaintiff nowhere stated this his employment was as a servant and not as a mukhtar. In fact the whole trend of the case, as made in the plaint, goes to show that his employment was as a mukhtar. He says that on account of his being engaged by the defendant he was prevented from being engaged by the opposite side. Rule 33 of Part VII, Chapter I, page 167 of the General Rules and Circular Orders (Civil, Vol. I) of the High Court prescribes that any person who having been admitted as a pleader or mukhtar shall accept any appointment whether under Government or not, or shall enter into any trade or business, shall give notice thereof to the High Court who may thereupon suspend such pleader or mukhtar from practice or pass such orders as the said court may think fit. Now, in the present case no such notice was given, and, therefore, it must be presumed that the plaintiff who was a mukhtar did not accept any appointment under the defendant but accepted an engagement as a mukhtar. It is contended on behalf of the plaintiff-respondent that the provisions of this rule might have been contravened; but this did not affect the question as to whether the plaintiff accepted any appointment under the defendant. We cannot presume that the plaintiff acted in contravention of the rule laid down by the High Court. We can only presume that he did act in compliance with the rule, and that his employment was not as a servant but as a mukhtar.

It is next argued that assuming that section 28 of the Legal Practitioners Act is applicable, the

agreement set up by the plaintiff is not covered by the terms of the said section. It is contended that the section contemplates agreements for services in respect of business done in connection with cases pending in court and not in respect of business done in cases not pending in court. In my opinion the provisions of section 28 are very wide and comprehensive and they include services rendered in respect of business done by pleaders, mukhtars or revenue-agents even in connection with cases not pending in court. It was so held in *Game* v. *Kye* (1). The view taken in *Game* v. *Kye* (1) appears to have been approved of in *Ishan Chandra Kar* v. *Ram Charan Pal* (2); and the plain language of the section does not leave any doubt in my mind that all agreements between a legal practitioner and his client, whether in connection with cases pending in court or cases not pending in court, fall within the mischief of the section. Sections 28 to 31 of the Legal Practitioners Act have been repealed by Act XXI of 1926 but this does not affect the rights of the parties in the present case. I am, therefore, of opinion that the suit was not maintainable on the basis of the agreement set up by the plaintiff.

It has, however, been argued on behalf of the plaintiff-respondent that even if the plaintiff was not entitled to enforce the agreement, he was entitled to recover reasonable fees for work done, and reliance was placed upon the provisions of section 70 of the Contract Act. In my opinion the plaintiff is not entitled to claim any amount when the agreement upon which he based his claim cannot be enforced. The question was considered in *Hazari Lal* v. *Tilok Chand* (3) where the learned Judges observed as follows: "Suppose the case of an agreement between pleader and client duly reduced to writing, fixing the remuneration of the pleader, but not filed

(1) (1913) 19 Ind. Cas. 209. (2) (1914) 20 Cal. L. J. 445.
(3) (1893) P. R. no. 136.

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in court. If the pleader, ignoring this contract, were to sue under section 70 of the Contract Act for reasonable compensation for his services, the written contract would be a complete answer to the claim for reasonable compensation. The answer would be that there is no question between us as to what is reasonable compensation: we have agreed as to the compensation, and the plaintiff is either entitled according to that agreement, or is entitled to nothing. Let him enforce the agreement, and the answer would be a good defence". These observations apply with great force to the facts of the present case. The claim is based on an agreement, and that agreement is not enforceable in law. Having regard to the terms of the agreement it is not open to the plaintiff to ask the court to fix a reasonable remuneration, and he cannot be given any decree at all on the basis of a reasonable compensation. Reference has been made to certain Madras and Allahabad decisions in support of the contention that the plaintiff would be entitled to a reasonable compensation; but they were cases where no agreement was set up, and no case has been cited in which a claim was made on the basis of an agreement, and that agreement being held to be not enforceable in law, a decree was made for reasonable remuneration for services rendered. Mookerjee and Carnduff, J.J. in *Srimati Kamini Debi* v. *Khetra Mohan Ganguly* (1) referred to the Allahabad and Madras cases and then observed that it was worthy of note that the contrary view had been maintained by the learned Judges of the Punjab Chief Court in *Hazari Lal* v. *Tilok Chand* (2) just referred to. I am of opinion that the plaintiff cannot in the present case fall back upon section 70 of the Contract Act and claim a reasonable compensation.

In this view of the case it is not necessary to consider the other questions raised in the appeal. Had it been necessary to go into those points I would

(1) (1912-13) 17 Cal. W. N. 45. (2) (1893) P. R. no. 136.

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have been inclined to make a decree in favour of the plaintiff for the sum claimed under schedule ' A ' of the plaint; but as regards the plaintiff's claim under schedule ' B ' of the plaint, I am of opinion that the plaintiff was not entitled to succeed. The evidence shows that he did not " build up " the cases as agreed upon. His own letters to the Manager show that a good deal of work was left undone, and he left the work himself and not that the works were taken away from him, and it is further shown that on account of negligent work the defendant had to suffer loss. It is, however, not necessary to go into these points in view of the fact that the plaintiff is not entitled to maintain the suit on the basis of the agreement set up by him.

I would, therefore, decree the appeal, set aside the decree of the Subordinate Judge and dismiss the plaintiff's suit with costs throughout.

ALLANSON, J. I agree.

Appeal decreed.

APPELLATE CRIMINAL.

Before Mullick and Wort, J.

ZAHURI SAHU

v.

KING-EMPEROR.*

1927.

April, 21.

Evidence Act, 1872 (*Act* 1 *of* 1872), *section* 73—*Thumb-impression of accused, power of court to order taking of—refusal of accused to give thumb-impression, inference from—Identification of Prisoners Act*, 1920 (*Act XXXIII of* 1920), *section* 5.

Where a person charged with having made a false claim on a handnote denied that he had filed the suit in question but declined to allow his thumb-impression to be taken in

*Criminal Appeal no. 25 of 1927, from a decision of S. B. Dhavle, Esq., I.C.S., Sessions Judge of Monghyr, dated the 2nd February 1927.

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court for comparison with the thumb-impression upon the plaint in that suit, *held*, that the court was entitled to ask the accused to allow his thumb-impression to be taken for the purpose of comparison and to draw an inference adverse to him on his refusal to give his thumb-impression.

Banwari Hajam v. *King-Emperor* (1), distinguished.

King-Emperor v. *Tun Hlaing* (2), followed.

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

M. K. Mukharji, for the appellant.

C. M. Agarwala, Assistant Government Advocate, for the Crown.

MULLICK, J.: Agreeing with all four assessors the learned Sessions Judge of Monghyr has sentenced the appellant Zahuri Sahu to rigorous imprisonment for eighteen months for an offence under section 471 of the Indian Penal Code. Agreeing with three of the assessors the learned Judge has sentenced the appellant to rigorous imprisonment for eighteen months and a fine of Rs. 100 for an offence under section 209 of the Indian Penal Code; the terms of imprisonment are to run concurrently.

It is found by the learned Judge that on the 20th November, 1925, Zahuri instituted a suit in the Court of the Small Cause Court-Munsif at Begusarai upon a hand-note against one Badri Gope. Badri Gope contended that the hand-note was a forgery and that the thumb impression on it was not his thumb impression. The hand-note was sent to a finger-print expert together with the admitted impressions of Badri's thumb in both hands. The expert found that the impression upon the hand-note did not tally with those taken for Badri. When the Small Cause Court case came on for trial, Zahuri absented himself and the suit was dismissed for default. Thereafter Badri applied for the prosecution of Zahuri and

(1) (1922) I. L. R. 1 Pat. 242.
(2) (1923) I. L. R. 1 Rang. 759, F. B.

notice was issued upon him to show cause why he should not be prosecuted. Zahuri did show cause and his defence was that he had never filed the plaint nor the hand-note and that the thumb impression on the verification to the plaint was not his. The Munsif directed a prosecution nevertheless with the result that Badri was tried in the Session Court at Monghyr and was convicted and sentenced as stated before.

Now the case seems to be proved beyond doubt. It is established by the evidence of the finger-print expert that the hand-note is a forgery and that Badri never put his thumb impression on it. The expert deposes that Badri's thumb impression is of a different type to that found upon the hand-note and that the number of deltas also differ.

The substantial question in this case is whether the defence that Zahuri never appeared in the Civil Court at all and that some other person impersonated and caused a plaint to be filed in the Small Cause Court can be accepted. Upon this point we have the evidence, first of all, of Jageshwar Prasad, who was the pleader who filed the plaint, and his clerk, Ajodhya Prasad, who caused the plaint to be prepared and verified; then there is also the evidence of the pleader Babu Baidyanatheswar Prasad who appeared for Zahuri in the miscellaneous proceedings in which he was called upon to show cause against his prosecution. Babu Jageshwar admits that he had never seen him before the day on which Zahuri came to file the plaint, but he had opportunities of seeing this man in the course of a civil suit and he deposes that Zahuri was the man who brought the hand-note. Ajodhya Prasad similarly had many opportunities of seeing Zahuri and he too deposes that Zahuri was the man who brought the hand-note and that the verification upon the plaint was drawn up by some one under Zahuri's instructions. He himself did not see the verification drawn up nor the thumb impression put upon the verification. He

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says he told Zahuri to get it done. Zahuri was asked in court whether he was willing to give his thumb impression for comparison with the thumb impression upon the plaint and he declined. I think, in these circumstances, it is open to the court to draw an inference adverse to him.

FULLICK, J.

Our attention has been drawn to *Banwari Hajam* v. *King-Emperor* (1) in which there are observations by one of the Judges constituting the Division Bench to the effect that it is improper to take forcibly a thumb impression from an accused person in a criminal proceeding. The decision, however, did not turn upon that point, and the question whether it is proper or not to ask the accused to give his thumb impression was not clearly raised. On the other hand, it was decided by a Full Bench in the High Court at Rangoon in *King-Emperor* v. *Tun Hlaing* (2) that the court has power under section 73 of the Indian Evidence Act to direct an accused person, present in court, to make his finger impression for the purpose described in that section and that section 342 of the Code of Criminal Procedure relates only to the oral questioning of the accused.

Section 5 of Act XXXIII of 1920 which is an Act to authorise the taking of measurements and photographs of convicts and others lays down:

> "If a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the Code of Criminal Procedure, 1898, it is expedient to direct any person to allow his measurements or photograh to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photographs to be taken, as the case may be, by a police officer."

In my opinion there was quite sufficient legal authority for the court to ask the accused person whether he would consent to have his thumb impression taken for comparison with the thumb impression

(1) (1922) I. L. R 1 Pat. 242. (2) (1923) I. L. R. 1 Ran. 758, F. B.

upon the plaint. But this is not all. Babu Baidyanatheswar Prasad, the Vakil who appeared for the accused in the miscellaneous proceedings, deposes that the accused was the man who came to answer the notice issued by the court. There the accused denied that he was the person who had filed the hand-note or the plaint. Babu Baidyanatheswar had several opportunities of seeing the accused and his evidence cannot be lightly brushed aside.

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MULLICK, —

The result is that, in my opinion, the assessors were fully justified, upon the evidence, in believing the case for the prosecution and the learned Sessions Judge's order must, therefore, be affirmed. The conviction under section 209 of the Indian Penal Code for making a false claim fraudulently and under section 471 of the Indian Penal Code for dishonestly using as genuine a forged hand-note, is upheld. There is no doubt that the accused being himself the plaintiff knew of the fraudulent nature of the claim and of the fradulent nature of the hand-note. In these circumstances the convictions under both sections are correct and the sentences are not unduly severe.

The appeal is dismissed.

WORT, J. I agree.

APPELLATE CRIMINAL.

Before Mullick and Wort, J.J.

GHANSHYAM SINGH

v.

KING-EMPEROR.*

1927.

April, 22, 25, 26.

Criminal Trial—Burden of proof—counter case capable of precise proof but not supported by evidence—mere discrepancies insufficient to rebut evidence on oath—Penal Code,

*Criminal Appeals nos. 35 and 39 of 1927, from a decision of Rai Bahadur J. Chatterji, Sessions Judge of Saran, dated the 19th of February 1927.

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1860 (*Act XLV of* 1860), *sections* 304, 109—*Order to beat —deceased assaulted with spear and killed.*

Although, in a criminal trial, the burden of proof lies in the first instance upon the prosecution, yet when evidence has been given on oath by witnesses who profess to have seen the occurrence and who directly implicate the accused and ascribe particular acts to them, the evidence is not discredited merely by reason of a discrepancy here and a discrepancy there or by reason of the absence of an adequate motive or by showing that there may be exaggerations in the story told by the prosecution witnesses. *G* and two others were charged under section 304 of the Penal Code. The evidence showed that one of *G*'s companions was armed with a spear and the other with a lathi; that *G* gave the order to "beat" *P* and that the two other thereupon assaulted *P* so that he died of his injuries. It was contended that the order given by *G* did not include an order to assault *P* with a spear, and, therefore, that he could be convicted only of abetting the offence of causing hurt and not of abetting the offence under section 304.

Held that *G* was rightly convicted under sections 304/109 of the Penal Code.

This was an appeal against an order made by the Sessions Judge of Chapra sentencing the appellant Ramkhusi to rigorous imprisonment for ten years for an offence under section 304 of the Indian Penal Code. The appellant Ghanshyam was sentenced to rigorous imprisonment for three years and a fine of Rs. 300 for an offence under section 304 read with section 109 of the Indian Penal Code. The appellant Ramautar was sentenced to rigorous imprisonment for one year for an offence under section 323 of the Indian Penal Code.

The case of the prosecution was that Ghanshyam, who was the president of the panchayat of mauza Sabalpur, set out about 1-30 p.m. on Saturday, the 27th November, 1926 for the house of a kayastha named Ramlagan who resided in another part of the same village. Ghanshyam was accompanied by his relatives Ramautar and Ramkhusi who resided in the same house with him. Ramkhusi was armed with a

spear and Ramautar and Ghanshyam were both armed with lathis. It was said that owing to the conduct of Ramlagan, which will be presently explained, Ghanshyam was annoyed and intended to punish Ramlagan that day. The evidence as regards the previous acts of Ramlagan was this: Ramlagan had a nephew called Ramchandra, a boy of 9 or 10 years of age. Ramlagan alleged that this boy had come under the influence of Audh Behari Singh, the son of Sheodhar, and of Baliram, the younger brother of Ghanshyam. Ramlagan did not approve of Ramchandra's association with these two young men and had been objecting for some time. Shortly before the 25th November Ramchandra disappeared from home. On the 25th November Ramlagan went to the fair at Sonepur which was close to Ghanshyam's house. There he found Ramchandra in the company of Baliram and Audh Bihari. An altercation took place between him and these two young men and he alleged that he gave them a beating.

It was suggested that Ghanshyam was annoyed at Ramlagan's impertinence and that he intended on the 27th November to take revenge upon him.

There were four eyewitnesses in this case, Deoki Singh, Sukhan Singh, Rambaran Singh and Rambadan Singh, and they all deposed to seeing Ghanshyam and his two companion coming from the direction of Ghanshyam's house and meeting the deceased Pardip, also a Babhan of the same village but apparently belonging to a separate faction.

It was alleged by these men that Pardip made some slighting remark about Ghanshyam and twitted him about his abusing his authority as the president of the local panchayat. Pardip next abused Ghanshyam in foul language who thereupon ordered his companions to beat Pardip. Ramautar then struck Pardip with his lathi and Ramkhusi delivered a mortal blow with his spear. It appeared that owing to some peculiarity of conformation the deceased Pardip had his liver on the left side instead of

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the right and Ramkishun's blow penetrated his liver and intestines and caused almost instant death.

The evidence further was that the village chaukidar Bhajan arrived on the scene almost immediately afterwards but was unable to obtain from Pardip any account of who had caused his injuries. It was said that Pardip was alive but speechless. A stretcher was brought and, according to some witnesses, Pardip died before being placed upon the stretcher, and, according to others, he died on the way to the police-station. Under the orders of Bhajan, Roshan Dusadh another chaukidar of the village, then started for the police-station which was about three miles from Sabalpur. Roshan arrived at the police-station about 2 o'clock and made a communication to the Sub-Inspector which was recorded as a first information, although whatever he knew about the occurrence was mere hearsay.

In the meantime Deoki Singh and Sukhan Singh set out with the body of Pardip Singh for the thana and arrived there some time about 4 o'clock.

The Sub-Inspector, after having recorded Roshan's information, set out on horseback for Sabalpur and arrived there about 3-30 p.m. He stayed there for about half an hour and then went back to the police-station in order, as he said, to take the dying declaration of Pardip in case he should be alive. He arrived at the police-station about 4 p.m. and found that Pardip was dead and that Deoki and Sukhan were there with the body. At 5 p.m. he took the statements of Deoki and Sukhan and then learnt for the first time that Ramkhusi had killed the deceased with a spear thrust under the orders of Ghanshyam and that Ramautar also had joined in the assault. The Sub-Inspector immediately hurried back to the village and proceeded to the house of Ghanshyam. He did not find any marks of violence in the house; but on the way to that house he noticed at the house of Sheodhar Singh

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the gomastha of the village, traces of an attack of some kind. He then went to the house of a chaukidar named Raja Singh and there took down the statement of Ramautar who had several injuries upon his person. In consequence of what Ramautar said, he next sent for Sheodhar and took down a statement from Sheodhar containing a more or less detailed account of an attack upon his house by a large number of villagers. At 7 or 7-30 p.m. he took down the statements of Rambaran and Rambadan. The investigation was continued for many days after that and the result was that the police rejected the account given by Sheodhar and accepted the account given by Deoki, Sukhan, Rambaran and Rambadan and sent up the present appellants for trial.

The four assessors distrusted the prosecution evidence and found all the accused not guilty.

The Sessions Judge in an elaborate judgment came to a different conclusion and sentenced the accused as stated above.

Sir Ali Imam (with him *Md. Yunus*, *Jafar Imam* and *S. Ali Khan*), for the appellants.

C. M. Agarwala, Assistant Government Advocate, for the Crown.

MULLICK, J. (after stating the facts set out above, proceeded as follows): Before us the evidence of the four material witnesses has been examined very carefully and subjected to very destructive criticism by the learned Counsel for the appellants. *26th April 1927.*

But after having considered all the matters brought into prominence in the course of the cross-examination of the prosecution witnesses in the lower court and in the address of the learned Counsel before us, I think on the whole that the learned Sessions Judge has taken a right view of the evidence. The fact is that in this case the accused have too unwisely relied upon the abstract doctrine of the burden of

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proof. They had a definite counter case which they put forward before the police on the very evening of the day of the occurrence. It was a clear cut case capable of precise proof. Ghanshyam was a well-to-do man and was the head of the village. Sheodhar, the man who was atacked, was the gomastha of the landlord. The village consists of a thousand houses and Ramlagan, the leader of the kayasthas, represents a very small minority. It was the easiest thing in the world for Ghanshyam to produce conclusive evidence before the trial court of the attack upon Sheodhar's house and of the manner in which Pardip came by his death. Instead of that the appellants have relied upon suggestions, indications and improbabilities for the purpose of discrediting the sworn testimony of the eyewitnesses. It is true that the prosecution must prove their case in the first instance before the accused can be called upon to make their defence; but when evidence has once been given on oath by witnesses who profess to have seen the occurrence and who directly implicate the accused and ascribe particular acts to them, I do not think it will avail the accused merely to rely upon a discrepancy here and a discrepancy there or upon the absence of adequate motive or on indications that there may be exaggerations in the prosecution story. I think in this case something more was expected of the accused and they should have called witnesses to prove on oath that Pardip was attacked not on a path near the houses of the witnesses Rambadan and Rambaran but in the house or outside the house of the gomastha, Sheodhar. The fact is that there is only one version before us of which there is any legal evidence and cross-examination has not materially shaken it.

As to what Sheodhar's account was, we have no idea whatever. It is said that the first information was allowed to be read out at the trial, but we have no knowledge of the contents of that information. I thought perhaps that we should be able to

gather from the statements of the accused what their precise case was; but I find that in his examination in the Session Court on the 12th February Ramkhusi was asked why he had been implicated by the witnesses who had deposed against him. His answer was:

"They have falsely implicated me out of malice. I shall make further statement in writing."

He also stated that he was not in the village at all on the day of occurrence; but no evidence has been given to prove alibi.

Ramautar also was asked the following questions

"Would you at all like to say if Pardip was struck with a bhala to your knowledge?"

Answer—"No Sir."

Then he was asked:

"Did you appear as a witness for Sheodhari Prasad before the daroga and supported Sheodhari's story by saying that you had witnessed Pardip being struck with a bhala?"

Answer—"I will not say anything further orally. Whatever I have to say I will submit in writing."

Ghanshyam was asked:

"Is it a fact that you admitted your presence at the occurrence and supported the case of Sheodhari made to the daroga as his witness who had seen such an occurrence?"

Answer—"No, Sir. I shall file a written statement."

The written statements filed do not give any details. They merely state that the accused have been falsely implicated owing to enmity and that the real truth as to the cause of Pardip's death and the place of the occurrence has been suppressed.

In this unsatisfactory state of affairs I think that unless it can be shown beyond all doubt that the witnesses for the prosecution have broken down, their testimony is entitled to be accepted as a substantially true account of the occurrence.

* * * * *

The result, therefore, is that I agree with the learned Sessions Judge in believing that the four eye-witnesses are substantially speaking the truth in the court.

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It may be that the motive alleged was not adequate for so severe an injury, but it is impossible to speculate as to the sufficiency or insufficiency of motive for a criminal act. There may have been other matters of enmity between Ghanshyam on the one hand and Pardip on the other, or it may be that Ramkhusi acted under the excitement of the moment and delivered the fatal blow without thinking what he was doing. In this connection it has to be mentioned that Pardip was wearing wooden sandals. It is suggested that this part of the story is a fabrication; but we have the evidence of the Sub-Inspector that as soon as he came to the place he found the wooden sandals on the road and that they were besmeared with blood. The fact that Pardip was wearing these sandals to some extent supports the case that he was not a member of a mob making a determined attack upon the house of Sheodhar.

As regards the damage to the house, the evidence is that the Sub-Inspector found that some tiles were dislodged from the roof and one of the pillars of the verandah was cut with a sharp-cutting instrument and a picture in the verandah had fallen or been pulled down and the glass of the frame was smashed. He also found some blood marks upon the top of the plinth of the verandah about three feet from the ground. He suspected that in the yard in the front of the house there were blood marks also; but the Chemical Examiner reports that no blood was found in the earth scraped from these places. But the bricks removed from the plinth showed that the smears thereon were human blood. The learned Sessions Judge thinks it possible that after Pardip received his injuries on the road a large number of villagers attacked Sheodhar's house and did the damage found by the Sub-Inspector. With regard to the blood, he thinks that it might have come from Ramautar's injuries. He also observes that between Sheodhar's house and the spot marked B upon the police map there are no traces of any blood at all on the ground but that from B to G a distance of about

128 feet there were several patches, and that the theory that Pardip could not have been injured in Sheodhar's house gains some support from the fact that there are no blood marks between Sheodhar's house and the spot B. In my opinion the evidence in the case is consistent with the theory and on the whole we must hold the learned Sessions Judge's view of the guilt of the accused to be correct.

A point has been made with regard to the conviction of Ghanshyam. It is said that as he gave only the order to beat he cannot be held liable for the results of the act of Ramkhusi and that at most he can be convicted only of the offence of abetting Ramautar in voluntarily causing hurt; but having regard to the fact that Ramkhusi was armed with a spear and Ramautar was armed with a lathi and that Ghanshyam gave the general order to beat, I think it is a reasonable inference that he intended all the results that followed. Ramkhusi would not have attacked Pardip if it had not been for that order and this is the learned Sess' s Judge's view and in my opinion it is correct.

The result, therefore, is that the convictions and sentences are affirmed and the appeals are dismissed.

WORT, J. I agree.

APPELLATE CIVIL.

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

RAMGULAM SINGH

v.

RAJ KUMAR RAI.*

1927.

April, 26.

Execution of Decree—execution restrained by injunction—decree set aside and subsequently restored—limitation.

*Appeal from Appellate Order no. 314 of 1926, from a decision of S. B. Dhavle, Esq., I.C.S., District Judge of Monghyr, dated the 14th December, 1926, confirming a decision of Babu Badri Narain Ray, Munsif of Begusarai, dated the 5th December, 1925.

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Some of the parties against whom a decree had been passed having instituted a suit to set aside the decree, obtained an injunction restraining the decree-holder from executing it. The suit succeeded in the trial court and the decree was set aside on the 26th August, 1922. On the 6th April, 1925, the decision in the second suit was reversed. On the 24th June, 1925, the decree-holder in the first suit made the present application to execute his decree. The last step-in-aid of execution of that decree had been taken on the 1st September, 1921.

Held, that inasmuch as, between 26th August 1922, and the 6th April, 1925, there was no decree in existence, the present application was within time.

Appeal by the judgment-debtors from an appellate order confirming an order of the original court which had overruled the judgment-debtor's objection to the decree-holder's application for execution of his decree and ordered the execution to proceed.

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

S. N. Roy (with him *K. P. Singh*), for the appellants.

Anand Prasad, for the respondent.

DAWSON MILLER, C. J.: This appeal, in my opinion, must be dismissed. The question is whether the decree-holders are entitled to execute their decree or whether the execution is barred by limitation. The last step in aid of execution was taken on the 1st September, 1921, and the present execution proceedings were filed on the 24th June, 1925. Were that all it is clear that the present execution petition would be considerably out of time. It appears, however, that the decree which it is sought to execute was the subject of a suit by certain of the parties whose interests were affected by that decree and on the 16th September, 1921, they having instituted a suit to set aside the decree on the ground that it was null and void, an injunction was granted restraining the present decree-holders from executing it. On the

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26th August, 1922, that suit succeded and the whole decree was set aside as being null and void. Therefore the execution proceedings were restrained by injunction from the 17th September, 1921, that is to say 17 days after the last step-in-aid of execution. That injunction no doubt expired when the plaintiffs in the suit to set aside the decree obtained their decree setting aside the previous decree on the 26th August, 1922, but from that date onwards up to the 6th April, 1925, there was no decree at all which the present decree-holders could execute for by the previous decision it had been declared null and void. On the 6th April, 1925, however, the order setting aside the decree which it is now sought to execute was reversed and from that date the decree having been restored it was open to the decree-holders to execute it. They did file the present proceedings on the 24th June, 1925. Therefore they are clearly not out of time for from the 17th September, 1921, up to the 6th April, 1925, they were either restrained by injunction from executing their decree or there was no decree whatsoever to execute. In these circumstances it is quite clear that time did not run between the 17th September, 1921, and the 6th April 1925. The Limitation Act is always subject to this, in so far as it applies to execution, that there must be some decree in existence which you can in fact execute. In the present case, for the period which I have mentioned between August 1922 and April 1925 there was no decree which could be executed at all and the only period during which execution could take place was the short period between the 1st September, 1921, and the 17th September in the same year and the 6th April, 1925, and the 24th June, 1925, when in fact the execution case was filed. This was the view taken by the Munsif and by the District Judge on appeal. In my opinion it is clearly the right view. This appeal must be dismissed with costs.

Ross, J. I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Dawson Miller, C.J. and Kulwant Sahay, J.

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v.

March, 8, 9, 10, 11, 14, 15, 21, 22; April, 27.

MAHARAJA KUMAR JAGAT MOHAN NATH SAHI DEO*

Minerals, right to, in a maintenance grant, whether passes to grantee—absence of words of express grant and clear implication, effect of—khorposh grant, incidents of— extrinsic evidence of intention, inadmissible where no ambiguity in document of grant— feudal laws of England, principles underlying, whether apply to India.

Held (*Per Dawson Miller, C.J.*) on review of the following cases :

Tituram Mukerji v. *Cohen* (1), *Hari Narayan Singh Deo* v. *Sriram Chakravarti* (2), *Jyoti Prasad Singh* v. *Lachipur Coal Company* (3), *Durga Prasad Singh* v. *Braja Nath Bose* (4), *Biswanath Gorain* v. *Surendra Mohan Ghose* (5), *F. F. Christian* v. *Tekaitni Narbada Keori* (6), *Kunja Behari Seal* v. *Durga Prasad Singh* (7), *Shashi Bhusan Misra* v. *Jyoti Prasad Singh Deo* (8), *Raj Kumar Thakur Giridhari Singh* v. *Megh Lal Pandey* (9), *Megh Lal Pandey* v. *Rajkumar Thakur* (10), *Raghunath Roy Marwari* v. *Durga Prasad Singh* (11) and *Secretary of State for India in Council* v. *Srinivasa Chariar* (12).

that in the case of a maintenance grant (khorposh) heritable in the male line, where the reversion remains in the

*First Appeal no. 123 of 1925, from a decision of Babu Phanindra Lal Sen, Subordinate Judge of Ranchi, dated the 4th July 1925.

(1) (1906) I. L. R. 33 Cal. 203.
(2) (1910) I. L. R. 37 Cal. 723.
(3) (1911) I. L. R. 38 Cal. 845.
(4) (1912) I. L. R. 39 Cal. 696.
(5) (1913) 19 Cal. W. N. 102.
(6) (1914) 19 Cal. W. N. 796, F. B.
(7) (1915) I. L. R. 42 Cal. 346.
(8) (1917 I. L. R. 44 Cal. 585, P. C.
(9) (1918) I. L. R. 45 Cal. 87 P. C.
(10) (1907) I. L. R. 34 Cal. 358.
(11) (1920) I. L. R. 47 Cal. 95.
(12) (1920) I. L. R. 44 Mad. 421.

grantor, the mineral rights do not pass without words of express grant or by clear implication.

Where, therefore the grant recited as follows :

" ————I have granted the entire pargana———— original with dependency————(together with) jalkar, bankar, trees, parjapur (tenants' houses), four boundaries all included (sab sudha) in brit jagir to————for his maintenance ".

Held, on a construction of the grant, that there was no intention to pass the subsoil rights.

The right of the junior members of the family to maintenance out of an impartible estate does not arise out of co-ownership but out of the custom which is a modification of the ordinary Mitakshara law. A khorposh grant, therefore, does not, on the failure of male descendants in the male line of the grantee, go back by survivorship, but reverts to the parent estate.

Baijnath Prasad Singh v. *Tej Bali Singh* (1), *Katama Natchiar* v. *The Raja of Shivagunga* (2), *Sartaj Kumari* v. *Deoraj Kuari* (3), distinguished.

Rama Rao v. *Rajah of Pittapur* (4), referred to.

Where a document of grant is produced in evidence and contains no latent ambiguity, extrinsic evidence of intention is inadmissible.

The feudal laws of England are no guide to the principles affecting land tenures in Bengal.

Per *Kulwant Sahay, J.*—In an impartible raj the junior members of the family have not the ordinary co-parcenary rights which members of a joint Hindu family have; and a grant of maintenance by the holder of the raj to the junior members of the family does not amount to a partition, and such grants do not by themselves amount to a conveyance of full proprietary rights including rights to minerals and subsoil rights.

(1) (1921) I. L. R. 43 All. 228, P. C.
(2) (1861-64) 9 Moore. I. A. 543.
(3) (1888) I. L. R. 10 All. 272; L. R. 15 I. A. 51.
(4) (1918) I. L. R. 41 Mad. 778.

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Sartaj Kuari v. *Deoraj Kuari* (1), followed.

Baijnath Prasad Singh v. *Tej Bali Singh* (2), *Katama Natchiar* v. *The Raja of Shivagunga* (3), *Rajah Rup Singh* v. *Rani Baisni* (4), distinguished.

Sri Raja Venkata Surya Mahipati Rama Krishna Rao Bahadur v. *The Court of Wards* (5), *Rama Rao* v. *Rajah of Pittapur* (6), *Tara Kumari* v. *Chaturbhuj Narayan Singh* (7), referred to.

Appeal by the plaintiff.

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

Sir B. C. Mitter of the Calcutta Bar (with him *B. C. De*), for the appellant.

Pugh (with him *S. Sinha*, *P. K. Sen*, *C. C. Das*, *M. Imam*, *M. Prasad*, *G. S. Prasad*, *K. P. Sukul*, *S. N. Banerji*, *S. N. Palit* and *B. N. Mitter*), for the respondents.

DAWSON MILLER, C. J.: This is an appeal on behalf of the plaintiff from a decree of the Subordinate Judge of Ranchi, dated the 4th July 1925, dismissing the plaintiff's suit for a declaration of his right to the minerals in pargana Tori.

The main question for determination in the appeal is whether a grant of pargana Tori made in 1867 by Maharaja Jagannath Sahi Deo of Chota Nagpur to his younger son descendible in the direct male line of the grantee and resumable on failure of lineal male heirs passed not only the surface rights but also the right to the minerals thereunder.

The plaintiff, the present Maharaja of Chota Nagpur, is the elder son of Maharaja Jagannath Sahi

(1) (1888) I. L. R. 10 All. 272.
(2) (1921) I. L. R. 43 All. 228, P. C.
(3) (1861-64) 9 Moo. I. A. 543.
(4) (1885) I. L. R. 7 All. 1.
(5) (1899) I. L. R. 22 Mad. 383, P. C.
(6) (1918) I. L. R. 41 Mad. 778.
(7) (1915) I. L. R. 42 Cal. 1179, P. C.

Deo the grantor and succeeded to the Raj on his father's death in 1869. The first defendant who may be referred to as the Maharaj Kumar is the plaintiff's younger brother being the son of the same father by a different mother. It was to this defendant that pargana Tori was granted by way of maintenance by his father in 1867. The second and third defendants are licensees of the Maharaj Kumar under a prospecting license, dated the 27th May, 1921. The defendant no. 5, the Tori Syndicate Limited, claims to be the assignee of the rights of the second and third defendants. This defendant was added on his own application. The fourth defendant, the Tori Coal and Minerals Prospecting Company, Limited, claims under a prospecting license granted by the plaintiff and supports the plaintiff's case. The remaining defendants numbered 6(*a*) and 6(*b*) who were also added on their own application claim as licensees of the Maharaj Kumar under a prospecting license granted to their deceased father on the 23rd May, 1924, alleging that the previous license to the second and third defendants had been cancelled.

The plaintiff claimed (*a*) a declaration of his right to the minerals in pargana Tori and the right of access thereto for himself, his servants and agents, (*b*) a permanent injunction against the contesting defenddants restraining them from interfering with the exercise of the plaintiff's right, and, (*c*) a permanent injunction against the said defendants restraining them from working the mines and removing the minerals in pargana Tori.

The contesting defendants pleaded that the minerals passed to the Maharaj Kumar under the grant of 1867 either by its terms or by custom and, further, that they have acquired title by adverse possession and that the suit is barred by limitation. A further plea was raised that the plaintiff had relinquished his rights, if any, in favour of the Maharaj Kumar by instruments of release and confirmation, dated the 10th March, 1893

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Eleven issues were settled for determination but two of them originally numbered 6 and 9 were struck out before trial by the learned Judge without objection by the Maharaj Kumar as being irrelevant and unnecessary. They raised the question whether the Chota Nagpur Raj bearing tauzi no. 1 on the revenue roll of the Collector of Ranchi was a permanently settled estate and whether the villages in pargana Tori appertained to that estate. The defendants 2 and 3 objected to their deletion but as they admitted that the villages in pargana Tori appertained to the Chota Nagpur Raj estate the learned Judge did not consider it necessary to determine the nature of that estate. Of the remaining issues re-numbered 1 to 9 the first four were not pressed by the defendants at the trial or in this appeal. The remainder were as follows:—

5. Is the suit barred by limitation?

6. Have the mineral rights in pargana Tori passed to and vested in the defendant no. 1 either by virtue of custom as alleged by him or by virtue of the alleged lease, dated Magh Sudi 7, 1923, Sambat?

7. Has the plaintiff got any title to the minerals in pargana Tori and is he entitled to the declaration and injunction prayed for?

8. Did the plaintiff abandon and relinquish his rights, if any, to the mines and minerals in the aforesaid pargana by the instruments of release and confirmation of the 10th of March, 1893?

9. What relief, if any, is the plaintiff entitled to.

If the grant were merely a lease either for a term or in perpetuity or a maintenance grant for the life of the grantee I consider that the question would be concluded by a series of authorities binding on this court notwithstanding that there are words of general import in the grant itself which, taken in their widest significance, would be sufficient to pass all rights in the property to the grantee and the heirs male of his body. The learned Subordinate Judge before whom the case came for trial held that none of the decisions upon which reliance was placed by the plaintiff governed the present case. He was further of opinion

that the nature of the estate created by the grant bore a close resemblance to what in England would be called an estate in tail male and was in the nature of a free-hold estate passing the underground as well as the surface rights. He further relied upon evidence of surrounding circumstances when the grant was made as shewing the intention of the grantor. He further held that the suit being one for a declaration was barred by Article 120 of the Schedule to the Limitation Act. He also decided the eighth issue in favour of the defendants holding that the plaintiff had by the transaction of the 10th March, 1893, abandoned and relinquished his rights in the minerals to the Maharaj Kumar.

The translation of the grant of 1867 used in the lower court and printed with the record was imperfect, certain important words being entered as illegible. We accordingly had a translation made by an official translator of this court which is as follows:—

"Sri Sri Basudev Rai Sahi

Sign Manual

Maharajadhiraj Sri Jagarnath Sah Deo.

This patta is granted in respect of brit jagir on the auspicious 7th day of Magh Sudi, Sambat 1923, by the great and powerful Maharaj Sri Jagarnath Sah Deo.

I have granted the entire pargana Tori khas bhandar, original with dependency, appertaining to the Collectorate and District Kismat Lohardagga, Sub-District Ranchi, (together with) jalkar, bankar, trees, parjapur (tenants' houses), four boundaries, all included, in brit jagir to Manjhil Lal Sri Jagat Mohan Nath Sah Deo for his maintenance. He with his sons and grandsons and so on shall realise from the former and present elakadars rents fixed in respect of the jagirs granted previously and at present, in accordance with the patta, together with the rakumats. So long as the sons and grandsons and so on of Manjhil Lal Sri Jagat Mohan Lal Sah Deo will live, (they shall take possession of) bhandar khas at every place and realise rents in respect of the entire pargana Tori, khas bhandar and the elekadari, and enjoy the same peacefully, and pay to huzur an annual rental of Rs. 300 (Rupees three hundred) in the Company's coin together with rakumat. So long as Manjhil Lal is not fit to sign his name by his own pen, the papers of his villages (dehat), such as thika patta, receipts, acquittance, etc., shall be executed under the sahi signature of huzur, and Manjhil Lal shall continue to get all the income from the aforesaid villages (dehat). He shall remain in possession and occupation

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of the said villages (dehat) and peacefully enjoy the same. It is, therefore, witnessed by Dudhbaiya Sri Puran Sahi Bakhsh Sri Nilamar Das Mirdaha Sri Ganesh Ram. Signature (scribe?) Pande Bhupal Rai of Bhoro.

(On the margin)

Witnessed by

Swami Sri Trambak Nath Deo.

Purohit Sri Gobind Ram, Guri Sri Manik Ram.

Jubraj Sri Pratap Udainath Sah Deo.

Thakur Sri Padumlochan Nath Sah Deo."

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The words " four boundaries, all included " are a literal translation of the words " chatur sima sab sudha " and might perhaps be rendered in idiomatic English as " including everything within the four boundaries. " The words " bhandar khas " refer apparently to the villages or portions of the estate in the direct possession of the proprietor himself and not rented or farmed to others. The Chota Nagpur Raj to which pargana Tori appertains is admittedly an impartible estate and succession thereto is governed by the rule of male lineal primogeniture, females being excluded. Such an estate according to the decision in the case of *Sartaj Kuari* v. *Deoraj Kuari* (1) is alienable at the will of the Maharaja for the time being except in so far as there may be any custom to the contrary and no such custom has been shewn in this case. The younger sons of the family although they have no right to partition or to restrain alienation are entitled by the custom prevailing in the family to a maintenance grant of a portion of the estate which descends in the direct male line of the grantee in the same manner as the parent estate and is resumable on failure of that line. According to the evidence of the defendants' witness no. 3 the third son of the plaintiff, there is no hard and fast rule as to the kind of property to be given in khorposh. There is no set form for the documents executed in evidence of the grants. The terms of such grants may not be exactly similar but

(1) (1888) I. L. R. 10 All. 272.

the substance is the same. At the time of making grants calculation is made on the basis of the income derivable from the pargana concerned. This witness adds that up to now no mines in Chota Nagpur have to his knowledge been worked. Except Chhota Lal none of the khorposhdars in the Raj has as yet worked any mines in their respective villages and he adds "I do not know in what village or villages the said Chhota Lal has worked mine but I have heard that he has got some mines working". Chhota Lal there referred to is the fourth son of the Maharaja. He was also called as a witness and agrees with his brother that there is no fixed rule as to the extent of khorposh grants in reference to the parent estate. There is no dastur on the point. If any disputes arise in the matter the same have to be decided either in court or by arbitration. It does not appear from his evidence that he ever worked any mines within his khorposh grant but he appears to have excavated clay or earth on his estate for the purpose of making bricks for his house without any opposition from the plaintiff. In fact it may be stated at once that except for the evidence of Lal Jogendra Nath Sahi Deo, a son of the present khorposhdar of the Jharia estate, held under the Chota Nagpur Raj, there is no evidence of any of the khorposhdars having worked the minerals upon their estates. The evidence of this witness is of the vaguest description. He says that some 40 or 50 years ago some iron mines used to be worked on that estate. The operations went on for two or three years. The greatest depth reached was about 15 feet and the excavations were made along a ditch 100 to 150 steps in length. This village is in a remote part of the country 44 or 45 miles from the nearest railway station and it does not appear that the Maharaja of Chota Nagpur had any knowledge of the matter. I think that it may safely be assumed that in 1867 when the grant in question in this suit was made the question of mineral rights was not present to the mind of any one.

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Several cases have been drawn to our attention of maintenance grants and leases in which it has been held that the mineral rights did not pass except by express words of grant or by necessary implication. In *Tituram Mukerji* v. *Cohen* (1) the Judicial Committee held that a khorposh grant for the lifetime of the grantee could not be presumed to be more than a grant of the rents and profits and did not carry with it the right to open mines and remove minerals which are a portion of the soil. In that case there was no direct evidence as to the terms of the grant. In *Hari Narayan Singh Deo* v. *Sriram Chakravarti* (2) it was held that a perpetual lease to a certain idol at a nominal rental did not pass the mineral rights in the absence of any evidence that the grantor had parted with them. Again the document in this case relied on by the lessees was not produced. In *Jyoti Prasad Singh v. Lachipur Coal Company* (3) it was held in the Calcutta High Court that a permanent moghali brahmottar grant which had existed before the permanent settlement, nothing being known about the intentions of the parties at the time of the inception of the lease, did not pass the mineral rights. In *Durga Prasad Singh* v. *Braja Nath Bose* (4) it was held by the Judicial Committee that a digwari grant in Manbhum did not pass the mineral rights to the Dighwar the presumption being that they remained with the zamindar in the absence of proof that he parted with them. In *Biswanath Gorain* v. *Surendra Mohan Ghose* (5) it was held by the Calcutta High Court that the interest of a khorposhdar heritable in the male line, being a limited interest liable to defeasance by failure of heirs and thereupon resumable by the proprietor for the time being, was not an interest sufficient to carry with it the subsoil rights. That was a case arising in Chota Nagpur and would

(1) (1906) I. L. R. 33 Cal. 203, P. C. (3) (1911) I. L. R. 38 Cal. 845.
(2) (1910) I. L. R 37 Cal. 723. (4) (1912) I. L. R. 39 Cal. 696.
(5) (1913) 19 Cal. W. N. 102.

appear to be indistinguishable from the present case unless it should appear from the words of the grant now relied on that the mineral rights were transferred. The case of *Christian* v. *Tekaitni Narbada Koeri* (1) does not carry the matter any further. It was the case of a maintenance grant for the lifetime of the grantee and as the deed did not contain any express provision authorising the grantee to open new mines and to appropriate the minerals therefrom it was held that the minerals did not pass. The grant however was made in 1894 and was governed by section 108 of the Transfer of Property Act. In *Kunja Behari Seal* v. *Durga Prasad Singh* (2) the previous decisions of the same court in the cases above referred to decided in 1910 and 1911 were followed and it was held that a moghali brahmottar grant of a mauza did not pass the minerals to the grantee. The case of *Shashi Bhusan Misra* v. *Jyoti Prasad Singh Deo* (3) was decided by their Lordships of the Privy Council in 1916. It was the case of a permanent mukarrari grant made before the permanent settlement to certain Brahmins and the question for determination was whether such a grant carried with it the mineral rights in the soil. The Lord Chancellor in delivering the judgment of the Board pointed out that it was important to avoid giving words used in connection with legal transactions in India the special and technical meaning which they possess in England and added "According to our law the word 'grant' is strictly applicable to the conveyance at common law of remainders, reversions and incorporeal hereditaments which do not lie in livery or of which livery could not be given. But in connection with the present dispute the word has no such meaning and it is important at the outset to bear this in mind." Previous decisions of their Lordships' Board were referred to and from those decisions a principle was

(1) (1914) 19 Cal. W. N. 796. (2) (1915) I. L. R. 42 Cal. 346.
(3) (1916) I. L. R. 44 Cal. 585, P. C.

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enunciated which in their Lordships' opinion was conclusive of the case before them. The principle so enunciated was " that when a grant is made by a zamindar of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable minerals will not be held to have formed part of the grant in the absence of express evidence to that effect. In *Raj Kumar Thakur Giridhari Singh* v. *Megh Lal Pandey* (1) it was held that a mukarrari lease of land of a permanent and heritable character did not pass the minerals unless by the terms thereof there was an express or plainly implied grant of the under ground rights. In that case just as in the present the grant contained words of general import. The terms of the grant appear from the report of the case in the Calcutta High Court in *Megh Lal Pandey* v. *Raj* Kumar Thakur (2). They are as follows :—

" I settle in mukarrari the whole of mauza Baramasia with all rights (mai hak hakuk) as per boundaries given below appertaining to my zamindari, etc."

Their Lordships held that in spite of the wide general terms the minerals did not pass. " It is unavailing to urge " said Lord Shaw in delivering their Lordships' judgment, " that the right granted by the mukarrari patta to the lessee is of a permanent heritable and transferable character, as even although this be the case it does not advance the question of whether the lease itself embraced within its scope the mineral rights. On the contrary unless there be by the terms of the lease an express or plainly implied grant of those rights they remain reserved to the zamindar and are part of his zamindari." Again in *Raghunath Roy Marwari* v. *Durga Prasad Singh* (3) it was held that the principle enunciated in the previous cases applies as well to rent free grants as to grants of tenures at fixed rates. The grant in that

(1) (1927) I. L. R. 45 Cal. 87. (2) (1907) I. L. R. 34 Cal. 358, 364.
(3) (1919) I. L. R. 47 Cal. 95.

case was of rent free brahmottar land. Sir John Edge in delivering the judgment of their Lordships said " The result at which their Lordships have arrived after a consideration of the decisions of the Board is that where a zamindar grants a tenure in lands within his zamindari, and it does not clearly appear by the terms of the grant that a right to the minerals is included, the minerals do not pass to the grantee. " In 1920 the case of the *Secretary of State for India in Council* v. *Srinivasa Chariar* (1) was decided by the Judicial Committee. In that case a village had been granted as a shortriyam inam in 1750 by the Nawab of the Carnatic. The grant provided that the grantee having appropriated to his own use the produce of the seasons each year might pray for the prosperity of the Empire and that he should pay a fixed yearly sum to the Sirkar. The inam was enfranchised in 1865 and the inam title deeds purported to convert the tenure into a permanent freehold upon payment of a quit rent. In 1905 the Madras Government imposed upon the successors of the original inamdars royalties in respect of stone which they had quarried in the village. The latter sued for a declaration of their full rights to the rocks and hills within the village and claimed a refund of the royalties already paid. It was held that upon a true construction of the grant the full right to the quarries and minerals did not pass to the grantee and that having regard to Madras Act VIII of 1869 the inam title deeds could not vest in the inamdars a subject-matter not vested in them by the grant; consequently the Government was entitled to impose royalties on stone quarried in the village. It was further held that the terms of the grant being in evidence neither the inam title deeds nor certain admissions made by the Government in land acquisition proceedings were evidence as to its effect. At most those proceedings could amount to no more than

(1) (1920) I. L. R. 44 Mad. 421.

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action taken under a misapprehension of the Government's legal rights and this could not make the law one way or the other, nor could it affect the Government's title. It was further stated by Sir Lawrence Jenkins in delivering the judgment of the Board that the rules of English law as to real property in England could afford no guidance as to what passed under the grant of a village in inam. This latter point has frequently been insisted upon and I think it may now be said that the feudal laws of England are no guide to the principles affecting land tenures in Bengal. The learned Subordinate Judge has been at some pains to draw an analogy between the present grant and an estate tail in England and because the tenant in tail enjoys the mineral rights he infers that the holder of a putra putradi tenure can enjoy the same rights. But the analogy is not supported by authority nor would it, in my opinion, bear close inspection. A tenant in tail has a freehold estate and is, for all practical purposes on an equal footing with a tenant in fee simple. Under the present grant it appears to me that the interest created, although not strictly a lease as defined in the Transfer of Property Act, bears most of the essential features of an interest created between landlord and tenant a rent being reserved and the reversion in the event of failure of lineal male heirs remaining in the landlord. On the face of it the document is a maintenance grant and the presumption upon the authorities quoted must, I think, be that the minerals did not pass without words of express grant or by clear implication. From the terms of the grant itself it would appear that the enjoyment of the rents was the main object of the grant. From the authorities quoted I think the principle emerges that where the reversion remains in the grantor the minerals do not pass without express words. If this is so even in the case of a permanent lease, I think the same principle should apply to the present grant where the interest terminates on the failure of male lineal descendants.

An argument was addressed to us upon the meaning of the words " sab sudha " " all included " or " including everything " which it was contended were sufficient to pass not merely the surface rights but also the subject minerals. But this part of the case appears to me to be concluded by the decision of the Privy Council in the case of *Raj Kumar Thakur Giridhari Singh* v. *Megh Lal Pandey* (1) in which it was held that similar words (mai hak hakuk) (with all rights) in a mukarrari lease did not add to the true scope of the grant or cause minerals to be included within it. In my opinion there is nothing to be gathered from the terms of the grant itself which indicate an intention to pass the mineral rights.

It was argued, however, that the parties being governed by the Mitakshara law the property of the Raj remained joint family property except in so far as the custom of the faimly modified the Mistakshara law. It was therefore contended that a khorposh grant, which the younger sons were entitled to insist on, was analogous to a partition and that they took, under such a grant, the whole of the proprietary rights in the estate within the area of the grant itself and that on the failure of male descendants of the grantee, the estate granted did not revert to the parent estate as in the case of a lease but went back by survivorship. In support of this contention the case of *Baijnath Prashad Singh* v. *Taj Bali Singh* (2) was relied on. There the previous decisions including the case of *Katama Natchir* v. *Raja of Shivagunga* (3) and *Sartaj Kuari* v. *Deoraj Kuari* (4) were reviewed and it was held that the successor to an impartible estate which is ancestral property of a joint Hindu family governed by the Mitakshara law is designated by survivorship subject to the custom of impartibility; the eldest member of the senior branch of the family

(1) (1917) I. L. R. 45 Cal. 87, P. C.
(2) (1921) I. L. R. 43 All. 228.
(3) (1861-64) 9 Moo. I. A. 543.
(4) (1888) I. L. R. 10 All. 272; L. R. 15 I. A. 51.

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therefore succeeds in preference to the direct lineal senior descendant of the common ancestor if the latter is more remote in degree. It seems to me however that the right of the junior members of the family to maintenance out of an impartible estate does not arise out of co-ownership but out of the custom which is a modification of the ordinary Mitakshara law. In *Rama Rao* v. *Rajah of Pittapur* (1), frequently referred to as the second Pittapur case, it was held that in the absence of special custom the grandsons of a deceased zamindar are not entitled to maintenance out of the impartible estate in the hands of his successor. The right to maintenance is a personal and not a real right, otherwise the younger sons would be entitled to a charge upon the property for their maintenance in the hands of a transferee of the proprietor for the time being which is not the case. Moreover the argument that the khorposh estate goes back to the parent Raj by survivorship and not by reversion, although it has certain attractions, will not bear examination. Alienability is an incident both of the parent estate and of the khorposh grant. Suppose a Maharaja should transfer his estate to another the reversion to the khorposh grant in the event of failure of male descendants of the grantee would pass to the transferee who certainly could not take by survivorship. Again if the khorposh grant should be alienated the transferee would take subject to defeasance on failure of the direct line of the original khorposhdar. In this case also it could not be said that the khorposh grant went back to the parent estate by survivorship.

Reliance was also placed on the fact that the two main junior branches of the family had their gaddis, called quarkari gadi and thakurai gadi just as the Maharaja has the raj gadi and from this we were asked to infer that they held some special proprietary interest in the property constituting their khorposh

(1) (1918) I. L. R. 41 Mad. 778.

grants. This suggestion, however, is discounted by the witness who speaks to it for he says that there is no difference in the rights possessed in their khorposh grants by the first three sons and those of the junior ones and he adds that the assignment of khorposh properties to the first three sons does not amount to a partition of the raj. The word gadi conveys an idea of superiority in the possession of the holder thereof. He adds

"The estate in my possession cannot be called gadi."

This was the evidence of the fourth son of the Maharaja.

A point was also made of the fact that in a previous suit in 1915 the plaintiff in giving evidence had described the second and third sons as the maliks of their gaddis. A chance expression of this sort may be appropriate enough in the context in which it was used but it does not necessarily mean more than that the persons so designated have complete powers of disposal over the interests which they hold. The question of mineral rights was not then under consideration; nor can such an expression afford any guide to the intentions of the grantor expressed in a document made by the deponent's father nearly fifty years earlier.

The learned Subordinate Judge has also been greatly influenced by what he describes as the peculiar circumstances existing when the grant was made. At that time both the plaintiff and the Maharaj Kumar were children under a year old having been born within a month of each other in the previous year. Their father, the Maharaja Jagannath Sahi Deo who was then over sixty years of age and apparently of somewhat weak intellect, had a few years earlier placed his nephew and heir presumptive Upendra Nath Sahi Deo, known as Burra Lal, in charge of his estate as manager but owing to a quarrel between the Maharaja and his nephew in 1863 the latter was dismissed and illfeeling arose between them. In 1865 the Maharaja left his ancestral home at Palkote and

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settled at Bhanro in another part of his estate and his two sons were born in the following year. The chances of Burra Lal succeeding to the Raj were thus put an end to, but he appears to have circulated rumours to the effect that the plaintiff and his brother were not the sons of the Maharaja and his Ranis, and in 1869 on the death of the Maharaja he sued the Ranis and the Court of Wards, under whose management the estate had been placed, to establish his title thereto on the allegation that the two sons were supposititious children. In this he succeeded in the trial court but the judgment was reversed on appeal. A copy of the judgment of the trial court has been put in evidence on behalf of the defendants and marked Exhibit F(1). From this document further particulars of this incident may be gathered. I have referred to it merely because the learned Subordinate Judge has attached great weight to it as shewing that the Maharaja in 1867 was apprehensive that the Raj might be wrested from his sons by the machinations of his nephew and, therefore, in order to secure some property at least to the family, in case his fears should prove well founded, he made the grant of Tori to his younger son. From this the learned Judge deduces that there could be no room for doubt that the Maharaja intended to convey full rights to the grantee subject to the reservations expressly mentioned. With great respect to the learned Judge I thing the intention must be gathered from the language of the grant itself and not from considerations of such a speculative nature. Had it been his intention by this grant to secure the future welfare of both his children, as the learned Judge finds, I hardly think he would have made provision for the younger of his children only. It would have been equally easy to secure the future of his elder son by a similar grant and, had he felt any real apprehension as to the succession being diverted, I think the strong probabilities are that he would have made provision for both. The story told by the defendant as to what he heard from the Ranis concerning the Maharaja's intentions is at most

hearsay. It is contradicted by the plaintiff and I do not think any reliance can be placed on it. I presume the evidence was admitted by the learned Judge as evidence of contemporanea expositio. But where the document is produced in evidence and contains no latent ambiguity extrinsic evidence of intention can hardly be admissible.

The learned Judge also found that the plaintiff in 1893 abandoned his right to the minerals. The question as to the right to the minerals does not appear to have received much, if any, attention until the year 1890 when the Maharaj Kumar for a consideration of Rs. 25,000 granted to Mr. Max Anderson of Calcutta by a thika patta, Exhibit B(1), dated the 10th Novebmer, 1890, a license to prospect for minerals in pargana Tori for a period of five years with power during that period to dispose of the mineral rights to any person or company for a term of 25 years, the consideration for the lease to be shared between the licensor and licensee in certain proportions. By another document of the same date, Exhibit B—1/1, he granted Mr. Anderson for a period of five years the mining rights in three of the villages of the Tori estate. At that time it would appear that the Maharaj Kumar anticipated that his right to dispose of the minerals might be questioned by the plaintiff, for by the terms of the prospecting license, in case the plaintiff or his successors should dispute the right, the Maharaj Kumar undertook at his own expense to defend any suit that might be brought against the licensee and to hold him harmless against all loss, costs, damages and expenses arising therefrom. Shortly afterwards the plaintiff did dispute his brother's right to deal with the minerals but the dispute between them appears to have been amicably settled by the intercession of their respective mothers. Mr. Anderson was anxious to get an extension of his prospecting license but apparently was not content with a grant from the Maharaj Kumar alone. In the result the plaintiff and his brother in 1893 agreed that

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Mr. Anderson's license should be extended for a further period of 10 years and that he should have power during the extended period to grant a lease of the mining rights for 50 years. Accordingly two agreements were executed both, dated the 10th March, 1893. These are Exhibit B-1/2 and Exhibit 10. The former is the extension of the prospecting license in favour of Max Anderson and is signed by both brothers. The latter is a deed of release signed by the plaintiff relinquishing in favour of Max Anderson his rights to the minerals in pargana Tori during the term created by the prospecting licensee and the lease, if any, that might be granted thereunder. The recitals in this document are important. After referring to the pattas granted in 1890 by the Maharaj Kumar it contains a recital to the effect that the Maharaja claims that all rights to minerals and metals lying in and under the lands comprised within the Chota Nagpur Raj including pargana Tori belong to him as Maharaja of the said Raj, and that on failure of the heirs male of the Maharaj Kumar he has the right to resume the said pargana free of all incumbrances. It then states that Mr. Anderson has applied to the Maharaja to release to him his rights in the minerals in the lands described in the two previous pattas for the purpose of perfecting his title. It then continues

> "And whereas by an agreement on an eight annas stamp paper dated the fifth February one thousand eight hundred and ninety-three it has been mutually agreed between the said Kumar Jagat Mohan Nath Shah Deo and myself for ourselves our heirs and assigns that from that day henceforth we shall equally enjoy all profits and benefits to be derived from the produce of any mines or minerals in the said pargana Tori or the sale price or rent or other benefit thereof * * * * Now I do hereby release to you and your Syndicate and to your and their assigns all my rights whatsoever the same may be to the metals and minerals and precious stones of every description and under the surface of all the lands in pargana Tori,"

for the term mentioned in the two thika pattas. The learned Judge relied upon these documents of 1893 as showing that the plaintiff,

> "expressly and in unmistakeable terms admitted that the defendant no. 1 was the sole master of the mines and minerals and as such had every right to deal with the same."

I do not think that any such inference can be drawn from the transaction evidenced by these two documents. In the deed of release (Exhibit 10) the plaintiff distinctly asserted his exclusive right to the minerals and enters into the transaction because he and his brother had come to an agreement to share equally between them the profits to be derived from the minerals in pargana Tori under an agreement, dated the 5th February, 1893, and not because the Maharaja Kumar had any other title. There is no admission that the minerals had passed by the grant of 1867. If the agreement of the 5th February, 1893, referred to in the deed of release were valid and enforceable, then the rights of the parties would be governed by that agreement in this case, but neither party is now relying upon it for it appears that it was never registered and cannot be enforced or put in evidence by either party. It may be mentioned here that Mr. Anderson's license expired in 1905 and, as no advantage was taken of the terms to execute a lease of the mineral rights, it has long ceased to be operative. I must hold therefore that there was no relinquishment by the plaintiff of his mineral rights in pargana Tori in favour of his brother.

In 1908 the Tori estate was being administered by a manager under the Encumbered Estates Act. In order to pay off the debts and get the estate released the Maharaja Kumar obtained a loan from Sirkar Bernard and Company of rather more than a lakh of rupees on mortage and promised to release the minerals in pargana Tori to the lendor. A prospecting lease was in fact granted to Sirkar Bernard and Company but it was never registered and nothing came of it. The next transaction was in 1921 when the Maharaj Kumar granted a prospecting license to the defendants 2 and 3, dated the 17th May that year. The present suit was instituted in August 1922. The learned Subordinate Judge said he was inclined to the view that a suit for a declaration was barred by Article 120 of the first schedule to the Limitation Act by reason of

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the fact that the cause of action arose in 1900 and in 1903 when the Maharaj Kumar asserted a right to lease the minerals to Mr. Anderson and that in any event even if a fresh cause of action arose in 1921 he was of opinion that this was not a case in which the court would be justified in passing a declaratory decree. I think on both points he was wrong. In 1893 the situation was entirely different. The parties then purported to compromise the dispute existing between them and on the strength of that compromise the plaintiff agreed to grant a prospecting lease in favour of Mr. Anderson and to share the proceeds with his brother. The compromise between the plaintiff and his brother now turns out to be inoperative owing to lack of registration and the Maharaj Kumar himself is repudiating it and claiming to be exclusively entitled to the mineral rights. Thus an entirely new situation arose in 1921 and in my opinion a fresh cause of action accrued and a suit for a declaration would not be time barred. Further if the plaintiff can make out his title to the minerals I can see no reason why he should be refused the relief sought in the circumstances of this case merely because in declaratory suits the court has, in proper circumstances, a discretion in the matter. That discretion should not be arbitrarily exercised. The discretionary refusal to grant declaratory relief would not determine the question of title and the only effect of exercising a discretion in favour of the defendants would be to involve the parties in additional expense and litigation as soon as the defendants began to work the minerals and deprive the plaintiff of possession. The facts necessary to arrive at a determination have been fully gone into in the present suit and I can see no reason for refusing the relief claimed as a matter of discretion in the present suit if we consider that the plaintiff has established his title.

The only question of limitation raised and determined in the lower court was that to which I have referred and which is based on Article 120 of the

schedule to the Limitation Act. No issue as to adverse possession was raised or determined, although the point was taken in paragraph 5 of the written statement of the second and third defendants, but there is no evidence in the case to support the view that the defendants, or any of them, by working the minerals acquired any adverse title. In my opinion the suit is not barred by limitation.

The learned Judge expressed the view that the mineral rights passed to and vested in the defendant no. 1 by virtue of the immemorial custom obtaining in the family and the grant as evidenced by the deed of 1867. I do not know on what grounds the learned Judge concluded that the mineral rights passed by custom. There can be no instance of the mineral rights passing before 1867 as up to that time the minerals had not been worked and it is difficult to see how there could be any custom one way or the other. The Maharaj Kumar himself when asked in cross-examination whether in Chota Nagpur putra putradi grants conveyed minerals stated that he could give no opinion and apart from his own case he did not know of any other.

A cross-objection was filed on behalf of the defendant no. 3 complaining that issues 6 and 9 as originally framed were improperly deleted by the Subordinate Judge and should be restored for hearing and determination. It was admitted, however, by this defendant when the matter was dealt with by the learned Subordinate Judge on the 17th June, 1925, that the villages comprising pargana Tori appertained to the Chota Nagpur Raj. The point raised, however, is that unless the Chota Nagpur Raj is a permanently settled estate the minerals do not belong to the plaintiff. The defendants other than those numbered 2 and 3 did not dispute at the trial that the Chota Nagpur Raj was a permanently settled estate and indeed the interest claimed by the principal defendant himself, through whom the others claimed, depends upon the assumption that the plaintiff's father was in

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possession of the minerals and able to pass them by the grant of 1867. The title of the defendant no. 3 himself also depends upon the right of the first defendant through whom he claims. The plea therefore will not avail him unless he can shew some title apart from that derived from the Maharaj Kumar. The argument is that the defendant no. 3 is in possession of the minerals and is therefore entitled to resist the plaintiff's claim in the absence of proof of the plaintiff's title. There is, however, no evidence on the record to shew that the defendants 2 and 3 or any of the other defendants are in possession of the minerals and the claim asserted by these defendants must stand or fall upon the rights of the defendant no. 1 who does not himself dispute that the Chota Nagpur Raj is a permanently settled estate or that the mineral rights were vested in the plaintiff's predecessor before the grant of 1867.

In my opinion the decree of the trial court should be reversed and the appeal should be allowed with costs here and in the court below against the contesting defendants and the cross-objection should be dismissed with costs, the costs to carry interest at 6 per cent. per annum from this date until realisation. The plaintiff is entitled to a declaration of his title to the mines and minerals in pargana Tori and to an injunction restraining the defendants other than the defendant no. 4 from entering upon, working or removing any mines or minerals within the said pargana or from interfering with the plaintiff, his servants or agents in doing all acts reasonably incident to the enjoyment of the plaintiff's right in the mines and minerals in the said pargana.

KULWANT SAHAY, J.—The principal questions for determination in this appeal are: First, whether the defendant no. 1 acquired rights to the mines and minerals in pargana Tori under the grant of February 1867 or by custom; secondly, if the plaintiff had abandoned or relinquished his rights, if any, to the

mines and minerals in pargana Tori; and thirdly, whether the suit was barred by limitation.

I shall first deal with the question of interpretation of the deed of February 1867 which has been marked as Exhibit 8 in the case. The correctness of the translation of the deed as given on page 10 of part III of the paperbook was disputed on behalf of the respondent and a fresh translation by a senior translator of the court was made. I have myself compared this translation with the original document and I find that the translation is accurate.

* * * * *

It is contended on behalf of the plaintiff that by this grant the rights to the mines and minerals in pargana Tori did not pass to the defendant no. 1 On the other hand, it is contended on behalf of the respondents that all subsoil rights including the mines and minerals passed to the defendant no. 1. Reliance was placed on behalf of the plaintiff-appellant on the term of the grant whereby the grantee and " his sons and grandsons and so on " were to

> " realize from the former and present elakadars the rents fixed in respect of the jagirs granted previously and at present, in accordance with the patta;"

and also to the term that " so long as the sons and grandsons and so on " of the grantee

> " will live they shall take possession of Bhandar Khas at every place and realize rents in respect of the entire pargana Tori Khas Bhandar and the elakadari and enjoy the same peacefully,"

and further on to the term that the grantee

> " shall continue to get all the income from the aforesaid villages."

It is contended that these terms clearly show that what was granted was merely the rents and profits of the villages comprised in pargana Tori and that it was not the intention of the grantor to demise the subsoil and mineral rights in the pargana. It is contended that the grant was for the purpose of maintenance of the grantee and maintenance grants have

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always been held to pass only the surface rights and not the subsoil rights to such grantees. As regards the generality of the terms used in the document it was contended that they referred only to the surface rights and not to the subsoil rights.

On behalf of the respondents it is contended that the document makes no reservation whatsoever and that the entirety of the rights possessed by the grantor were transferred to the grantee. Great reliance was placed upon the word " sab sudha " translated as " all included " occurring in the document. It was contended on behalf of the respondent that " sab sudha " meant everything comprised in the land. The contention of the respondent was that the word " sudha " in Sanskrit meant the soil, the earth, and that " sab sudha " meant all the earth, and that, therefore, it included the subsoil rights. It is true the etymological meaning of the word " sudha " in Sanskrit is earth, but the popular significance of the word " sab sudha " is everything included. The words " sab sudha " follow the words " four boundaries ". Now, the grant of " four boundaries " would be meaningless. What was actually intended to convey was everything included within the four boundaries. Reliance has been placed upon the word " darobast "which occurs thrice in the document. " Darobast " is a Persian word and means entire, and the grant was of the darobast pargana Tori Khas Bhandar darobast original with dependencies. The word " darobast " does not carry the defendants any further. It merely means that the entire pargana Tori with the entire Khas Bhandar was granted. " Bhandar " according to Fallon's Dictionary means villages managed by the Raja or zamindar himself, his own peculiar estate not rented or farmed to others. " Khas Bhandar " therefore means such villages as were held by the grantor in his own direct possession and were not let out or farmed to others. This was in contradistinction to the villages settled in jagir with the elakadars and the

deed expressly says that the grantee was to realize the rents and profits of the villages of the Khas Bhandar as well as those held by the elakadars under jagirs granted by the grantor.

On a construction of the terms of the deed, therefore, it seems clear that there was nothing in it to indicate that the grant was of the subsoil or mineral rights. It was a grant of rents and profits of the villages included in pargana Tori. The grant was a " putra pautradi " grant and such grants mean that the grantee's male descendants in direct line were to hold the pargana, and that in the event of failure of male descendants in the direct male line the properties were to revert to the grantor. If reversion be left in the grantor, then in the absence of express grant minerals remain with the grantor. The defendants' evidence shows that at the time of making the maintenance grants in the family calculation is made on the basis of the income derivable from the property granted, and the object of the grant is to secure to the grantee sufficient income in order to enable him to maintain himself in accordance with his dignity and this, it appears, is the case even when grants are made to the third and succeeding sons of the Maharaja. At the time the grant was made it was never in contemplation of the grantor to grant the minerals. The generality of the terms used cannot be held to include the corpus in the grant because it gives the grantee only the right to the usufruct and no power is given to him to consume the property itself and the general enumeration must be taken to be ejusdem generis. The word " sab sudha " appears to have the same meaning as the word " hakhakuk " which was construed by the Privy Council in *Rajkumar Thakur Giridhari Singh* v. *Megh Lal Pandey* (1) as not to increase the actual corpus of the subject affected by the grant. Having regard, there-

(1) (1917) I. L. R. 45 Cal. 87, P. C.

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fore, to the plain meaning of the terms used in the document, I am unable to say that the grant included the minerals or subsoil rights.

I may here refer to the contention of the appellant to the effect that the grant is really a lease, and as such the minerals could not pass. In this connection I am disposed to agree with the learned Subordinate Judge that the deed Exhibit 8 cannot be held to be a lease. It is not a transfer for a certain time express or implied or in perpetuity. It is contended on behalf of the appellant that the grant was of a tenure and the relationship between the parties is that of a landlord and tenant, and reference was made to three suits for rent instituted by the plaintiff against the defendant no. 1 for rent under the provisions of section 139(3) of the Chota Nagpur Tenancy Act (VI of 1908 B.C.). Exhibit 3 is a plaint of a suit for rent against the defendant no. 1 where the rent is claimed in respect of a tenure or jagir in lieu of services for 1970, 1971 and 1972 Sambat. Exhibit 7 is a written statement in that suit, Exhibit 4 is the judgment, and Exhibit 5 is the decree in that suit. It is argued that in the written statement (Exhibit 7) there was no denial of the relationship of landlord and tenant between the parties, or that the suit was not one under section 139 of the Chota Nagpur Tenancy Act. Exhibit 4(*a*) is a judgment in another rent suit for the years 1974-76 Sambat. Exhibit 4(*b*) is the judgment in a third rent suit. Now, these documents do not go to establish that the deed Exhibit 8 was a lease. Section 139 of the Chota Nagpur Tenancy Act applies not only to cases of rents properly so called but also to dues which are recoverable as if they were rents. These suits do not go to establish that the relationship between the parties was that of landlord and tenant and that the defendant no. 1 was holding as a lessee under the plaintiff. It was contended that it was a lease in perpetuity subject to a condition of reversion in the case of failure of male issue. In my opinion, having regard to the terms of the document, it cannot be

considered to be a lease in perpetuity. Reference may in this connection be made to the decision of Sir Lawrence Jenkins in the *Municipal Corporation of Bombay* v. *the Secretary of State for India* (1). I would therefore hold that there is no substance in the contention of the appellant that the deed was really a lease. It is a khorposh grant for a term which is not certain and not a grant in perpetuity.

The learned Subordinate Judge has held that the words used in the deed are ambiguous, and in order to ascertain the intention of the grantor he has considered the circumstances existing at the time the deed was executed and the subsequent conduct of the parties. Mr. Pugh on behalf of the respondent no. 1 has also referred to those circumstances and to the subsequent conduct of the parties. Reliance has been placed by the learned Subordinate Judge upon the fact that the Chota Nagpur Raj forms an impartible estate and the succession thereto is governed by the rule of primogeniture and that no females are entitled to succeed. It is the common case of the parties that according to the custom of the family grants for maintenance of portions of the estate are made either by the Maharaja in his life-time to his sons, or if no grant is made to the sons by the reigning Maharaja then after his death the eldest son who succeeds to the Raj makes grants of maintenance to his younger brothers. It appears from the evidence that the eldest son of the Maharaja succeeds to the Raj. His second son is called the Kuar, the third son is called the Thakur and other younger sons are called Lals. The eldest son who succeeds to the Raj has the Rajgi Gadi assigned to him. The second and the third sons also appear to have gadis in this Raj which are called the Kuarkari Gadi and the Thakurai Gadi. It is the case of the defendants that the properties given as maintenance to the second and to the third sons are really portions of the original estate which are severed

(1) (1905) I. L. R. 29 Bom. 580.

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from the Raj and allotted to the second and the third sons as appertaining to their respective gadis, and that the maintenance grant is not a grant of the rents and profits of the villages only but it is a complete severence or partition of the villages from the Raj and they belong to the gadis of the second and the third sons and that the occupiers for the time being of the Kuarkari and the Thakurai gadis are absolute proprietors of the villages comprised in the grant in the same way as the Maharaja for the time being is the proprietor of the main estate assigned to the Rajgi Gadi. Mr. Pugh contends that such grants to the Kuar and to the Thakur really amount to a partition of the joint family estate under a peculiar custom of the Chota Nagpur Raj family, and that although the Chota Nagpur Raj itself is impartible, yet by custom there is a partition so far as the maintenance grants are concerned. The rules of succession to the Rajgi Gadi and to the Kuarkari and the Thakurai Gadis are the same, i.e., the rule of primogeniture and the exclusion of females applies to all the three gadis. Reference was made to the deposition of the plaintiff given in a previous suit, a certified copy whereof has been admitted in evidence and marked as Exhibit A(1) and printed at page 58 of part III of the record, where the Maharaja admits that there are three gadis in his family, viz., the Maharaja Gadi, the Kuarkari Gadi and the Thakurai Gadi, and that the occupiers for the time being of these gadis are the maliks of their respective gadis. Reference was also made to the fact that the Tori pargana which was granted to the defendant no. 1 was itself a separate Raj at one time subordinate to the Chota Nagpur Raj and it was resumed by the Maharaja sometime in the year 1819 and then re-granted to the defendant no. 1 who holds a very dignified position, is himself the holder of a gadi and enjoys the privilege of danka and nishan as it appears from the evidence in the case. The history of the Tori pargana is given in the Final Report of the Survey and Settlement Operations in the District of Palamau by Mr. T. W. Bridge at page 47, para-

graph 19 and the subsequent pages of the Report. It is contended that it is not a grant to a petty tenure-holder but the grant of a pargana which was a Raj in itself, and that, therefore the grant was an absolute grant conveying the proprietary interests including the subsoil and the mineral rights in the villages. The Todi pargana consists of a large number of villages having an area of 665 square miles. Mr. Pugh's contention is that it is settled law that the members of the family of an impartible Raj are governed by the Mitakshara Law as regards succession, that they are members of a joint Hindu family and the succession is governed by the rules of succession obtaining in joint Hindu families, the only difference being that according to the particular custom of the Raj only one member of the family succeeds to the Raj and the others get maintenance allowance, but, argues Mr. Pugh, the maintenance allowance to the junior members of the family in this particular Raj always consists of portions of the estate, and that by such grant the portions allotted are really severed from the parent estate and made over to the junior members of the family, and this rule amounts to a partition of the joint family according to the peculiar custom in the family. The grants are always putra pautradi grants and revert to the Raj on the failure of male descendants of the grantee, but this reversion is not really a reversion to the grantor in the true sense of the term but the grantor takes the estate on the failure of the male line of the grantee by right of survivorship in the same way as on the death of the Maharaja for the time being the eldest son of the Maharaja takes it by survivorship according to the rules governing Mitakshara joint Hindu families. Mr. Pugh distinguishes the case of khorposh grants from the ordinary mukarrari grants in Chota Nagpur and the adjoining estate of Ramgarh, and contends that such grants have no resemblances to thika or mukarrari grants.

Reference is made by Mr. Pugh to the decision of their Lordships of the Privy Council in *Baijnath*

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Prashad Singh v. *Tej Bali Singh* (1). In this case Lord Denedin reviewed almost all the cases dealing with the subject of succession to impartible estates, and on a review of the cases beginning with the *Shivagunga case* (2) which was decided in the year 1863 and ending with the case of *Rajah Rup Singh* v. *Rani Baisni* (3) which was decided in the year 1884, his Lordship observed that up to this point the law was all one way and affirmed these propositions :—

(1) The fact that a raj is impartible does not make it separate or self-acquired property.

(2) A raj, though impartible, may in fact be self-acquired or it may be family property of a joint undivided family.

(3) If it is the latter, succession will be regulated according to the rule which obtains in an undivided joint family, so far as the selection of the person entitled to succeed is concerned, i.e., the person will be designated by survivorship, although then, according to the custom of impartibility, he will hold the raj without the others sharing it.

His Lordship then referred to the case of *Sartaj Kuari* v. *Deoraj Kuari* (4) which was decided in the year 1888. The question raised in this case was as to whether the holder of an impartible raj could alienate the properties appertaining to the raj even when there were no purposes of legal necessity, and it was held that he had the power to alienate. This finding was based on the principle that there was no such coparcenary in an estate impartible by custom, as, under the law of the Mitakshara governing the descent of ordinary property, attaches to a son on his birth. His Lordship then refers to the *First Pittapur* case (5) and to the *Second Pittapur* case (6) and to the other cases

(1) (1921) I. L. R. 43 All. 228.
(2) (1863) 9 Moo. I. A. 543.
(3) (1885) I. L. R. 7 All. 1.
(4) (1888) I. L. R. 10 All. 272; L. R. 15 I. A. 51.
(5) (1899) I. L. R. 22 Mad. 383, P. C.
(6) (1918) I. L. R. 41 Mad. 778.

subsequent to *Sartaj Kuari's* case (1), and the conclusion come to was that the zamindari being the ancestral property of the joint family, though impartible, the successor falls to be designated according to the ordinary rule of the Mitakshara Law, and that the respondent in that case being the person who in a joint family would, being the eldest of the senior branch, be the head of the family is the person designated in the impartible raj to occupy the gadi.

The contention of Mr. Pugh is that what has been laid down by the Privy Council in the case of *Baijnath Prasad Singh* v. *Tej Bali Singh* (2) is that the members of the family of the Maharaja for the time being of an impartible raj are members of a joint Hindu family, unless there is a separation and partition amongst them, and that the maintenance grants of the nature with which we are concerned in the present case are really allotments of a portion of the estate to the members of the joint family, and that they are absolute conveyances which revert to the raj not by right of reversion but by right of survivorship as in an oridinary Hindu family.

The argument is ingenious; but in my opinion there is no substance in it. It is true that the members of the family of an impartible raj are governed by the rules of a joint Hindu family, but such rules apply only for the purposes of succession and there is no coparcenary in an impartible estate such as exists in ordinary Mitakshara families and there is no such co-ownership as to entitle the junior members of the raj to demand a portion of the estate by partition, as appears to the laid down in *Sartaj Kuari's* case (1) and as was held by the Calcutta High Court in the *Dhalbhum case* (3). Lord Dunedin referring to *Sartaj Kuari's* case (1) observed as follows. " Even, however, if their Lordships thought the decision in

(1) (1888) I. L. R. 10 All. 272; L. R. 15 I. A. 51.
(2) (1921) I. L. R. 43 All. 228, P. C.
(3) (1924) 40 Cal. L. J. 331; 82 Ind. Cas. 886.

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Sartaj Kuari (1) wrong—an opinion which they do not pronounce—the case has stood too long to be now touched ".

The rule of law laid down in *Sartaj Kuari's* case (1) must be considered to be good law even now; and if *Sartaj Kuari's* case (1) lays down the correct law then it is clear that in impartible estate there is no real co-ownership in the proper sense amongst the members of the family of the holder of an impartible raj and in determining the question of succession the right of survivorship is to be presumed, but only for the purposes of succession and for nothing else. The principle of *Sartaj Kuari's* case (1) was applied to wills in the *First Pittapur* case (2). In the *Telwa* case (3) it was found that there had been a complete separation and that, therefore, the widow of the last holder was entitled to succeed to the estate in priority to the next male reversioner. Towards the end of the judgment in that case Sir John Edge observed that the learned Judges of the High Court had overlooked the fact that Bhupat Narayan Singh and his son who were the junior members of the family had no coparcenary rights in the impartible estate and no rights in that estate which entitled them or either of them to a partition of the impartible estate. They could not have prevented Thakur Ranjit Narayan Singh, the holder of the impartible estate, from alinating that estate in such a way as to determine any contingent interest they had in it under the custom, and that their contingent interest under the custom was liable to be defeated by an alienation of the estate of Thakur Ranjit Narayan Singh even if the family had remained joint. I am of opinion that in an impartible raj the junior members of the family have not the ordinary coparcenary rights which members of a joint Hindu family have; and the grant of maintenance by the holder of the raj to the junior members of the raj cannot and does not amount to a partition and such

(1) (1888) I. L. R. 10 All. 272; L. R. 15 I. A. 51.
(2) (1899) I. L. R. 22 Mad. 383, P. C.
(3) (1915) I. L. R. 42 Cal. 1179, P. C.

grants do not by themselves amount to a conveyance of full proprietary rights including rights to minerals and subsoil rights.

Sir Binode Mitter on behalf of the appellant points out that the contention of Mr. Pugh that on the failure of male descendants in the line of the grantee the holder of the raj takes the property by survivorship is fallacious, because if there is a separation the Maharaja for the time being could not take the property by survivorship. If the grantee sells the properties given to him to a stranger then in the case of failure in the main line the Maharaja cannot be held to take it by survivorship but he takes it only in exercise of his right of reversion. If the Maharaja for the time being transfers the entire raj the transferee could not enforce the right of survivorship but takes it only by right of reversion. The contention of Mr. Pugh must therefore fail.

The learned Subordinate Judge observes that the circumstances existing at the time the deed of February 1867 was executed and the subsequent conduct of the parties go to show that what was granted was an absolute estate and that the subsoil and the minerals also passed. The circumstances referred to by the learned Subordinate Judge are that there is evidence of a custom in the family that the Maharaja for the time being makes grants to his sons or brothers of portions of the estate for their maintenance, and that this custom is capable of being enforced by arbitration and if necessary by suit. This circumstance does not lend support to the contention that the grants of maintenance include the subsoil rights in the properties granted. On the other hand the evidence is that an account is taken of the rents and profits of the properties proposed to be granted, and that the extent of the properties granted is such that the income thereof may be sufficient for the maintenance of the grantee. No doubt there is evidence of the fact that there are three gadis in the Chota Nagpur Raj and that the plaintiff in his evidence in a previous

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suit (Exhibit A 1) has stated that the holders of the Kuarkari and the Thakurai gadis are the maliks of the properties granted to them; but this to my mind does not take the case further. The evidence on the record is not sufficient to establish a custom that the grants to the holders of these gadis are absolute grants, and the term "malik" by itself does not indicate that an absolute interest, including the subsoil rights, is granted to the holders of these gadis. It is true that the grants are not mere life grants but devolve upon successive male heirs in the main line of the grantees; but this contention also does not go to show that the intention of the grantor was to grant more than the right to enjoy the usufruct of the properties granted. No doubt the properties granted can be transferred to strangers, but they can do so only so long as the male line of the grantee continues, and on extinction of male line the property reverts to the grantor. The learned Subordinate Judge has held that the estate created by grants like these are peculiar to the family, being the off-spring of immemorial custom, and such estates created by such grants are unknown to and not recognized by the ordinary Hindu law and that they are peculiar estates similar to estates tail of the English law. The circumstances set forth above, either singly or taken together, do not lend support to the contention that grants such as the one now under consideration pass the mines and minerals in the properties granted.

The other circumstance referred to by the Subordinate Judge as existing at the time of the grant is the fact disclosed by the plaint (Exhibit E 1) and the judgment (Exhibit F 1) of the suit brought by Opendra Nath Sahi Deo against Rani Luchun Kower and Rani Komal Kower, the widows of the late Maharaja and the mothers of the plaintiff and the defendant no. 1, respectively. In the first place the judgment (Exhibit F 1) is not legal evidence as regards the circumstances alleged to exist at the time of the grant. This judgment was admittedly set aside on appeal and a

copy of the judgment of the court of appeal has not been produced. Moreover, the judgment is of a date subsequent to the date of the grant in question in the present suit and it is not evidence of circumstances contemporaneous with the execution of the deed. There is no evidence that at the time of the grant there was any litigation which would induce the then Maharaja to have recourse to proceedings which would amount to an absolute transfer of a portion of the estate. If this was the intention of the Maharaja in making the grant such intention could have been expressed and given effect to in a much more definite and conclusive manner than the method adopted by the Maharaja in making the grant under the deed (Exhibit 8). The oral evidence of the circumstances referred to by the learned Subordinate Judge existing at the time of the grant is not such as to enable one to hold that the father of the plaintiff and the defendant no. 1 intended to make provision for the defendant no. 1 and through him for the plaintiff also in case Baralal Opendra Nath Sahi Deo succeeded in wresting the raj from him, and that the object of the grant was that the Maharaja intended to convey full rights thereby to the grantee.

As regards the subsequent conduct of the parties the evidence to my mind is not such as to lead to the conclusion that the intention of the parties to the grant was that full rights, including subsoil rights, did pass. The letter Exhibit D—1(*c*) of the Deputy Commissioner to the Manager of the Chota Nagpur Estate and letter Exhibit D—1(*d*) from the Deputy Commissioner to the defendant no. 1 do not in any way refer to the minerals. It appears that the estate of the plaintiff as well as that of the defendant no. 1 were under the Court of Wards and that the direction given in the letter Exhibit D—1(*e*) was merely a direction as regards the management of the respective estates. There is nothing in these letters to indicate any conduct of the parties which would go to show that the minerals passed to the defendant no. 1. Moreover, any admission made by the Deputy Commis-

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sioner as representing the Court of Wards would not be binding upon the plaintiff. Furthermore, although evidence of subsequent conduct of the grantor or the grantee can in certain cases be taken into account in order to find the intention of the grantor and the grantee, the conduct of other persons is of no value for this purpose.

Reference is then made to the conduct of the defendant no. 1 and the plaintiff in connection with the grants of certain prospecting licenses. Exhibit B (1) is a thika patta, dated the 10th of November, 1890, granted by the defendant no. 1 to one Max Anderson. Under this deed Max Anderson was granted the right to prospect and search for metals and minerals and precious stones of every description in and under the surface of all the lands in pargana Tori. The defendant no. 1 in this deed claimed to be the sole and absolute owner of the pargana Tori and of all rights to minerals or metals therein. Exhibit B—1/1 is another patta of the same date by the defendant no. 1 to Max Anderson in respect of rights to metals, ores, minerals and precious stones in two villages of pargana Tori. Three years later in the year 1893 the term of the previous lease in favour of Max Anderson was extended. Exhibit B—1/2, dated the 10th March, 1893, is an agreement between the defendant no. 1 and Max Anderson to extend the term. This deed bears the seal of the plaintiff, and, although the executant of the deed is the defendant no. 1 alone, towards the end of the deed it is stated that he undertakes and agrees to execute and register further pattas for the purpose of extension of time as provided for in the previous portion of the deed and to have it sealed and delivered to the said Max Anderson by the defendant no. 1 as well as by Maharaja Uday Pratap Nath Sahi Deo, the plaintiff. The next document is Exhibit 10 of the same date (10th of March 1893) as the agreement Exhibit B—1/2. This purports to be an instrument of release and confirmation by the plaintiff in favour of Max Anderson. In this document

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there is a recital of the fact that an agreement had been executed on the 5th February 1893 whereby it had been mutually agreed between Kumar Jagat Mohan Nath Sahi Deo, the defendant no. 1, and the Maharaja, plaintiff, that from the date of the said agreement each of them shall equally enjoy all profits and benefits to be derived from the produce of any mines or minerals in the said pargana Tori or the sale price, or rent or other benefit thereof. The Maharaja, plaintiff, in this document also asserts that although the ticca patta of 1890 had been executed by the defendant no. 1 in favour of Max Anderson yet the Maharaja plaintiff claimed that all rights to minerals and metals lying in and under all the lands comprised within the raj or estate of Chota Nagpur including the said pargana of Tori belong to him as the Maharaja of the said raj or estate, and that he (the Maharaja) had the right to resume the said pargana Tori free of all incumbrances in the event of the failure of heirs male of Kumar Jagat Mohan Nath Sahi Deo, the defendant no. 1. The Maharaja by this document purported to release in favour of Max Anderson all rights whatsoever that he may have to the metals and minerals in pargana Tori and to release and relinquish all claims to demands of rents or royalties in respect of such metals and minerals during the term or period of the thika pattas granted by the defendant no. 1. Now, these documents, to my mind, do not constitute evidence of conduct of parties which would go to show that the parties themselves understood that the subsoil rights and minerals in pargana Tori passed to the defendant no. 1 under the grant of February 1867. The two pattas of 1890 no doubt show an assertion of title to the mines and minerals by the defendant no. 1; but in the document of 1893 (Exhibit 10) we have a clear assertion by the plaintiff that he claimed all the subsoil rights in pargana Tori. The agreement of the 5th of February 1893 referred to in Exhibit 10 has not been produced and neither party relies upon it, and it is not possible to say what the nature of the agreement

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between the parties actually was. It might be that it referred only to the term of the lease granted to Max Anderson. In my opinion the acting of the parties evidenced by the deeds of 1890 and 1893 gives us no assistance in construing the deed of 1867. The lease granted to Max Anderson, however, was not operative and Max Anderson did not work any mines under the lease.

The next set of documents showing the conduct of parties consists of certain pattas and maintenance grants made by the plaintiff. Exhibit C—1/2 is a patta, dated the 24th April 1891, executed by the plaintiff in favour of Srimati Kuarani Alakh Manjari Koeri, the wife of the defendant no. 1. By this deed the plaintiff granted one mauza to the lady as jagir descendible to children and the mines in the said mauza were expressly excluded. Exhibit G(1) is an indenture made on the 5th of April, 1916, between the Maharaja, plaintiff, and his son Jagat Kishore Nath Sahi Deo. It appears that certain properties had previously been granted by the Maharaja, plaintiff, to his said son by way of maintenance but the income of all those properties were not found to be sufficient and there was a dispute between the parties as regards the amount of income of the villages given as maintenance. The matter appears to have been referred to the Raja of Saraikala, who is the father-in-law of the plaintiff, who made an arbitration between the parties, and under this arbitration the plaintiff granted certain other villages to make up the deficiency. This indenture (Exhibit 1) evidenced this fact and it acknowledged that the son got certain villages to make up the deficiency in the maintenance grant. In this document there is nothing to show that the mines were excluded as was expressly done in the patta Exhibit C—1/2 granted by the plaintiff to the wife of the defendant no. 1. Exhibit C(1) is a khorposh grant, dated the 13th June, 1917, by the plaintiff to another son of his named Gopeshwar Nath Sahi Deo. In this deed also there is no reservation as regards the mines. Exhibit H(1), dated the 13th June, 1917, is

another patta by the Maharaja, plaintiff, to another son of his named Aseswar Nath Sahi Deo granting him certain villages by way of maintenance. Here also the mines, etc., were not excluded. Exhibit C—1/3 is a patta by the defendant no. 1 to Braj Kishore Nath Sahi Deo, one of the sons of the plaintiff. In this document the defendant no. 1 made a grant of mauza Murpa to the plaintiff's son including mines of all kinds existing in the village. The last document is Exhibit C—1/1 a patta, dated the 22nd April, 1921, granted by the plaintiff in favour of his son Gopeshwar Nath Sahi Deo. The son had purchased certain villages which had previously been granted in jagir to certain persons. By this document the plaintiff granted to his said son one of the mauzas purchased by him as jagir descendible to children, and in this document mines of all kinds have been excluded. The argument based on behalf of the respondent upon these documents is that although mines were excluded in the document Exhibit C—1/2 granted in favour of the wife of the defendant no. 1, there is no such express reservation of the mines in the maintenance grants executed by the plaintiff in favour of his sons, and that when there was an intention to exclude the mines such intention was expressly expressed in those documents. In the first place these documents are of no help to us in construing the deed of 1867. In the next place we find that in 1890 the defendant no. 1 in his lease to Max Anderson had already made an assertion of title to the mines and minerals, and there is no wonder that when the plaintiff executed the document Exhibit C—1/2 in favour of the wife of the defendant no. 1 on the 24th of April, 1891 he expressly excluded the mines from the patta. The documents G(1), C(1), H(1) and C—1/1 came into existence in the years 1916, 1917 and 1921 respectively after there was some sort of agreement come to between the plaintiff and the defendant no. 1 as evidenced by the release (Exhibit 10), dated the 10th March, 1893. In any event, the mere fact of no mention being made as regards the mines, either excluding the same or

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granting the same, in some of the documents executed by the plaintiff and mention thereof being made in others after the question had become prominent is not sufficient to enable us to construe the deed of 1867 and to hold that the minerals and subsoil rights passed to the defendant no. 1 under the grant (Exhibit 8).

As regards the custom pleaded by the defendant no. 1 the evidence is not sufficient to prove the same. The defendants' witness no. 2, who is the fourth son of the plaintiff, says nothing about the custom in his examination-in-chief. In his cross-examination he admits that the khorposh grants made to him and to the other junior members of the family are of the same character as the grants made to the Kuar and to the Thakur. He further states that there is no difference in the rights possessed in the khorposh grants by the first three sons and by the junior sons. It follows, therefore, that the fact of the existence of the three gadis makes no difference in the character of the grant made to the holders of the Kuarkari and the Thakurai gadis and to the other junior members of the family. This witness further admits that the assignment of khorposh properties to the first three sons does not amount to a partition of the Raj. Defendants' witness no. 3 is the third son of the Maharaja, plaintiff. He too does not prove the custom. He states that at the time of making the grants calculation is made on the basis of the income derivable from the pargana concerned. His deposition shows that up till now no mines in Chota Nagpur have been worked to his knowledge, and excepting Chhote Lal none of the khorposhdars under the raj has yet worked any mines in their respective villages (by Chhote Lal he means the second witness for the defendant). The fourth witness for the defendant is the holder of an estate granted in khorposh by one of the ancestors of the present Maharaja. This grant was made long before the Permanent Settlement and the deed is not forthcoming. He states that 40 or 50 years ago some iron mines used to be worked in the pargana granted to him, but his cross-examination shows that this

statement is not supported by any reliable evidence. The next witness is the defendant no. 1 himself. His evidence also does not prove the custom alleged. He no doubt asserts that coal and other minerals have been extracted from several mauzas comprised in pargana Tori granted to him but he is unable to produce any satisfactory evidence, such as the account papers or to call witnesses who worked the mines. The instances he gives are not instances sufficient to prove the working. As regards Max Anderson, we have seen that the Maharaja in confirming the grant made to him by the defendant no. 1 distinctly asserted his claim to the minerals. As regards Sarkar Barnard and Company, it appears that they advanced money on mortgage of defendant no. 1's wife's property and not on a prospecting license granted by the defendant no. 1 to them and that, therefore, this is no evidence as regards the working of the mines. Moreover, even if there was working of the mines by the defendant no. 1 there is nothing to show that this was done with the knowledge of the plaintiff. I am of opinion that the evidence on the record is not sufficient to prove the custom alleged by the defendant no. 1.

The learned Subordinate Judge then obsreves that the estate granted to the defendant no. 1 resembles estates-tail of the English law, and that, as the ordinary Hindu law does not recognize an estate such as that created by the grant under consideration, and as no light can be had in the matter from the provisions of the Hindu law, and as in all cases for which no specific statutory directions are to be found in the Indian law, the courts are to act according to justice, equity and good conscience, and as the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding relevant rules of the common law of England and as the nearest approach to the estate created by the grant under consideration is to be found in the estate known as an estate-tail male in the common law of England, he proceeds to examine the nature of such

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an estate under the common law of England and to hold that as estates-tail male in England carry the right to work mines and quarries beneath and within the lands, the grant under consideration also included the right to the mines and the subsoil rights in the villages comprised in pargana Tori. In this connection I need only observe that it is not safe to apply the principles of the common law of England to the grant under consideration. As was observed by Jenkins, J., in *Kalidas Ahiri* v. *Manmohini Dasi* (1) to draw an analogy from the English law of real property is wholly misleading. There is a fundamental difference between the land tenures in England and India and peculiarities of the feudal system of England are not to be found in India. I would, therefore, not base any decision on the point under consideration on a reference to the law of real property of England.

It has been contended on behalf of the appellant that the decisions of the Privy Council as well as of the High Courts in India show conclusively that the defendant no. 1 cannot under the grant of 1867 claim any right to the mines and minerals in pargana Tori; and reference has been made to *Tituram Mukherji* v. *Cohen* (2), *Hari Narayan Singh Deo* v. *Sriram Chakravarti*(3), *Jyoti Prasad Singh* v. *Lakhipur Coal Company*(4), *Durga Prasad Singh* v. *Braja Nath Bose* (5), *Biswanath Gorain* v. *Surendra Mohan Ghose* (6), *Christian* v. *Tikaitni Narbada Keori* (7), *Kunja Behari Seal* v. *Durga Prasad Singh* (8), *Shashi Bhusan Misra* v. *Jyoti Prasad Singh Deo*(9), *Rajkumar Thakur Girdhari Singh* v. *Megh Lal Pandey* (10), *Raghunath Roy Marwari* v. *Durga Prashad Singh*(11), *and the Secretary of State for India in Council* v. *Srinivas Chariar*(12). Most of these cases have been

(1) (1907) I. L. R. 34 Cal. 358.
(2) (1906) I. L. R. 33 Cal. 203.
(3) (1910) I. L. R. 37 Cal 723.
(4) (1911) I. L. R. 38 Cal. 845.
(5) (1912) I. L. R. 39 Cal 696.
(6) (1913) 19 Cal. W. N. 102.
(7) (1914) 19 Cal. W. N. 796.
(8) (1915) I. L. R. 42 Cal. 346.
(9) (1916) I. L. R. 44 Cal. 585.
(10) (1917) I. L. R. 45 Cal. 87, P. C.
(11) (1919) I. L. R. 47 Cal. 95.
(12) (1920) I. L. R. 44 Mad. 421.

considered by the learned Subordinate Judge. These cases mostly relate to mukarrari grants of debottar or brahmottar grants. In *Tituram* v. *Cohen*(1), the grant itself was not available, but from the circumstances appearing from the evidence it was taken to be a life grant. In *Hari Narayan* v. *Sri Ram Chakravarti*(2), the grant was to an idol. In this case also the deed was not produced. In *Jyoti Prasad Singh* v. *Lachipur Coal Company*(3), the grant was of a permanent lease and the deed was not produced. It was to a stranger and not to a member of the family. In *Durga Prasad Singh* v. *Braja Nath Bose*(4), the grant was a dighwari grant and made to a stranger. The judgment of the High Court which went up in appeal to the Privy Council is reported(5) and *Hari Narain* v. *Sri Ram Chakravarti*(2) was followed. In *Biswanath Gorain* v. *Surendra Mohan Ghose*(6) the case was of a Khorposh grant to a junior member of the family, and in this case it appears the question was raised as to whether the subsoil rights passed. In *Christian* v. *Tikaitni Narbada Koeri*(7), the grant was a maintenance grant to a widow for life. In *Kunja Behari Seal* v. *Durga Prasad Singh*(8), the grant was a moglai brahmottar grant. In all these cases it was held that the subsoil and mineral rights did not pass. In *Shashi Bhusan Misra* v. *Jyoti Prasad Singh Deo* (9) the Lord Chancellor after considering some of the cases referred to above observed as follows:

"These decisions, therefore, have laid down a principle which applies and concludes the present dispute. They establish that when a grant is made by a zamindar of a tenure at a fixed rent, although

(1) (1906) I. L. R. 33 Cal. 203.
(2) (1910) I. L. R. 37 Cal 723.
(3) (1911) I. L. R. 38 Cal. 845.
(4) (1912) I. L. R. 39 Cal. 696, P. C.
(5) (1907) I. L. R. 34 Cal. 753.
(6) (1913) 19 Cal. W. N. 102.
(7) (1914) 19 Cal. W. N. 796.
(8) (1915) I. L. R. 42 Cal. 346.
(9) (1917) I. L. R. 44 Cal. 585.

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the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect ".

In this case the Lord Chancellor further observed that in considering the question raised in the appeal, viz., as to whether the mukarrari grant in that case carried with it the mineral rights in the soil it is important to avoid giving the words used in connection with legal transactions in India a special and technical meaning that they possess in England, and the meaning of the word " grant " was not the same in India as in England. The grant which was under consideration by the Privy Council in *Rajkumar Thakur Giridhari Singh* v. *Meghlal Pandey* (1) is set out in the judgment of the High Court(2). It was the case of a mukarrari lease and the expression " mai hak hakuk " was used in the lease, and it was held that unless there be by the terms of the lease an express or plainly implied grant of mineral rights they remain reserved to the zamindar, there being no evidence of his having parted with them. The word " sab sudha " in the document under considera-

tion in the present case has the same significance as the word " hak hakuk " in the case before their Lordships of the Privy Council in *Rajkumar Thakur Giridhari Singh* v. *Meghlal Pandey*(1). The grant under consideration was produced in *Raghunath Roy Marwari* v. *Durga Prasad Singh* (3). The terms were :

> " I hereby grant you rent-free brahmottar land in mauza Jinkai in pargana Jharia. You should enjoy it comfortably by cultivating and by getting the same cultivated by others and to bless me. Hence this patta is granted to you."

In the present aase also there is a direction to realise rents and profits from the elakadars and to enjoy the income. It was held by their Lordships in the Privy

(1) (1917) I. L. R. 45 Cal. 87, P. C. (2) (1907) I. L. R. 34 Cal. 753,
(3) (1919) I. L. R. 47 Cal. 95,

Council that where a zamindar grants a tenure of lands within his zamindari and it does not clearly, appear by the terms of the grant that a right to the minerals beneath the soil is included the minerals do not pass to the grantee, and that this principle applies as well to rent-free grants as to grants of tenures at fixed rents. In the *Secretary of State for India in Council* v. *Srinivasa Chariar* (1) the grant under consideration was an " inam " grant by the Government which existed prior to the British Government to a Brahmin and the grantee was to appropriate to his use the produce of the seasons of each year, the grantee in return being expected to be assiduous in offering up prayers for the lasting prosperity of the empire. It was held that it was not a complete transfer and that the grantee had not the power to consume the subject-matter of the grant by quarrying operations. These cases, therefore, hold that unless there is an express or implied grant of the minerals such grants which formed the subject-matter of consideration in those cases did not pass the minerals. It is noticeable that none of the cases cited is a case of a khorposh grant similar to the one under consideration, except perhaps the case of *Biswanath Gorain* v. *Surendra Mohan Ghose* (2) but there the fact that the khorposhdars did not possess the subsoil rights was conceded by all the parties other than defendants nos. 1 and 2 and they did not very strenuously contest the point. The authorities, therefore, do only go to the extent of showing that it is settled that in mukarrari grants or in grants for life or in debottar or brahmottar grants minerals do not pass without an express provision to that effect. To my mind they are not conclusive so far as the question in the present case is concerned and, as I have observed, with the exception of the case of *Biswanath Gorain* v. *Surendra Mohan Ghose* (2), no other case has been cited which deals precisely with the point raised in the present case.

(1) (1920) I. L. R. 44 Mad. 421. (2) (1913) 19 Cal. W N. 102.

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KULWANT SAHAY, J.

In *Satyendra Ranjan Chakravarti* v. *Ramlal Kaviraj* (1) which was a case which went up to the Privy Council from a decision of a Division Bench of this court, the question turned on the interpretation of a patni lease and on a construction of the lease which contained the words " adha " and " urdha " it was held that the subsoil rights passed. The High Court had held that patni leases stand on the same footing as mukarrari tenures. Their Lordships of the Privy Council, however, considered the cases which have been cited in the present case and observed that not one of these was a tenure of a patni taluq in the hands of a patnidar, and their Lordships were of opinion that the question as to whether patni leases did convey mineral rights was still open and they expressed no opinion on that point. Similarly, the authorities cited in the present case if they do not apply to patni leases they cannot be said to apply to khorposh grants of the nature we are now concerned with. I would, therefore, hold that the authorities cited, except *Biswanath Gorain's case* (2), do not directly apply to the present case. On a construction of the deed itself, however, and on the evidence in the case I am of opinion that there was no intention to pass the minerals and the defendant no. 1 did not acquire the right to the minerals under the grant.

On the question as to whether the plaintiff abandoned or relinquished his rights, if any, to the mines and minerals in pargana Tori, the argument is based upon Exhibit B—1/2 and Exhibit 10. I have already considered these documents and I am of opinion that it cannot be said that the plaintiff did abandon or relinquish his rights. All that can be said was that the plaintiff agreed to confirm the grant made by the defendant no. 1 to Max Anderson and it related only to the term of the grant to Max Anderson. Max Anderson, however, did not work the mines under the grant and the matter was dropped. There

(1) (1925) I. L. R. 4 Pat. 244, P. C. (2) (1913) 19 Cal. W. N. 102.

is a clear assertion of title made by the plaintiff in Exhibit 10.

The next question is the question of limitation. The Article applicable is Article 120 of Schedule I to the Indian Limitation Act and the period of limitation is six years from the time when the right to sue accrues. It is contended on behalf of the defendant that the right to sue for a declaratory decree and injunction accrued to the plaintiff in 1884, and for this purpose reliance is placed upon the deposition of the defendant no. 1 where he states that when he attained majority in 1884 he commenced working the mines. On the other hand, the cause of action alleged by the plaintiff is the grant of the prospecting license by the defendant no. 1 to the defendants nos. 2 and 3, which is dated the 17th of May, 1921, and the suit was instituted in August 1922. In my opinion the cause of action accrued to the plaintiff in 1921 and the suit is not barred by limitation. In the first place the evidence is not sufficient that the defendant no. 1 worked the mines in 1884, nor does it appear that if there was a working of the mines it was of such an open character as to be said that the plaintiff knew about it. In any event the cause of action is a recurring one, and unless it can be shown satisfactorily by evidence that the working of the mines by the defendant no. 1 was of such an open nature as to lead to a presumption that the plaintiff knew about it, or unless there is direct evidence of the fact that the plaintiff had knowledge of the working of the mines by the defendant no. 1 more than six years before they filed the suit, I am of opinion that the present suit cannot be said to be barred by limitation.

The only other point left for consideration is the one raised by the defendants nos. 2 and 3 in their cross-objection. Issue no. 6 as originally framed was as to whether the estate bearing Tauzi no. 1 on the Revenue Roll of the Ranchi Collectorate, commonly known as the Chota Nagpur Raj, was a permanently settled estate and as to whether it had the legal status

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KULWANT SAHAY, J.

of such an estate; if not, has the plaintiff any right to bring the suit. The question raised by this issue arose upon the pleadings. Paragraphs 1—3 of the plaint did make an assertion that the estate commonly known as the Chota Nagpur Raj was a permanently settled estate. Paragraphs 9-11 of the written statement of the defendants nos. 2 and 3 raised the question that the Chota Nagpur Raj is not a permanently settled estate. Upon the pleadings the issue raised did properly arise. It appears, however, that this issue was cancelled by the learned Subordinate Judge by his order no. 85 in the ordersheet, dated the 16th of June, 1925. The issue was cancelled as being irrelevant and unnecessary. This appears to have been done in the absence of the defendants nos. 2 and 3. It appears from order no. 89, dated the 17th June, 1925, that the defendants, nos. 2 and 3 filed a petition praying that the original issue no. 6 which was cancelled the previous day might be restored. The learned Subordinate Judge rejected this application with the observation that it was admitted by the learned Vakil for these defendants that the villages making up pargana Tori do appertain to Tauzi no. 1 of the Ranchi Collectorate as now constituted and that it was not disputed by the said defendants that pargana Tori concerned in the present suit appertained to the Chota Nagpur Raj estate held by the plaintiff and that it was also not disputed that the defendant no. 1 claimed the said pargana by virtue of a grant or lease from the last Maharaja as representing that estate. In view of these facts the learned Subordinate Judge was of opinion that the question of the nature of the estate held by the plaintiff did not arise for decision in the present case and he, therefore, did not see any reason why the original issue no. 6 should be restored. In my opinion it cannot be said that the learned Subordinate Judge was in error in striking out issue no. 6. It is argued that if the estate of the plaintiff is not a permanently settled estate the question did arise as to whether he had a right to the minerals in the Chota Nagpur Raj,

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and unless he proved his right to the minerals in the Chota Nagpur Raj it cannot be said that he was entitled to a declaration that he had the rights in the minerals in pargana Tori. The defendants, however, have no title, or possession. The defendant no. 1 did not dispute the title of the plaintiff apart from the grant of 1867, as in fact he could not do so inasmuch as he claimed title through the predecessor in title of the plaintiff. The defendants nos. 2 and 3 who claim through the defendant no 1 also cannot raise the question having no title by possession, and in my opinion there is no substance in the cross-objection.

KULWANT SAHAY, J.

In the result, therefore, I would allow this appeal and decree the suit with costs here and in the court below and dismiss the cross-objection of the defendants nos. 2 and 3.

Appeal allowed.
Cross-objection dismissed.

APPELLATE CIVIL.

Before Adami and Scroope, JJ.

RAGHUNATH PRASAD SAHU

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Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XLIV, rule* 1, *proviso, scope of—court, power of, to consider whether decree contrary to law or usage or otherwise erroneous or unjust, after notice is issued.*

When an application for leave to appeal in forma pauperis has been admitted and the court has ordered notices to be served on the opposite party and the Government Pleader, it is no longer open to the court to consider whether the proviso to rule 1, Order XLIV, Code of Civil Procedure, 1908, applies,

* Pauper Case no. 7 of 1926.

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that is to say, it cannot examine the question whether the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust.

Mussammat Buchan Dai v. *Jugal Kishore*(1), followed.

Application by the plaintiffs.

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

S. N. Bose (with him *A. K. Gupta*), for the petitioner.

The court is precluded at this stage from going into the merits of the case and considering under the proviso to Order XLIV, rule 1, whether the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust, I rely on *Mussammat Buchan Dai* v. *Jugal Kishore* (1) where it was held that it was open to the court to reject the application before admission if it was not satisfied that the decree was contrary to law, etc.; but when once it is admitted and notices have been ordered to issue on the opposite party and on the Government Pleader, the question is finally decided.

Abani Bhushan Mukerjee (Government Pleader), *Parmeshwar Dayal* and *Anand Prasad*, for the opposite party. Every case must be decided on its own facts; and where it is not manifest that the Court, while admitting the application, considered the question arising under the proviso to rule 1, Order XLIV, the court is not precluded from examining the question at this stage.

S. N. Bose, replied.

S. A. K.

ADAMI, J.—This is an application for leave to appeal in forma pauperis. The applicant instituted a suit claiming a declaration that certain sums of money deposited with a banking business in the name

(1) (1924) A. I. R. Pat. 791.

of an idol were joint family property and that he was entitled to a one-sixth share of the amounts so deposited.

The learned Subordinate Judge decided that the applicant was not entitled to any of the sums deposited and also that the suit was barred by limitation. His suit was therefore dismissed on the 28th August, 1926.

This Court reopened on the 27th October but it was not until the 25th November that the application was made. In that application the applicant sought leave to appeal in forma pauperis and he also asked that under section 5 of the Limitation Act the time for making the application should be extended. On the 1st December the learned Advocate for the applicant was heard and an order was passed that notice should issue both on the respondents and the Government Pleader.

The applicant was allowed in the lower Court to sue in forma pauperis and it is not shown before us that since permission was granted to him in the lower Court that he has acquired other properties. We have not the materials before us to form any adequate opinion on that point.

Now it is uncertain whether the order of this Court passed on the 1st December, 1926, referred only to the application for leave to appeal in forma pauperis or also covered the application for extension of time under section 5. If it referred to the application to appeal in forma pauperis it would seem that under a ruling of this Court in the case of *Mussammat Buchan Dai* v. *Jugal Kishore*(1) it is not open to us now to consider whether the proviso to rule 1 of Order XLIV of the Code of Civil Procedure applies, that is to say we cannot examine the question whether the decree of the lower Court was contrary to law or to some usage having the force of law, or was otherwise erroneous or unjust. Even in that case, however,

(1) (1924) A. I. R. Pat. 791.

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ADAMI, J.

we have to consider the question whether the application could be received as having been filed within time and whether any extension can be granted.

* * * * *

To my mind there is no good justification for overlooking the delay made by the applicant in putting forward his application. He was long out of time and the explanation given by him is, in my mind, insufficient and I would hold that this application is barred and no further extension should be given.

Now if we take it that the notice was issued on the respondents and the Government Pleader with regard to the application for extension of time only, it would fall upon us to consider whether the proviso to Order 44, rule 1, should be applied and we should look to see whether the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or injust. If we were to look into the judgment of the lower Court from this point of view, I would be inclined to say that there is nothing in the judgment to show that it is erroneous or unjust or that there is anything in it which is contrary to law.

The learned Subordinate Judge has found as a fact that though some items are mentioned in the books of the banking business of the idol, the applicant failed to show that he had a claim to any of those items, and also the Subordinate Judge has found as a fact that even if the applicant had a claim to those sums mentioned in those three books, there are entries mentioned in the fourth book which show that the applicant would be indebted to the idol to a larger amount than he could claim under the other three books. From all points of view I would hold that this application for leave to appeal in forma pauperis is an application which should not be allowed especially as it was filed too late.

I would reject the application.

A month's time will be allowed from this date to the applicant for extension of the time allowed by law for the filing of an appeal with the proper court-fee.

SCROOPE, J.—I agree.

Application rejected.

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REVISIONAL CRIMINAL.

Before Adami and Scroope, JJ.

BIGAN SINGH

v.

KING-EMPEROR.*

1927.

Feb., 10.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 353, 530 *and* 537—*witnesses not examined in presence of accused—trial vitiated.*

Except in the cases mentioned in section 353 of the Code of Criminal Procedure, 1898, a trial is vitiated by failure to examine the witnesses in the presence of the accused person.

Where, therefore, the witnesses were examined-in-chief in the absence of the accused persons, and the latters' legal representative did not object but at a later date cross-examined the witnesses in the presence of the accused, *held*, that the trial was vitiated by the irregularity.

Subrahmania Ayyar v. *King-Emperor* (1), applied.

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

H. L. Nandkeolyar (with him *D. L. Nandkeolyar*) for the petitioner.

C. M. Agarwala, Assistant Government Advocate, for the Crown.

SCROOPE, J.—The petitioner has been convicted under section 211/109 of the Indian Penal Code for

*Criminal Revision no. 41 of 1927 against an order of J. A. Saunders, Esq., I.C.S., Sessions Judge of Muzaffarpur, dated the 8th January 1927, modifying the order of A. Whittaker, Esq., I.C.S., Subdivisional Magistrate of Sitamarhi, dated the 4th December, 1926.

(1) (1902) I. L. R. 25 Mad. 61, P. C.

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SCROOPE, J.

abetting one Ramawtar Singh in bringing a false case against Matha Kabari of Madhkaul and was sentenced to 18 months' rigorous imprisonment by the Sub-divisional Magistrate of Sitamarhi. His sentence was reduced on appeal to nine months by the Sessions Judge of Muzaffarpur. He has now filed a revisional petition in this Court and the first contention taken on his behalf by the learned Counsel arises in the following way.

Two separate complaints were lodged in this case against the petitioner and Ramawtar Singh who has been tried and convicted under the substantive section. It appears that the latter's case was taken up first and on the 13th September 1913 witnesses were examined in that case. The next date was the 23rd September and on that date we find the following order—

> "The case against Ramautar should have proceeded jointly with the case against Bigan. The evidence against the accused is exactly the same as that against Ramautar. Bigan is present. The evidence against Ramautar is read out in Hindi to the prosecution witnesses who admit that it is correct. Bigan has heard all the evidence. His Mokhtear who appears also for Ramautar raises no objection and files a petition for one cross-examination. Charge under section 211/109 framed against Bigan."

Thus there was no compliance with the provisions of section 353 of the Criminal Procedure Code which requires that with certain exceptions which are not in question, the evidence should be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader. Admittedly there was no order of the Court dispensing with his personal attendance for the purpose of this trial and in fact it appears that on the 13th September when the examination-in-chief of the prosecution witnesses in Ramawtar's case was taken he was not present at all in Court but was giving evidence in the Session Court. Then on the subsequent day the evidence in Ramawtar's case was read over to him as described above. The contention then that the trial is bad on this account must succeed.

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SCROOPE, J.

The learned Assistant Government Advocate urges that the irregularity is one that is cured by section 537 of the Criminal Procedure Code as it does not fall within the irregularities described in section 530. In my opinion the irregularity is of the class referred to by their Lordships of the Privy Council in *Subrahmania Ayyar* v. *King-Emperor*(1) where the view expressed is that the disobedience to an express provision as to a mode of trial is more than an irregularity When the Code enacts positively that evidence should be taken in a certain way it cannot be said that a contravention of this express provision comes within the description of error, omission or irregularity and I do not think that the waiver of any objection by his Mukhtar on this score improves the case for the prosecution. To accept the view that such waiver can get over disregard of an express provision of the Code would open the door to all kinds of irregularities and defects in procedure. The trial must be held to be bad on this account and the application must succeed and the conviction and sentence of the petitioner must be set aside.

As regards the question of re-trial there is an absence of direct evidence connecting the petitioner with the filing of the criminal case. The petitioner's case throughout has been that he sent Aklu and not Nathuni to realise money from Ramawtar whereas Ramawtar's case is that Nathuni was sent. Had there been a conspiracy between them as found by the lower Courts, I think this evidence would have been identical on this question. The circumstances of course are gravely suspicious against the petitioner, but taking all the facts and circumstances into consideration and that the petitioner has already served a certain amount of imprisonment, I do not think that it is a fit case in which to direct a re-trial.

ADAMI, J.—I agree.

Rule made absolute.

(1) (1902) I. L. R. 25 Mad. 61, P. C.

APPELLATE CIVIL.

Before Adami and Scroope, JJ.

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Feb. 15.

FATEH BAHADUR SINGH

v.

PARMESHWAR PRASAD SAHU.*

Execution of Decree—Limitation—step-in-aid—Order to file written processes and identifier's affidavit—written processes not filed—filing of affidavit alone not a step-in-aid—Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 1, *Article* 182(5).

An application for execution of a decree was made on the 1st August, 1921, and on the 5th January, 1922 the court directed the decree-holder to file written processes and the identifier's affidavit as to service of notice under Order XXI, rule 22, of the Code of Civil Procedure, 1908, by the 12th January. On the latter date the affidavit was filed but not the written processes. The application for execution was dismissed. On the 2nd January, 1925, the decree-holder again applied for execution.

Held, that in the circumstances of the case the filing of the affidavit did not amount to a step-in-aid of execution and, therefore, that the second application for execution was barred by limitation.

Thakur Singh v. *Sheo Bhajan Singh*(1) and *Pran Kishun Das* v. *Pratap Chandra Daloi*(2), distinguished.

Annapurna Thakurani v. *Dhirendra Nath Chakravarti*(3), referred.

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

Baldeo Sahay and *C. P. Singh*, for the appellant.

Sambhu Saran, for the respondent.

*Appeal from Appellate Order no. 190 of 1926, from a decision of H. Ll. L. Allanson, Esq., I.C.S., District Judge of Gaya, dated the 9th April, 1926, affirming the decision of M. Ihtsham Ali Khan, Subordinate Judge of Gaya, dated the 16th January, 1926.

(1) (1919) 4 Pat. L. J. 521. (2) (1916-17) 21 Cal. W. N. 423.

(3) (1919-20) 24 Cal. W. N. 55.

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SCROOPE, J.

SCROOPE, J.—The final decree in the suit out of which this execution arose was passed on the 31st August, 1919, and the first execution case started on the 1st August, 1921, and on the 5th January, 1922 the decree-holder was directed by the Court to file written processes and identifier's affidavit as to service of notice under Order XXI, rule 22, by the 12th January. On the latter date affidavit is alleged to have been filed but the written processes were not filed and the case was dismissed for default. The execution case out of which the present application arises was filed on the 2nd January, 1925, and admittedly it would be barred by limitation unless the decree-holder can refer to some application to the Court to take a step in aid of execution within three years prior to 2nd January, 1925. The decree-holder refers to the filing of the identifier's affidavit as such a step. The Subordinate Judge accepted the contention and held that the application was not time-barred and the District Judge of Gaya upheld this decision in appeal. The judgment-debtor has now appealed to this Court.

The first point taken in appeal is that as a matter of fact the identifier's affidavit was not filed on the 12th January, 1922, that is, before the execution case was dismissed but both the Courts have found against him on this point and that is a finding of fact which is conclusive so far as this Court is concerned. It cannot be argued that such a finding is not based on any evidence as it is a fair inference from the order-sheet in the Subordinate Judge's Court, dated the 12th January, 1922, which refers only to the failure to file written processes; there is no reference to any failure to file the affidavit. The stamp on the affidavit is faint; but its condition is not inconsistent with its having been filed on the 12th January. The affidavit in question must be taken as having been filed on the 12th January, 1922.

The next point then is whether the filing of this affidavit amounts to a step in aid of execution and the learned Vakil for the petitioner judgment-debtor

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FATEH BAHADUR SINGH v. PARMESHWAR PRASAD SAHU.

SCROOPE, J.

relies on the case of *Annapurna Thakurani* v. *Dhirendra Nath Chakravarti*(1) in which it was held that the mere filing by the decree-holder's identifier of an affidavit of service unaccompanied by any application, oral or written, does not give a fresh start to limitation The contrary view is taken in a case of this Court *Thakur Singh* v. *Sheo Bhajan Singh*(2) which following a previous Calcutta decision in the case of *Pram Kishun Das* v. *Pratap Chandra Daloi*(3) lays down that filing of an affidavit in proof of service of a notice of attachment is a step-in-aid of execution. There is undoubtedly a conflict of authority on the point and this Court would be bound to follow the previous Patna decision were it not that the present case is not on all fours with it. Whether there has been an application to the Court to take a step in aid of execution is a question of fact as is laid down in the first of the cases cited above and in this case the Court had on the 5th January, 1921, in effect laid down as a condition of taking a further step-in-aid of execution that the decree-holder was to file written processes and the identifier's affidavit. He only performed the latter act and it is not even contended that any oral, much less written application, was made or that any explanation was furnished regarding the failure to file written processes. The decree-holder contended himself with filing the affidavit and this really remained passive so far as relates to getting the Court to take any further step-in-aid of execution. Accordingly the Court dismissed the execution case for default. In my opinion then the mere filing of the affidavit did not in the circumstances of this particular case amount to an application to the Court to take a step-in-aid of execution. In the case relied on by the respondent, which is referred to above, it would appear that all that was required was that the identifier's affidavit should be filed, whereas here there was the further condition requiring written processes.

(1) (1919-20) 24 Cal. W. N. 55. (2) (1919) 4 Pat. L. J. 521.

(3) (1916-17) 21 Cal. W. N. 423.

It is then argued that there was no necessity to file written processes: that is a point which cannot be gone into now. Apparently the processes related to settling the terms of the sale proclamation under Order XXI, rule 66. If the Subordinate Judge acted wrongly in dismissing the execution case, the decree-holder had his remedy in a fresh application within the period of limitation or in resort to the provisions of Order XLVII of the Code of Civil Procedure for review. But he has taken neither course.

SCROOPE, J.

The fourth contention is that even assuming that no application was made within the same period to the Court to take a step-in-aid of execution, the present execution application should be treated as one in continuance of the former. But as the previous application was dismissed for default, I fail to see how the present application can be treated as one in continuance of it. To accept this contention would really make Article 182 of the Limitation Act meaningless as in successive execution cases the bar of limitation could always be lifted in this way. The case relied on by the learned Vakil for the petitioner, namely, *Mussammat Kaniz Zohra* v. *Boondi Sahu*(1) is palpably different from the present case. That was a case which was struck off in the executing Court as soon as ever the order of the High Court setting aside the sale was received. The order striking off the execution case was consequential on the order of the Appellate Court. There was no laches on the part of the decree-holder. Here there has been a distinct dismissal of the execution case owing to his laches and I therefore cannot accept the argument now put forward on this point.

Holding as I do that no application was made to the Court on the 12th January to take a step-in-aid of execution the present execution proceedings are barred by limitation and the appeal must succeed and is allowed with costs.

ADAMI, J.—I agree.

Appeal allowed.

(1) (1917) 2 Pat. L. J. 115.

FULL BENCH.

Before Dawson Miller, C.J. and Mullick, Jwala Prasad, Das and Kulwant Sahay, JJ.

1927.

April 11, 12, 26.

BALUNKI ROUT

v.

SRI KUNJA BEHARI DEB.*

Orissa Tenancy Act, 1913 (*Bihar and Orissa Act II of* 1913), *sections* 5(5), 31 *and* 117(3)—*Bengal Tenancy Act* 1885, (*Bengal Act VIII of* 1885)—*rafa-tankidar, status of—entries in record-of-rights, correctness of, whether can be rebutted by previous settlement report published before enactment of the Act—landlord's right to have transfer of occupancy holding registered, whether based on custom—Section* 5(5), *presumption under, whether applies to interest created before the Act—onus to disprove grant lies on the person who wants to displace the presumption—error or defect in procedure—where second appeal lies—Code of Civil Procedure*, 1908 (*Act VIII of* 1908), *section* 100.

A settlement report prepared before the enactment of the Bengal Tenancy Act, 1885, cannot rebut the presumption of correctness of a record-of-rights prepared at a later date under the Bengal Tenancy Act, 1885.

Narayan Patnaik v. *Raghunath Patnaik*(1), *Raghunath Misra* v. *Ram Bahera*(2), overruled.

Where, therefore, the status of the rafa-tankidars of the Khurda estate in Orissa was recorded to be that of tenure-holders in the record-of-rights prepared under the Bengal Tenancy Act, 1885, but they were described as occupancy raiyats in a previous settlement report published before the Bengal Tenancy Act had come into force, *held*, that the presumption in favour of the correctness of the record-of-rights enacted by the Bengal Tenancy Act, 1885, and by the corresponding section 117(3) of the Orissa Tenancy Act, 1913, was not rebutted, and that in the absence of any evidence to the contrary, the rafa-tankidars were tenure-holders.

*Second Appeals nos. 31 of 1923, 45 of 1924 and 1 of 1925 from a decision of Babu Suresh Chandra Sen, Subordinate Judge of Cuttack, dated the 18th June, 1923, confirming a decision of Babu Nagendra Nath Das, Munsif, 1st Court of Puri, dated the 19th May, 1923.

(1) (1920) 5 Pat L. J. 273, (2) (1922) I. L. R. 1 Pat. 167.

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Where the lower appellate court came to a finding of fact, not upon the evidence before it, but on the authority of a previous finding of a court of superior jurisdiction upon similar facts in a case between different parties, *held*, that the court committed a substantial error or defect in procedure which might possibly have produced error or defect in the decision of the case upon the merits and, therefore, that its decision was revisable in second appeal under section 100, Code of Civil Procedure, 1908.

The landlord's right to have the transfer of an occupancy holding registered and the fee paid under the Orissa Tenancy Act, 1913, is based on section 31 of the Act and not upon custom.

The presumption arising under section 5(5) of the Bengal Tenancy Act, 1885, and the corresponding section of the Orissa Tenancy Act, 1913, applies to all cases, whether the interest was created before or after the Act was passed.

Per *Jwala Prasad, J.*—The presumption under section 5(5) of the Act arises merely from the area held by a tenant being over 33 acres or 100 bighas, and it is for those who want to displace the presumption to show that the lands were not held under one grant or to show that the purpose for which the right of tenancy was acquired was not such as would make the tenant a tenure-holder as defined in section 5(1).

Debendra Nath Das v. *Bibudhendra Mansingh Bhramarabar*(1), referred to.

The facts of the case are stated in the following Order of Reference.

JWALA PRASAD, A. C. J.: The point involved in these three second appeals is the same. The plaintiffs in all these appeals seek to eject the defendants under section 57 of the Orissa Tenancy Act on the ground that the plaintiffs are occupancy raiyats and the defendants under-raiyats. The defence is that the plaintiffs are tenure-holders and the defendants are occupancy raiyats and hence they cannot be ejected.

The Courts below have upheld the contention of the plaintiffs and have given them a decree for ejectment.

The defendants have come to this Court in second appeal. Their contention is that the plaintiffs being rafa-tankidars were tenure-holders. The plaintiffs rely upon previous decisions of this Court in *Harayan Patnaik* v. *Raghunath Patnaik* (2) and *Raghunath Misra* v. *Ram Behera* (3) in which it has been held that in the Khurdah Estate the

(1) (1918) I. L. R. 45 Cal. 805, P. C. (2) (1920) 5 Pat. L. J. 373.
(3) (1922) I. L. R. 1 Pat. 167.

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status of the rafa-tankidars is that of occupancy raiyats and not tenure-holders. The former case was decided by Coutts and Das JJ., and the latter by Das and Adami, JJ. In the first case the plaintiff rafa-tankidar was recorded as a tenure-holder in the Provincial and Revisional Settlements. Coutts, J. relied on the final report of the Survey and Settlement of Khurda Estate, dated the 20th September, 1886, paragraph 295 at page 104 in which it is stated that in the year 1839 Government agreed to a compromise with tankidars or holders of land on quit rents to the effect that on condition of their agreeing to pay rent at certain rates fixed by Government, no enquiries would be made into the liability of their holdings on resumption. The rates so fixed were termed rafa-tanki or compromised quit rent rates and the holders of the lands were known as rafa-tankidars. In paragraph 298 at page 105 it is stated that rafa-tanki holdings form one of the classes of ordinary raiyati tenures and that rafa-tankidars are to be classed as ordinary raiyats subject to special rules of enhancement. In paragraph 348 of the Report at page 130 it is stated that as rafa-tanki lands are in fact raiyati holdings the cultivators of such lands are only sub-raiyats or tenants-at-will with no rights of occupancy.

Continuing Coutts, J., said, " It is clear then that in the Khurda Estate rafa-tankidars are occupancy raiyats. There is no suggestion anywhere in this report that a rafa-tankidar may constitute a tenure and I am unable to accept the suggestion of the learned District Judge that this is so. In my view the settlement report is sufficient to rebut the presumption which arises from the entry in the Provincial and Revisional Settlements." He further held that the status of rafa-tankidar was created in the year 1839 and the zamindari of the temple of Jagannath originally formed part of the Khurda Estate and it was not transferable to the temple of Jagannath until after 1839 as a revenue free grant which did not affect the status of a rafa-tankidar who was at that time holding the land.

In *Raghunath Misra* v. *Ram Behera* (1) Das, J., observed, " Now, as I understand the position, in the year 1839 the Government agreed to a compromise with tankidars or holders of land on quit rent to the effect that on condition of their agreeing to pay rent at certain rates fixed by Government no enquiries would be made into the liability of their holding resumption. I understand that the quit rates so fixed were termed rafa-tanki or terms at fixed rates and the holders of the land were known as rafa-tankidars." He differed from the view of the District Judge that Mr. Taylor's opinion on the point is not entitled to much weight upon the ground that the case of *Harayan Patnaik* v. *Raghunath Patnaik* (2) ' concludes the matter '. Accordingly, he held that rafa-tankidars are occupancy raiyats and not tenure-holders and hence entitled to eject the under-raiyats under section 57 of the Orissa Tenancy Act.

Das, J. subsequently considered the question and felt considerable doubt in the correctness of the view taken by him in the aforesaid case and he ordered the case to be considered by the Judges of the next Circuit Court, observing that if they differed from his view the matter

(1) (1922) I. L. R. 1 Pat. 167. (2) (1920) 5 Pat. L. J. 373.

might be referred to the decision of a Full Bench. Accordingly, the case was placed before us along with other cases in which the same point is involved.

A short history of the different settlements of the Khurda Government Estate may be helpful.

In 1804 the Khurda Estate was confiscated on account of the rebellion of the Raja, and a survey settlement was made by Major Fletcher in October 1805. This was found to be impracticable. In 1806 Gulam Qadir, the Tahsildar, made a fresh settlement in which certain lands were set apart for religious ceremonies and jagirs at low, quit or tanki rents and the balance assessed at different rates for various classes of soil. In 1818 Mr. W. Forrester, Deputy Collector, concluded the settlement of Khurda by Mahals. In 1820 Mr. Wilkinson inaugurated a system of settlement approaching that of raiyatwari in Khurda. That settlement was from time to time extended, the effect of which was that it continued till October 1880 when came the cadastral settlement of Mr. W. C. Taylor which was extended by Government to September 1897. This was followed by a settlement made in 1897-98 by Mr. J. Taylor under the supervision of Mr. S. L. Maddox, Settlement Officer of the districts of Orissa. This settlement was made in accordance with the Bengal Tenancy Act, Chapter X, sections 3 to 5, 10 to 26, 41 to 49, 53 to 75 and 191, the provisions whereof were extended to Orissa by notification of Government, dated the 16th September 1891. This settlement was made for 15 years, and expired on the 30th September 1913. The next settlement of Khurda Estate was made in 1912 by Sudarson Das, which was confirmed by Government notification, dated the 15th January, 1916.

Hunter in his statistical account of Puri district, at pages 123-125, says that tanki tenures were formerly revenue free either as lakhiraj or jagir, but were subsequently assessed at quit rent. They vary in extent. Some consist of entire villages, while others are small detached patches of ground measuring a few acres altogether. After the invasion and conquest of the province by foreign powers the Rajas gradually began levying quit rent on most of such tenures and some of them were also resumed by the Moghals and the Marhattas. These tanki tenures are numerous in Khurda. Mostly they belong to Sasan Brahmans imported from the north by the several Hindu kings to whom villages were assigned for furnishing them with a decent livelihood. When under the provisions of Regulation VII of 1822 the tanki holdings were inquired into in the same manner as lakhiraj, all grants which would have been valid and exempted from the payment of revenue had they been held revenue free were also confirmed in perpetuity subject to payment of quit rent, while others were resumed and treated as resumed lakhiraj, being assessed at full or half rental. Such of the tenures as were paying tanki or quit rent—more than half the rental—were classed with khariddars of the first class and were also allowed malikana at 30 per cent. Their incidents are like those of confirmed or resumed lakhiraj or khariddars of the first class according as the tenures has been confirmed at the tanki jama or has been treated as resumed lakhiraj or khariddar. The revenue payable by these tanki tenures was paid through the zamindar and they were treated as dependent taluqdars. This would indicate that they were tenure-holders.

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In 1836 an inquiry was ordered to be made into the origin of the tanki tenures with a view to their resumption and then the tankidars entered into a compromise (rafa) agreeing to pay rent at certain rate. Hence they are called rafa-tankidars. This investigation was held under Regulation II of 1819 in the same manner and on the same principle as in the case of lands held rent free. They were ordered to continue to enjoy their holdings on the tanki or quit rents then levied until the lands were proved liable to full assessment (paragraph 63, page 34, volume II of the Rate Report by W. C. Taylor). In these resumption proceedings some of the lakhirajdars and tankidars entered into a compromise so that their tenures might not be resumed (paragraph 67, at page 35 of the said report). The tanki tenures as well as the resumed or bajapti lakhiraj tenures were declared liable to assessment at the next settlement at full raiyati rates of rent (paragraphs 76 and 77, at page 37 of the report). Full proprietary rights were accorded in the case of all lakhiraj and tanki holdings of all sorts not being debuttar or jagir. At page 43 of the report Mr. W. C. Taylor has given a list of the several classes of persons holding land in the Khurda Government Estate. The holders of the rafa-tanki or lands assessed on the terms of compromise mentioned above and subject to decrease or increase of raiyati rates of rent at the present or future settlement were classed in the same way as lakhirajdars and confirmed tankidars. The resolution of the Government no. 2361, dated the 23rd July 1880, on the aforesaid Rate Report is given at page 107 of the said report. At pages 206-207 the resolution refers to the tankidars. As to rafa-tankidars it says

"From the correspondence regarding rafa-tanki land and the manner in which they were assessed at half raiyati rates, it would, however, appear that in most cases the tankidars were of the raiyat class. In any case the Settlement Officer would only have to deal, as regards the assessment of revenue, with the quit-rent holder himself. It would be for the sub-tenant to assert in Court any rights he might conceive himself to possess against the tankidar. The difficulty does not, as far as the Lieutenant-Governor sees, affect the settlement proceedings materially."

The settlement was thus concluded in the light of the resolution of the Government and the final report was made on the 20th September 1886; vide paragraphs 294 to 298.

In 1839 the Government agreed to a compromise being made with some of the lakhirajdars and tankidars (or holders of land on quit-rents) to the effect that on condition of their agreeing to pay rents at certain rates fixed by Government, no enquiries would be made into the liability of their holdings to resumption and assessment at full rates.

Then followed the principles upon which the rents were assessed on the different kinds of lands cultivable, jungle, waste, orchards, etc. As to their status, it was said.

"Rafatanki holdings form one of the classes of ordinary raiyati tenures and will in future be so rated, and rafa-tankidars will in future be classed as ordinary occupancy raiyats, subject to special rules of enhancement."

According to this the tenures were to be treated as ordinary raiyati tenures and the holders thereof as ordinary occupancy raiyats *in future*, not that they were originally such. At pages 129-130, the Government held that the question does not concern the settlement officer, and that he need only record that such and such a field is held by a certain person named, styling himself raiyat of the lakhirajdar. These

orders have been attended to. The above remarks regarding cultivators on lakhiraj lands are also applicable to cultivators on bhaoli or confirmed tanki lands. The Courts must be left in cases of dispute to decide whether any such cultivator is an occupancy raiyat, or only a sub-raiyat under the bhaoli tankidar.

The aforesaid decisions of this Court in the cases of *Narayan Patnaik* v. *Raghunath Patnaik* (1) and *Raghunath Misra* v. *Ram Behera* (2) were based only upon the settlement report, and the aforesaid Government resolution was not referred to.

The settlement report of 1897-98 at page 65, paragraph 281, says that the decision of this point will depend, of course, on the question whether the tankidar himself is a tenure-holder or a raiyat and in deciding what to record on this head, the Settlement Officer must, no doubt, as the Board say, look to the general character of the tenure. The report says that from the previous correspondence and the manner in which rafa-tanki lands were assessed it would appear that in most cases the tankidars were of the raiyati class.

It seems to me that the settlement reports are not conclusive as to the character of the rafa-tanki and the status of the rafa-tankidars. They were assumed for the purpose of the settlement and the question before them was only as to the rate at which assessment of rent should be made. They were lakhiraj tenures in respect of which no revenue or rent was payable. In order to escape an inquiry into the validity of of the titles they agreed to pay quit rent or tanki. This is also indicated by the word " rafa-tankidars ". The tenures vary in extent and area. In some cases it comprises villages; in others small scattered bits of land. The original donees were generally Brahmans brought from up country and grants were made to them for furnishing them with maintenance. The probability is that the grants were in the nature of lakhiraj grants and not only creating mere tenancy. The lakhiraj or rent or revenue free grants are generally of the nature of grants of tenures. Therefore, the lands were not granted as raiyati holdings. The origin and nature of the grant would, therefore, indicate the creation of tenures at the inception. The subsequent fixing of the rent by compromise and the treating of them as merely raiyati holdings with the rights of occupancy would not make them really so. The cadastral settlement and the revisional settlements have recorded the lands in the present suit as tenures. The presumption is in their favour and the opinion of the settlement officers, which as observed above is not conclusive, does not to my mind rebut the presumption of the entries in the settlement record-of-rights. The rulings of the Division Bench of this Court referred to above have, however, held that rafa-tankidars are occupancy raiyats. Mr. Justice Das, who was a party to the last decision, has himself, as observed above, expressed grave doubt as to the correctness of the view taken by him. To my mind no such broad proposition can be laid down as has been done in the aforesaid cases. The character of the holding in each case must be determined according to the rules laid down in the Orissa Tenancy Act as to whether it is a tenure or an occupancy holding.

(1) (1920) 5 Pat. L. J. 373. (2) (1922) I. L. R. 1 Pat. 167.

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The question is of great importance, inasmuch as under the rulings in question the holders of lands under the rafe-tankidars would be mere under-raiyats liable to be ejected under section 57 of the Orissa Tenancy Act.

We differ from the decisions of the former Division Benches, and accordingly refer these three second appeals to a Full Bench.

Satish Chandra Bose, for the appellants: My contention is that rafa-tankidars are tenure-holders. The case of *Narayan Patnaik* v. *Raghunath Patnaik*(1) subsequently followed in *Raghunath Misra* v. *Ram Behera*(2) is based on two passages from Mr. Taylor's Report. The learned judges seem to think that the presumption arising out of the entries in the two subsequent record-of-rights is rebutted by the earlier Settlement Report of Mr. Taylor. I submit, in the first place, that Mr. Taylor's opinion carries with it no evidentiary value and, secondly, that an earlier settlement report cannot in law rebut the presumption arising out of entries in a subsequent record-of-rights prepared under the Tenancy Act. Moreover it cannot be laid down as a proposition of law that rafa-tankidars are raiyats.

[CHIEF JUSTICE: Is not this case concluded by a finding of fact?]

The lower appellate court has simply followed the two decisions of this court and has not based its finding on a consideration of the evidence on the record. The case is covered by section 100, Code of Civil Procedure.

[CHIEF JUSTICE: The judge has misdirected himself in thinking that the two decisions concluded the point in issue in the present case?]

Yes. Each case must depend upon its own facts. The judge has further erred in holding that the presumption under clause (*5*) of section 5, Bengal Tenancy Act, is not available as the tenancy in question had come into existence before the passing of the Act.

(1) (1920) 5 Pat. L. J. 273. (2) (1922) I. L. R 1 Pat. 167.

In *Gokul Mandar* v. *Pudmanand Singh*(1) although it was argued that the section was inapplicable to tenancies created before the passing of the Act, the Judicial Committee gave the respondents the benefit of the presumption arising under that section. The case of *Debendra Nath Das* v. *Bibudhendra Man-Singh*(2) lays down the criterion by which the status of the holder of the land is to be judged.

Gajendra Prasad Das (with him *Pitamber Misra*), for the respondent: The decisions in *Narayan Patnaik* v. *Raghunath Patnaik*(3) and *Raghunath Misra* v. *Ram Behera*(4) conclude the present case. The plaintiff in this case did not adduce any evidence as to the status of the tankidars, because they thought that the decisions of this court had settled the point. Mr. Taylor was bound to make an investigation and record a finding as to the rights and status of the holders of land inasmuch as the direction contained in Regulation VII of 1822, under which he was appointed was mandatory. His report, therefore, has a presumptive value. It was open to the learned judge who decided the case of *Narayan Patnaik* v. *Raghunath Patnaik*(3) to find whether in the circumstances of the case the presumption arising out of the entries in the record-of-rights was rebutted. The findings arrived at by the court of appeal below are findings of fact which cannot be challenged in second appeal. Lastly, I submit that section 5(*5*), Bengal Tenancy Act, is inapplicable to interests created before the Act. That section was not intended to have retrospective effect.

Satish Chandra Bose, in reply.

S. A. K.

Cur. adv. vult.

26th April, 1927.

DAWSON MILLER, C.J.—These three second appeals came before the Judges at the Circuit Court at Cuttack last year and were referred to a full bench for

(1) (1902) I. L. R. 29 Cal. 707 P. C.
(2) (1918) I. L. R. 45 Cal. 805 P. C.
(3) (1920) 5 Pat. L. J. 273.
(4) (1922) I. L. R. 1 Pat. 167.

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hearing, the learned Judges finding themselves unable to concur with two previous decisions of this Court in which the question then arising for determination had been decided. They arise out of three suits in which the plaintiffs as landlords in each case claim to recover possession of certain holdings by ejectment of the tenants. In each case the plaintiffs claim that they were occupancy raiyats and that the interest of the tenants was that of under-raiyats holding under them. In appeals no. 45 of 1924 and no. 1 of 1925 the facts are similar and these two appeals can be dealt with together. In appeal no. 31 of 1923 the cause of action alleged is somewhat different and it will be convenient to deal with that case separately.

In appeals no. 45 of 1924 and no. 1 of 1925 the right of ejectment is based upon the allegation that the defendants being under-raiyats of the plaintiffs failed to give up possession after due notice to quit had been served upon them under section 57 of the Orissa Tenancy Act. The plaintiffs' interest in the land is admittedly that of rafa-tankidars, a form of tenure prevailing in certain parts of Orissa and more particularly in the Khurda estate in which the lands in suit are situate. It is the plaintiffs' case that the status of a rafa-tankidar is that of an occupancy raiyat and that the tenants holding under him are under-raiyats and therefore liable to ejectment by their landlord on serving due notice to quit under section 57 of the Act.

The defendants, on the other hand, contend that the status of a rafa-tankidar is that of a tenure holder and that the tenants holding immediately under him are raiyats who have acquired, in this case, rights of occupancy in their holdings and cannot be ejected at the will of the landlord but only for the reasons stated in section 29 of the Orissa Tenancy Act. It is conceded that if the plaintiffs are tenure holders the defendants are occupancy raiyats and cannot be ejected. If, on the other hand, the plaintiffs are occupancy raiyats the defendants are under-raiyats and liable to ejectment in these two suits.

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The lower appellate Courts, from whose decisions these appeals are preferred, held in each case that the plaintiffs were occupancy raiyats and, therefore, entitled to a decree for ejectment and possession against the defendants who were their under-raiyats. In arriving at this decision the Courts below considered themselves bound by two decisions of the High Court in which a similar question had been considered and in which it was held that rafa-tankidars in the Khurda estate were occupancy raiyats and not tenure holders. The first case, *Harayan Patnaik* v. *Raghunath Patnaik*(1), was decided in 1920 and the second case. *Raghunath Misra* v. *Ram Behera*(2), was decided in 1921 and followed the earlier decision. The lower appellate Courts although the cases cited are in one sense decisions on questions of fact, considered that in so far as they determined the status of rafa-tankidars they were binding upon a Court of Subordinate jurisdiction. At the same time it would appear from the judgment of Mr. Dhavle, the District Judge of Cuttack in the case of Ananda Das *v.* Narain Panda out of which appeal no. 45 of 1924 arises that if he had not felt bound by the rulings of the High Court his decision might have been different upon the evidence before him in that case.

The question for determination in those two cases is whether a rafa-tankidar is a tenure holder or an occupancy raiyat. The history of the Khurda estate from the beginning of the last century when it was confiscated by the British Government in consequence of the rebellion of the Hindu Raja of Khurda and the subsequent settlement from time to time with rafa-tankidars and others is fully set out in the order of reference of the learned Judges of the Circuit Court, dated the 12th August 1926. It is sufficient to say that various settlements of a temporary nature of portions of this estate were made in 1805, 1806, 1808 and 1820. The latter settlement, made by

(1) (1920) 5 Pat. L. J. 373. (2) (1922) I. L. R. 1 Pat. 167.

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Mr. Wilkinson was extended from time to time until 1880 when the cadastral survey of Mr. W. C. Taylor took place. This was followed in 1897 by a settlement of Mr. J. Taylor, his son, under the supervision of Mr. Maddox, the Settlement Officer of Orissa, under the Bengal Tenancy Act which was then in operation in Orissa. The last settlement was that of 1912 made by Mr. Sudarsan Das. The origin of these tanki tenures is somewhat obscure. It appears from Hunter's Statistical Account of Bengal, Volume XIX, which deals with the Puri district, that they were originally revenue free held either as lakhiraj or jagir but after the invasion and conquest of Orissa the Rajas of Khurda began to levy quit rents upon these tenures and some of them were also resumed by the Moghals and the Maharattas. They were for the greater part grants made to Sasan Brahmins introduced by the Hindu Rajas. They varied in extent, in some cases including whole villages and in others a few bighas of land only. In 1838 during the resumption proceedings by the British Government the nature of these tanki or quit rent tenures or holdings was enquired into. At that time a compromise was entered into between some of the tankidars and the Government to the effect that on condition of their agreeing to pay rent at a certain fixed rate no enquiry would be made as to the liability of their interests to be resumed. The rates so fixed were known as rafa-tanki, or compromise quit rents, and the holders of these lands came to be known as rafa-tankidars. It would appear that in many cases rafa-tankidars belonged to the raiyati class but this in itself is not sufficient to shew that their interests were necessarily those of raiyats rather than tenure-holders. Two settlement reports of the Khurda estate were made by Mr. W. C Taylor in the years 1880 and 1886, the former known as the rate report and the latter as the completion report. In Mr. Taylor's report of 1886 there are two passages in which he expresses the view that rafa-tanki lands in Khurda are raiyati holdings. The first passage occurs in paragraph 298 and the

second in paragraph 348 of his report. The language is not very scientific as he apparently treats the terms "holdings" and "tenures" as synonymous. In the first passage he says

"Rafa-tanki holdings form one of the class of ordinary raiyati tenures and will in future be so rated. Rafa-tankidars will in future be classed as ordinary occupancy raiyats subject to special rules of enhancement."

In the later passage he says,

"But as rafa-tanki lands and baziafti or resumed lakhiraj and tanki tenures are in fact raiyati holdings it is clear that the cultivators of such lands are only sub-raiyats or tenants at will with no rights of occupancy."

Mr. Taylor's opinion is no doubt entitled to great respect but it does not appear that it was ever accepted by the Government or that any record-of-rights was prepared giving effect to the opinion so expressed. The Government resolution following the rate report of 1880 states,

"In the case of tankidars or quit-rent holders, the Board anticipate difficulty in deciding whether a cultivator, under such, is a sub-ryot or an occupancy ryot. The decision of this point will depend of course on the question whether the tankidar is himself a tenure-holder or a ryot, and in deciding what to record on this head, the Settlement Officer must, no doubt, as the Board say, look to the general character of the tenure. From the correspondence regarding rafa-tanki lands and the manner in which they were assessed at half ryoti rates, it would, however, appear that in most cases the tankidars were of the ryot class. In any case the Settlement Officer would only have to deal, as regards the assessment of revenue, with the quit-rent holder himself. It would be for the sub-tenant to assert in court any rights he might conceive himself to possess against the tankidar. The difficulty does not, as far as the Lieutenant-Governor sees, affect the settlement proceedings materially."

It would appear, therefore, that the Government at that time considered the nature of the interest of tankidars as an open question; nor was it necessary to decide that point as the Government were concerned merely with the revenue to be assessed upon the tankidars whether they were to be regarded as tenure-holders or occupancy raiyats. In order to ascertain the nature of these grants with any precision it would be necessary I think to enquire into the origin of the grant itself in each particular case but the grants in

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this case are not forthcoming and I agree with the opinion of my learned brother Jwala Prasad, A. C. J., expressed in the order of reference that the subsequent fixing of rent by compromise would not alter the nature of the tenancy. Mr. Taylor's opinion carries with it no legal presumption of its accuracy. But since the Bengal Tenancy Act of 1885 came into operation the record-of-rights prepared by the settlement officer under chapter X of that Act must be presumed to be correct until it is proved by evidence to be incorrect and the settlement officer is required to record the nature of the interest of those entered as having an interest in the land. A reference to the statistical Account of Bengal, Volume XIX to the Bengal District Gazetteer, Puri District, and to the subsequent settlement reports of Mr. J. H. Taylor of 1897-1898 and Mr. Sudarsan Das of 1915 will shew that the nature of the rafa-tankidari interest was a question for determination in each case and that they could not be classed as a whole either as tenures or as raiyati holdings. In the record-of-rights prepared by Mr. J. H. Taylor and published in 1898 and in that of Mr. Sudarsan Das published in 1912 the plaintiffs in these cases are recorded as tenure-holders and the tenants under them as occupancy raiyats. The presumption in favour of the correctness of the record-of-rights enacted by the Bengal Tenancy Act, which was in operation when Mr. J. H. Taylor's settlement was made, and by section 117(3) of the Orissa Tenancy Act of 1913, which now applies, supports the view that the interest of the plaintiffs in these suits is that of tenure-holders and not that of occupancy raiyats, and that the defendants are occupancy raiyats holding under them. In the two decisions which have been called in question by the order of reference the Court arrived at the conclusion that the opinion of Mr. W. C. Taylor expressed in his report in 1886 was sufficient to rebut the correctness of the record-of-rights prepared at a later date. After a persual of the documents and records already referred to I am of opinon that the decisions in those

cases were wrong and should be overruled. In the present cases it is conceded that except for the opinion of Mr. Taylor already referred to there is no evidence to rebut the accuracy of the record-of-rights.

The question then arises whether in second appeal the Court is entitled to go behind the findings of the lower appellate Court. It was contended on behalf of the appellants that questions determining status are themselves questions of law and that the decision was therefore contrary to law within the meaning of section 100 of the Civil Procedure Code. On the other hand it was contended on behalf of the respondents that the questions determined were questions of fact. It is, in my opinion, unnecessary to decide this point. Assuming that the point for decision is one of law then it is clear that a second appeal lies under section 100 of the Code Assuming, on the other hand, that the question was one of fact then the lower appellate Court should have determined the question upon the evidence before it, and should not have held that it was precluded from so doing by a previous finding of a Court of superior jurisdiction upon similar facts in a case between different parties. In this respect I think that the Court committed a substantial error or defect in procedure which may possibly have produced error or defect in the decision of the case upon the merits, and the only question remaining is whether we should send back the case to the lower appellate Court for further consideration on the merits or whether under section 103 of the Civil Procedure Code, as amended last year, we should determine the question for ourselves. As the whole of the evidence is before us and as I consider that there is no sufficient evidence to rebut the presumption arising from the record-of-rights, I think that this Court is in a position to determine the question without going to the expense and delay of remitting the case to the lower appellate Court. I would allow the appeals and set aside the decrees of the lower appellate Courts and in lieu thereof pass a decree in favour of the defendants in each case dismissing the suit with costs throughout.

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With regard to appeal no. 31 of 1923 arising out of suit no. 2047 of 1921 the plaintiffs alleging themselves to be occupancy raiyats sue to recover possession by ejectment of the first three defendants in the suit who had purchased the holding from the defendant no. 4, the original tenant. The case made was that the defendant no. 4 was a shikmi tenant holding under the plaintiffs and had no transferable interest in the land and that the first three defendants as transferees were therefore trespassers and liable to ejectment Alternatively, assuming that the defendant no. 4 had a transferable interest, they claimed that the transfer to the first three defendants was invalid as the provisions of section 31 of the Orissa Tenancy Act relating to registration and payment of registration fee had not been complied with and that those defendants were therefore trespassers.

The defendants 1 to 3 contended that the plaintiffs were tenure-holders and that the interest purchased by them was the occupancy right of the defendant no. 4 and that the holding was transferable without the consent of the landlord according to law.

In this case also the lower appellate Court held that the plaintiffs were occupancy raiyats and that the defendants 1 to 3 were trespassers as the defendant no. 4 being an under raiyat had no right to tansfer his holding to them. The Court accordingly passed a decree for ejectment. The decision already come to in the other two appeals must govern this case. This decision, however, does not determine the rights of the parties upon the facts disclosed in the case. Assuming that the plaintiffs are tenure holders and the defendant no. 4 is the occupancy raiyat under them, a transfer by sale of the occupancy holding is not valid against the landlord unless the provisions of the section have been complied with or the landlord has consented to the sale. There has been no consent in this case and admittedly the provisions of section 31, sub-section (*1*), have not been complied with by the transferees. Under that sub-section when a transfer

of an occupancy holding by private sale takes place the transferee must within a year of the transfer apply to the landlord for registration of the transfer and pay a maximum fee of 25 per cent. of the consideration money or six times the annual rent of the holding whichever is greater. The landlord may either accept the fee and consent to the transfer or he may refuse to accept the fee in which case the transferee may deposit the fee with the Collector who, after giving notice to the landlord to appear and be heard, shall decide whether the latter has any good and sufficient reason to refuse his consent. If he finds that the landlord has no good and sufficient reason to refuse his consent he may then declare that the transfer has been duly registered and pay over the fee to the landlord. Sub-section (4) provides as follows :—

"Save as provided in this section and sections 95 and 96, no transfer of an occupancy holding or portion of a holding otherwise than by succession or by sale in execution of a decree for arrears of rent shall be valid against the landlord of the holding unless and until he has consented thereto."

Sections 95 and 96 are not applicable.

The defendants in this case pleaded that the holding was transferable according to law without the permission of the landlord and that there was no custom in Orissa for mutation of names by depositing one-quarter of the consideration when an occupancy holding was transferred. This plea, however, is no answer to the suit. It is immaterial that there is no custom in Orissa. The landlord's right to have the transfer registered and the fee paid is based on section 31 of the Orissa Tenancy Act and not upon custom. The further plea that the holding is transferable according to law without the permission of the plaintiffs, even if substantiated, is no answer to section 31 of the Act, for no transfer by private sale is valid against the landlord unless he consents thereto or unless the provisions of the section as to registration have been complied with. It is not shewn that the

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landlord consented and it is admitted that the provisions as to registration and payment of fee have not been complied with. It follows that the defendants 1 to 3 have no valid title and are liable to ejectment as the lower appellate Court decided. The appeal in this case will therefore be dismissed with costs.

DAWSON MILLER, C.J.

Before concluding this judgment it should be mentioned that in appeals 31 of 1923 and 45 of 1924 the area held by the plaintiffs exceeds 33 acres or 100 bighas. The presumption therefore is, under section 5(5) of the Bengal Tenancy Act and the same section of the Orissa Tenancy Act, that the plaintiffs' interest is that of tenure-holders until the contrary is shewn. In the judgment of the lower appellate Court out of which appeal 31 of 1923 arises the learned Subordinate Judge considered that the presumption would not apply to interests which were created before the Bengal Tenancy Act came into operation. In my opinion this view cannot be supported. The presumption applies to all cases whether the interest was created before or after the Act was passed. In the judgment the subject of appeal 45 of 1924 the learned District Judge appears to have held that unless the party relying on the statutory presumption proved not only that the area was more than 33 acres but also that the whole area was held under a single grant the presumption would not apply. In my opinion this was misplacing the burden of proof. Once the area is shewn to exceed 33 acres or 100 bighas the presumption arises and it is for the party challenging it to prove the contrary.

In appeal no. 1 of 1925 this question was not raised or determined in the lower Courts and need not be considered.

MULLICK, J.—I agree with the learned Chief Justice.

JWALA PRASAD, J.—In my order of reference to the Full Bench, dated the 12th August, 1926, I have fully discussed the principal point involved in these appeals, viz., whether the plaintiffs in these cases are

occupancy raiyats or tenure-holders, and have set out chronologically the history of the different settlements of the Khurda Government Estate to which the lands in dispute appertain bearing upon the question. In order to avoid repetition the said judgment of reference is incorporated herein and should be read and reported as part hereof. I have shown therein that paragraphs 295 and 298 at pages 104 and 105 respectively of the settlement report of Mr. W. C. Taylor, dated the 20th September, 1885, relied upon to show that rafa-tankidars are occupancy raiyats are not conclusive. In the course of proceedings under Regulation II of 1819 for the resumption of lands held as lakhiraj or rent free under invalid titles, the Government agreed to a compromise or rafa with tanki or holders of land on quit rents to the effect that on condition of their agreeing to pay rent at certain rates fixed by Government, no enquiries would be made into the liability of their holdings to resumption and assessment on full rates. The Government in its resolution no. 2361, dated the 23rd July 1880 expressly left the question of the status of these rafa-tankidars to be determined by Courts and the Settlement Officer had to concern himself only with the assessment of revenue treating the rafa-tankidars to be occupancy raiyats in future for the purpose of fixed rents. They were accordingly called rafa-tankidars as having the tanki, rent or revenue, fixed by rafa or compromise. They were assumed or treated as occupancy raiyats only for the purpose of settlement of revenue. Their status was not enquired into: hence the settlement reports cannot be conclusive as to the character of the rafa-tankis and the status of the rafa-tankidars. Accordingly the question of status was left to be determined by proper Courts. The decisions of the Division Bench of this Court in the case of *Harayan Patnaik* v. *Raghunath Patnaik*(1) and *Raghunath Misra* v. *Ram Behara*(2) based only upon the aforesaid settlement report of

(1) (1920) 5 Pat. L. J. 373. (2) (1912) I. L. R. 1 Pat. 167.

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Mr. W. C Taylor without taking into account the Government resolution referred to above are obviously erroneous. The subsequent settlement by Mr. J. Taylor under the supervision of Mr. S. L. Maddox of 1897-1898 and the Revisional settlement of 1912 confirmed by Government notification, dated the 15th January, 1916, were made in accordance with the Tenancy Act and regular records-of-rights were prepared and have been filed in these cases. No record-of-rights based upon the settlement report of Mr. W. C. Taylor has been filed nor any such record-of-right seems to have been prepared. Section 117, clause 3 of the Orissa Tenancy Act (Act II of 1913) makes an entry in a record-of-rights prepared and published under the Orissa Tenancy Act (Act II of 1913) admissible in evidence and attaches a legal presumption of its correctness. The last revisional settlement record-of-rights prevails over the previous settlement record-of-rights and the presumption of its accuracy cannot be rebutted by anything shown to the contrary in the previous original settlement as was wrongly held in one of the aforesaid decisions of this Court. Nor can it be rebutted by an entry in the record-of-rights, if any prepared under the Settlement Report of Mr. W. C. Taylor of 1886. Far less the entries in the latest or revisional finally published record-of-rights of 1916 can be rebutted by anything said or held in the settlement report of Mr. W. C. Taylor of 1886. The reports in themselves can be of no legal evidence or value for determining the status of the rafatankidars or for rebutting the entry in the present record-of-rights prepared under the Orissa Tenancy Act.

In appeal no. 31 of 1923 the courts below have held that the entry in the record-of-rights, Exhibit 2, shows that the plaintiffs have been recorded as holding the entire mauza comprising an area of about 161·980 acres (400 bighas); in appeal no. 45 of 1924 the courts below have found that the plaintiff has been recorded as holding 38 acres of land. The courts below refused

to raise the presumption of the plaintiffs being tenure-holders under section 5, clause *5* of the Orissa Tenancy Act on the ground that in the aforesaid decision of this Court it was held that the status of rafa-tankidars was that of occupancy raiyats. In the latter case the learned District Judge stated a further ground that it was not shown that all the lands were held under one grant. To my mind both these grounds are erroneous. The presumption arises merely from the area held by a tenant being over 33 acres or 100 bighas [*Debendra Nath* v. *Bibudhendra* (1)]. Clause (*5*) of section 5 says that

> "where the area held by a tenant exceeds thirty-three acres the tenant shall be presumed to be a tenure-holder until the contrary is shown."

It is for those who want to displace the presumption arising from the area being over 33 acres, to show that the lands were not held under one grant or to show that the purpose for which the right of tenancy was acquired was not such as would make the tenant a tenure-holder as defined in clause (*1*) of section 5. These having not been shown in the present case, the presumption of the tenants being tenure-holders under section 5, clause 5 would prevail. I would therefore hold that in these two cases the presumption of section 5, clause (*5*), does arise and the contrary not having been shown the plaintiffs must be held to be tenure-holders. In these cases double presumptions arise, one under clause (*5*), section 5 and the other under section 117, clause (*3*), of the Act In the 3rd case, Appeal no. 1 of 1925, the presumption under section 117, clause 3 only would arise. I therefore hold that the plaintiffs in all these appeals are at least tenure-holders if not higher than that, such as taluqdars, etc., as the origin of the grants disclosed in the history already set out in my judgment of reference would indicate.

The courts below did not enquire in the matter but displaced the presumption in favour of the plaintiffs being tenure-holders simply relying upon the erroneous decision of this Court that all the rafa-tankidars in the Khurda district are occupancy

(1) (1918) I. L. R. 45 Cal. 805, P. C.

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raiyats. The courts below therefore committed an error of law and procedure and their findings are thus vitiated by section 100 of the Code of Civil Procedure and must be set aside. There is nothing in the record to rebut the presumption of the entries in the revisional record-of-rights nor is the original grant available. This Court is therefore competent, in second appeal, to determine the issue relating to the status of the plaintiffs in these cases under section 103 of the Code of Civil Procedure and to hold that the plaintiffs are tenure-holders in all the three appeals.

Appeals nos. 45 of 1924 and 1 of 1925 should therefore be decreed and the plaintiffs' suits dismissed with costs throughout. Appeal no. 31 of 1923 and the plaintiffs' suit must be decreed with costs throughout inasmuch as assuming the plaintiffs to be tenure-holders and the defendant no. 4 an occupancy raiyat, the transfer of the land by him in favour of defendants nos. 1 to 3 is invalid: the possession of defendants nos. 1 to 3 is that of mere trespassers, defendant no. 4 having by his transfer abandoned the holding. Thus I agree with the Hon'ble the Chief Justice.

DAS, J.—I agree with my Lord the Chief Justice.

KULWANT SAHAYA, J.—I agree with my Lord the Chief Justice.

FULL BENCH.

Ref. 28 Pat. 552.

Before Dawson Miller, C. J. and Mullick, Jwala Prasad, Das and Kulwant Sahay, JJ.

PURAN DAS

v.

EAST INDIAN RAILWAY COMPANY.*

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April, 12, 13, 26.

Railways Act, 1890 (Act IX of 1890), section 72—Risk note B—loss, onus as to primarily with the company—admission of loss in plaint, whether exonerates the defendant company—"non-delivery", whether included in "loss".

*Second Appeal no. 1289 of 1923, from a decision of C. H. Reid, Esq., I.C.S., District Judge of Bhagalpur, dated the 11th September, 1923, reversing a decision of Babu Radhakrishna Prasad, Munsif of Madhipura, dated the 15th July, 1922.

Risk note, Form B, under which the goods in question were carried holds the railway administration—

" harmless and free from all responsibility for any loss, detention, or deterioration of, or damage to the said consignment from any cause whatever except for the loss.....due to the wilful neglect of the railway administration or to theft by or the wilful neglect of its servants....."

Held, that the onus of proving that the goods were lost within the meaning of the risk note rests primarily upon the railway company which seeks to exempt itself from liability to deliver by reason of the exemptions contained in the contract.

Where, however, the plaintiff's allegation in the plaint was that he had come to know that the goods had been " lost " owing to negligence on the part of the servants of the defendant company and averred that on account of " non-delivery " he had suffered a loss of Rs. 963-14-0, and the defendants, while not admitting the allegations in the plaint, relied upon the provisions of the risk note which exonerated the company from liability and pleaded that there was no negligence on the part of the servants of the company,

Held (Jwala Prasad, J. dissentiente) that it being admitted in the plaint that there was a loss of the goods, the onus no longer lay upon the defendants to call evidence upon the point which was admitted in the pleadings, and that, therefore, in the absence of proof that there was any wilful neglect on the part of the company's servants, the defendants were not liable.

The question whether " non-delivery " is included in the word " loss " within the meaning of the risk note Form B did not, therefore, arise.

Great Indian Peninsular Railway Company v. *Jitan Ram* (1), *Madras and Southern Mahratta Railway Company* v. *Haridoss Bannalidoss* (2) and *East Indian Railway Company* v. *Jagpat Singh* (3), referred to.

Per *Jwala Prasad, J.* The risk note applies only when the goods are lost by the railway company and have gone out of its possession or where the company cannot trace

(1) (1923) I. L. R. 2 Pat. 442. (2) (1919) I. L. R. 41 All. 871.
(3) (1924) I. L. R. 51 Cal. 615.

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them so as to be able to deliver the same to the consignor. It does not include " loss " to the owner on account of the " non-delivery " of the article by the railway company in breach of its contract.

East Indian Railway Company v. *Messrs. Kali Charan Ram Prasad* (1), *Ganesh Das Bisheshwar Lal* v. *The East Indian Railway Company* (2), *Hearn* v. *London and S. W. Railway Company* (3) and *Millen* v. *Brasch* (4), followed.

H. & C. Smith and Company Limited v. *The Great Western Railway Company* (5) distinguished.

Great Indian Peninsular Railway Company v. *Jitan Ram Nimal Ram* (6) not followed.

Held, (*per Jwala Prasad, J.*, on a construction of the pleadings) that the case made out by the plaintiff was one of " non-delivery " and that, therefore, in the absence of proof of loss within the meaning of the risk note, the defendant company was liable.

Great Indian Peninsular Railway v. *Hiimat Lal* (7) and *B. B. C. I. Railway Company* v. *Firm Nataji Pratap Chand* (8), referred to.

The facts of the case material to this report appear from the following order of Das, J. (with him Adami, J, agreed).

This appeal arises out of a suit instituted by the appellant for recovery of Rs. 963-14-0 from the respondent, the East Indian Railway Company. The plaintiff alleges that although 16 bales of cloth were consigned the defendant-company delivered only 14 bales to him and that he did not get the remaining two bales. He states in the plaint that he came to know that

" they have been lost owing to the neglect on the part of servants of the railway company."

He states that on account of non-delivery of the goods the plaintiff has sustained certain damages and in the result he claimed Rs. 693-14-0 as against the Company. The defendant-company in their written statement alleged that " the goods in question were, in consideration of reduced rate of freight, booked under Risk Note B, which exonerates the defendants from all liability ". They also asserted that there was no negligence or carelessness on the part of the servants of the defendant-railway.

(1) (1922) 3 Pat. L. T. 215.
(2) (1927) I. L. R. 6 Pat. 189.
(3) (1885) 10 Exch. 793.
(4) (1882) 10 Q. B. D. 142.
(5) (1921) 2 K. B. 237.
(6) (1923) I. L. R. 2 Pat. 442.
(7) (1923) 73 Ind. Cas. 606.
(8) (1925) 87 Ind Cas. 79.

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The learned Subordinate Judge took the view that the suit was one for compensation for non-delivery of the goods and, following a decision of this Court in *East Indian Railway Company* v. *Messrs. Kali Charan Ram Prasad* (1), he held that the plaintiff was entitled to recover compensation as against the railway company. On appeal the learned District Judge thought that, on the plaint, it could not be contended that the case made by the plaintiff was one for compensation for non-delivery of the goods. He also took the view that the term 'loss' is wide enough to include everything which amounted to loss to the owner and that even in a suit based on an allegation of non-delivery, the plaintiff is bound by the terms of the Risk Note. In this view the learned Judge in the Court below is undoubtedly supported by the decision of this Court in *Great Indian Peninsular Railway Company* v. *Jitan Ram* (2).

I am of opinion that on the plaint as filed by the plaintiff it is open to him to contend that his suit is one for compensation for non-delivery of goods to him. As a matter of fact the cause of action in every case of this nature must arise by reason of the fact that the railway company fails to deliver the goods to the plaintiff. It is not possible for the plaintiff to make a distinction in the plaint between a case where the goods are lost by reason of the fact that the railway company cannot trace them and a case where they are lost because the railway company fails to deliver the goods to him in breach of his contract for any reason whatever. This being the position and it being admitted that the two bales were not delivered to the plaintiff, the burden of proof clearly lies in the first instance upon the railway company to establish that the case is within the special contract; that it to say, the burden of proof lies upon the railway company to establish that there is a loss, destruction, or deterioration or damage to the consignment. Once this is established by the railway company the onus will be shifted upon the plaintiff to show that the loss is due to the wilful neglect of the defendant or their servants as provided in the latter part of the contract. This is the view which was taken by Mullick, J., in *Great Indian Peninsular Railway Company* v. *Jitan Ram* (2) and I respectfully agree with that view.

Now the question is whether the defendant company has established that there is a loss, destruction, or deterioration or damage to the consignment; and this brings me to the question as to what is meant by the word loss in the Risk Note. Mullick, J., has taken the view that the Risk Note applies not only when the goods have been lost by the railway company in the sense that it cannot trace them but also when they are lost to the owner because the railway company fails to deliver them to him in breach of his contract for any reason whatsoever [*Great Indian Peninsular Railway* v. *Jitan Ram* (3).]

With great respect I am unable to take this view. The question has been dealt with at very great length in the very careful and exhaustive judgment of Page, J., in *East Indian Railway Company* v. *Joypat Singh* (4), and that learned Judge came to the conclusion that the term "loss" as used in the Risk Note and in section 72 of the Indian Railways Act, does not mean pecuniary or other loss suffered

(1) (1922) 3 Pat. L. T. 215. (2) (1923) I. L. R. 2 Pat. 442.
(3) (1923) I. L. R. 2 Pat. 442, 447. (4) (1924) I. L. R. 51 Cal. 615.

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by the owner of the goods through being wrongfully deprived of the possession, use, or enjoyment thereof, but means loss of the goods while in transit, and that such loss occurs whenever the Railway Company to which the goods have been consigned for conveyance involuntarily or through inadvertence loses possession of the goods, and for the time being is unable to trace them. I do not propose to discuss the matter at length for I entirely agree with the view taken by Page, J., in that case. I would, however, like to refer to one of the cases referred to by that learned Judge, the case of *Hearn* v. *L. & S. W. Railway Company* (1) in which case the question arose whether the goods the delivery of which had been delayed were lost within the meaning of that term as used in the analogous provisions of the Carriers Act, 1830. Baron Martin put this question to counsel: "Suppose a person delivered to a porter at a railway station a casket of jewels, and in consequence of his refusal to forward it the casket remained for sometime at the station, would that be a loss within the Act?" And Baron Alderson asked: "Suppose the goods were known by the carrier to exist, but were not delivered by him for a month, would that be a loss within the Act?" I respectfully endorse the view of Page, J., that "an affirmation that in such circumstances the goods have been 'lost' surely, involves a distortion of the meaning of the word so extravagant as to approach an abuse of the English language".

I should like to say a word on *Smith Ltd.*, v. *Great Western Railway Company* (2) on which reliance is placed by Mullick, J. Now the Risk Note in that case ran as follows:—"In consideration of your charging such lower rate we agree to relieve you from all liability for loss, damage, misconveyance, misdelivery, delay, or detention of or to such goods except upon proof that such loss, damage, misconveyance, misdelivery, delay, or detention arose from the wilful misconduct of your servants". Now it is obvious that the Risk Note in that case is of a far more sweeping nature than the Risk Note under section 72 of the Indian Railways Act. The Risk Note in the case before us covers a case of loss, destruction, or deterioration or damage to the consignment; whereas the Risk Note in *Smith, Ltd* v. *Great Western Railway Company* (2), covered detention of the goods. It is obvious that that case cannot be cited as an authority in India under the Indian Railways Act.

My view is in conflict with that of a Division Bench of this Court as taken in *Great Indian Peninsular Railway Company* v. *Jitan Ram* (3) and it will be necessary for me to refer the question for the decision of a Full Bench; but it seems to me that before we do so, it is necessary for us to obtain a finding on the question of fact raised between the parties, namely, whether the goods have been lost by the railway company in the sense that it cannot trace them or whether they are lost to the owner because the railway company has failed to deliver them to the plaintiff. This question has really not been determined by either of the Courts below. I quite agree with Mr. Justice Mullick that a party by merely suing for compensation for non-delivery cannot take the

(1) (1855) L. R. 10 Ex. 793.

(2) (1921) L. R. 2 K. B. 237; on appeal (1922) L. R. 1 A. C. 178.

(3) (1923) I. L. R. 2 Pat. 442.

case out of the Risk Note. The question is one of substance and not of form. As I have said, it is for the railway company to establish a case within the special contract and the question which I must now ask the lower appellate Court to determine is whether the railway company has established a case within the special contract. In other words, the lower appellate Court must decide on the evidence which is already on the record whether the railway company has established that the loss has occurred by reason of the fact that the defendant-company to which the goods have been consigned for conveyance involuntarily or through inadvertence lost possession of the goods and for the time being was unable to trace them.

I would accordingly remand the case to the lower appellate court for a decision on the issue framed by me. Let the record be sent down at once. The learned District Judge will decide this issue on the evidence on the record after hearing the parties and will send his decision to us with the record within two months from the time he receives the record from this Court. The case will be put up before us for final disposal when the learned District Judge returns his finding to this Court.

On receipt of the lower court's finding the following order of reference to a Full Bench was passed by their Lordships—

It is not necessary to recapitulate the facts which will be found fully stated in my order of remand, dated the 7th July, 1926. The learned District Judge has decided the issue framed by us in favour of the plaintiff-appellant; in other words, he has held that the Railway Company has failed to establish that the loss occurred by reason of its losing possession of the goods and being unable to trace them. This finding is a finding on fact and is binding on us in second appeal.

The question now arises whether the Railway Company has established that the case is within the special contract which applies when there is a loss, destruction or deterioration or damage to the consignment. I have considered the meaning of the word "loss" as used in the Risk Note in my order of remand. I am unable to agree with the view taken in *Great Indian Peninsular Railway Company* v. *Jitan Ram* (1) that the Risk Note applies not only when the goods have been lost by the Railway Company in the sense that it cannot trace them, but also when they are lost to the owner because the Railway Company fails to deliver them to him in breach of its contract for any reason whatsoever. It is not necessary to deal with this point at length, for the question has been dealt with very fully by Page, J. in *East Indian Railway Company* v. *Jogpat Singh* (2) with which decision I entirely agree. As my opinion is in conflict with that of a Division Bench of this Court in *Great Indian Peninsular Railway Company* v. *Jitan Ram* (1), I must refer the following point for decision by a Full Bench, namely, whether the Risk Note in this case applies not only when the goods have been lost by the Railway Company in

(1) (1923) I. L. R. 2 Pat. 442, 447.

(2) (1924) I. L. R. 51 Cal. 615.

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the sense that it cannot trace them, but also when they are lost to the owner because the Railway Company fails to deliver them to him in breach of his contract, for any reason whatsoever. Under the rules of this Court I must refer the appeal for the final decision of the Full Bench.

Nirsu Narain Sinha, for the appellant: My first contention is that the onus lies in the first instance on the defendant company to prove " loss " within the meaning of the risk note, which limits the general liability of the company as a bailee. In the second place I submit that " non-delivery " is included in the word " loss " or, in other words, " loss " does not mean loss to the owner but physical loss of the consignment. There has been a divergence of opinion on this point. In some cases it has been held that " loss " means loss to the owner and, therefore, it includes " non-delivery ". [Vide *Great Indian Peninsular Railway Company* v. *Jitan Ram* (1), *East Indian Railway Company, Limited* v. *Gopi Ram Gourishankar* (2), *East Indian Railway Company Limited* v. *Netram Ganesh Lal* (3), *Sri Newas Sita Ram* v. *East Indian Railway Company* (4), *Agent of the Bengal Nagpur Railway Company, Limited* v. *Hamir Mull Chagan Mull* (5), *East Indian Railway Company* v. *Fazal Ilahi* (6), *The Madras and Southern Mahratta Railway Company, Limited* v. *Haridoss Banmalidoss* (7) and *Hill, Sawyers and Company* v. *The Secretary of State* (8)]. On the other hand, in some cases it has been held that the word " loss " implies loss to the owner as well as the railway company [vide *East Indian Raiway Company* v. *Kali Charan Ram Prasad* (9), *Ganesh Das Bisheshwar Lal* v. *East Indian Railway Company* (10), *East Indian Railway Company* v. *Jogpat Singh* (11), *Gopi Ram Behari Ram* v. *Agent, East Indian Railway and Oudh and Rohilkhand Railway* (12), *The Great Indian Peninsular Railway Company* v. *Ramchandra Jagannath* (13), *Secretary*

(1) (1923) I. L. R. 2 Pat. 442.
(2) (1923) 73 Ind. Cas. 642.
(3) (1923) 75 Ind. Cas. 26.
(4) (1924) 78 Ind. Cas. 479.
(5) (1926) I. L. R. 5 Pat. 106.
(6) (1925) I. L. R. 47 All. 136.
(7) (1918) I. L. R. 41 Mad. 871.
(8) (1921) I. L. R. 2 Lah. 133 F. B.
(9) (1922) 3 Pat. L. T. 215.
(10) (1927) I. L. R. 6 Pat. 189.
(11) (1924) I. L. R. 51 Cal. 615.
(12) (1925) 30 Cal. W. N. 209.
(13) (1919) I. L. R. 43 Bom. 386.

of State for India in Council v. *Jiwan and Abdullah* (1), *East Indian Railway Company* v. *Kishan Lal, Tirkha Mal* (2), *Lala Badri Prasad* v. *Great Indian Peninsular Railway* (3), *Great Indian Peninsular Railway Company* v. *Firm Panna Lal Gopal* (4), and *Daudbhai* v. *Great Indian Peninsular Railway Company* (5)].

[Chief Justice :—" Loss " obviously means " loss " of goods and not to any person.]

Exactly. If loss refers to loss to the owner alone, then the railway company is absolved from the liability of accounting for the disappearance of the goods or showing that the company has got no possession of it. An anomoly is bound to arise inasmuch as the company can keep back the goods and refuse to deliver them to the plaintiff who can have absolutely no relief. The case of *Great Indian Peninsular Railway Company* v. *Jitan Ram* (6) is based on *H. & C. Smith and Company Limited* v. *The Great Western Railway Company* (7) but in that case the language of the risk note was very wide and the plaintiff had also admitted loss.

[Mullick, J.—Is the company liable for the wilful destruction of the goods?]

Yes.

[Mullick, J.—The answer can be in the affirmative only when you admit that " destruction " is included in " loss " in which case " loss " will mean " loss " to the owner only.]

" Loss " cannot mean loss to the owner while the goods are still in the custody of the company, well-kept in the godown.

The meaning of the word " loss " has been clearly and correctly explained in *East Indian Railway Company* v. *Jogpat Singh* (8) and I adopt the reasoning of that case as my argument. The words in the risk note are " loss, destruction, damage or deterioration *of the consignment* ". Why should they be taken to mean " loss " *to the owner*?

(1) (1923) I. L. R. 45 All. 380.
(2) (1923) I. L. R. 45 All. 530.
(3) (1924) 80 Ind. Cas. 725.
(4) (1923) A. I. R. Lah. 609.
(5) (1922) 69 Ind. Cas. 750.
(6) (1923) I. L. R. 2 Pat. 442.
(7) (1921) 2 K. B. 237.
(8) (1924) I. L. R. 51 Cal. 615.

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[Chief Justice.—If I drop my watch somewhere it might be in existence but all the same it is lost to me.]

It may be lost to you, but the thing itself is not lost if it is traceable.

[Chief Justice.—Your point is that there is no evidence to show if the goods have been lost, destroyed or damaged, the only evidence on the point being that of " non-delivery ".]

Yes. There must be some evidence of the actual disappearance of the goods, so much so that the company for the time being cannot trace them.

[Chief Justice.—Your argument is that " loss " does not refer to the injury sustained by the owner but to the physical " loss " of the consignment itself.]

Yes.

[Mullick, J.—Page, J., seems to think that the decision of Richardson, J. in *The Assam Bengal Railway Company, Limited* v. *Radhica Mohan Nath* (1) is in his favour, but as I read the quotation from his judgment I think he did hold that " loss " in section 77 included " non-delivery ".]

But Ghosh, J, did not decide the point.

[Das, J.—How could Ghosh, J. decide that section 77 was applicable to cases of " non-delivery " without first deciding the point as to what the meaning of the word " loss " was?]

[Chief Justice.—The observations in *East Indian Railway Company* v. *Jogpat Singh* (2) seem to be mere obiter dicta as the point was not necessary for the decision of the appeal inasmuch as on the evidence Page, J. held that there was " loss ".]

East Indian Railway Company v. *Jogpat Singh* (2) has been followed in *Gopram Behariram* v. *Agent, East Indian Railway and Oudh and Rohilkhand Railway* (3). If the meaning put upon the word " loss " in *Great Indian Peninsular Railway* v. *Rameshwar Prasad* (4) is accepted then the plaintiff cannot succeed in a case where the goods

(1) C. R. 972 of 1922.

(2) (1924) I. L. R. 51 Cal. 615.

(3) (1925) 30 Cal. W. N. 209.

(4) (1926) 7 Pat. L. T. 90.

are deliberately withheld by the company. I rely on the principles laid down in *H. & C. Smith and Company, Limited* v. *The Great Western Railway Company* (1). There are two classes of cases: (*i*) where the plaintiff admits loss; (*ii*) where he does not admit loss but claims the goods. The case of *H. & C. Smith and Company, Limited* v. *The Great Western Railway Company* (1) falls under the first head. In that case the plaintiff admitted loss and it was held that the onus lay upon the plaintiff to prove wilful neglect. The observations in *H. & C. Smith, Limited* v. *Great Western Railway Company* (2) which upholds *H. & C. Smith and Company Limited* v. *The Great Western Railway Company* (1) support my case.

[Chief Justice.—You also pleaded " loss " in the plaint.]

I pleaded " loss " owing to the wilful neglect of the railway company. My admission cannot be split up but must be taken as a whole. Moreover I pleaded " loss to me " owing to non-delivery and not " loss of the goods ".

Naresh Chandra Sinha (with him *B. B. Ghosh*) for the respondents: The word " loss " has been used in the Indian Contract Act, the Railways Act and the Risk Note in the same sense [See sections 72, 75 and 76, Railways Act, and sections 151, 152 and 161, Contract Act.] There is no provision for penalty for " non-delivery " in the Contract Act. It must, therefore, be taken that the legislature intended to include " non-delivery " in the word " loss " for the purposes of section 161. It cannot be assumed that the Act which exhaustively deals with the relations between the bailor and the bailee had provided for no remedy for " non-delivery ".

[Chief Justice.—This does not follow upon the wording of section 161. There may be no loss and yet the plaintiff may sue for detention of the goods.]

But it should be expected that the Contract Act would make some express provision for penalty in the case of " non-delivery ".

[Chief Justice.—Section 160 imposes the general liability on a bailee.]

In section 9 of the Indian Common Carriers Act (Act III of 1865) " non-delivery " is mentioned along with " loss "

(1) (1921) 2 K. B. 237, 257. (2) (1922) 1 A. C. 178.

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but section 76 of the Railways Act which for practical purposes reproduces section 9 of the Carriers Act does not mention " non-delivery " merely because it was thought that " non-delivery " was sufficiently provided for by reference to sections 151 and 161 of the Contract Act, vide *The Madras and Southern Mahratta Railway Company, Limited* v. *Haridoss Bannalidoss* (1).

[Chief Justice.—This case deals with section 77, Railways Act, and considerations that apply to that section are different from those that apply to the Contract Act. The judgment is largely based on what the learned judge thought was the intention of the legislature in enacting that Act.]

Section 7 of the Railways and Canal Traffic Act (17 and 18 Vic. Chapter XXXI, 1854) is analogous to section 72 of the Railways Act. Risk notes in England are executed under that section and therein we find the word ' loss " but not " non-delivery ". In some risk notes, however, provision is made for giving notice to the Railway within a certain period in the case of " loss " while another period is fixed for giving notice in cases of " non-delivery ". It was pointed out in *Great Western Railway Company* v. *Wills* (2) which reversed the decision in *Wills* v. *Great Western Railway Company* (3) that where the risk note contains provision for " loss " only it governs the case of " non-delivery " as well, but it is otherwise where the risk note specifically mentions the case of " non-delivery ".

I need not cite all the Indian decisions on the point but for the purposes of my case I shall only rely on the Full Bench decision of *Hill, Sawyers and Company* v. *The Secretary of State* (4) and the case of *Great Indian Peninsular Railway Company* v. *Jitan Ram* (5). The judgment of Page, J., in *East Indian Railway Company* v. *Jogpat Singh* (6) is mainly based on the preamble of the Carriers Act which gives the reasons for enacting that Act, but I submit that those reasons do not apply to cases under the Railways Act which is altogether different. Lastly I submit that the plaintiff having admitted " loss " in the plaint the controversial point does not arise in this case.

Nirsu Narain Sinha, replied.

S. A. K.

Cur. adv. vult.

(1) (1918) I. L. R. 41 Mad. 871
(2) (1917) 1 A. C. 148.
(3) (1915) 1 K. B. 199.
(4) (1921) I. L. R. 2 Lah. 133 F. B.
(5) (1923) I. L. R. 2 Pat. 442.
(6) (1924) I. L. R. 51 Cal. 615.

26th April, 1927.

DAWSON MILLER C. J.—In this case sixteen bales of cloth were delivered to the East Indian Railway Company at their station at Howrah consigned to the plaintiff at Bhaptiahi, a station on the Bengal and North-Western Railway Company's system. Only fourteen bales were delivered to the plaintiff at Bhaptiahi and he sued for the value of the missing bales alleging that they had been lost by the negligence of the servants of the railway companies, both being impleaded as defendants. Both companies denied liability and relied on the terms of the risk note, Form B, under which the goods were carried as exempting them from liability. The Bengal and North-Western Railway Company also alleged that they received only fourteen bales of the sixteen from the East Indian Railway Company and were therefore not liable to deliver more than they received.

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The trial court found that the Bengal and North-Western Railway Company received only fourteen bales from the other company and therefore were not liable. As against the East Indian Railway Company the court found that they were not exempted from liability under the risk note which whilst exempting the carrier from loss, destruction, deterioration of or damage to the goods unless caused by the wilful neglect of the company's servants did not exempt them from liability for non-delivery.

The District Judge of Bhagalpur on appeal by the East Indian Railway Company held that the company was protected from liability on two grounds, first, that the case made by the plaintiff in his plaint was that the goods had been lost and no issue had therefore been raised upon this point. As the railway company was not liable for loss of the goods unless caused by the wilful negligence of the railway administration or its servants or by theft by the latter the company was not liable in the absence of any evidence of wilful neglect or theft: Secondly,

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following the decision of this court in *Great Indian Peninsular Railway Company* v. *Jitan Ram* (1) he held that the word loss in the risk note was wide enough to include everything which amounted to a loss to the owner and that non-delivery was loss within the meaning of the risk note.

On second appeal to the High Court my brothers Das and Adami, JJ., differing from the view expressed in *Great Indian Peninsular Railway Company* v. *Jitan Ram* (1) were of opinion that mere non-delivery to the consignee was not in itself evidence of a loss of the goods within the meaning of the risk note and as no finding had been come to by the lower appellate court whether the goods had been lost they remanded the case to that court for finding whether the railway company had established that the loss had occurred by reason of the fact that the defendant company to which the goods had been consigned for conveyance involuntarily or through inadvertence lost possession of the goods and for the time being were unable to trace them.

The District Judge on remand found that the company had not proved that the loss occurred by reason of its losing possession of the goods and being unable to trace them. On this finding Das and Adami, JJ. disagreeing with the decision in the earlier cases cited referred the appeal to a full bench for determination, the question of law being formulated thus:—

> "Whether the risk note in this case applies not only when the goods have been lost by the railway company in the sense that it cannot trace them but also when they are lost to the owner because the railway company fails to deliver them to him in breach of its contract for any reason whatsoever."

Shortly put the facts upon which our decision must depend are as follows:—Sixteen bales were delivered to the East Indian Railway Company consigned to the plaintiff. Fourteen bales only were delivered. What happened to the two missing

(1) (1923) I. L. R. 2 Pat. 442.

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bales there is no evidence on the record to shew. The railway company has therefore not shown by evidence that the goods were lost in the sense that they have disappeared and cannot be traced or have been destroyed or rendered valueless. In other words it has not been shewn by evidence that there was a loss of the goods as distinguished from a loss to the owner thereof. By the risk note under which the goods were carried the owner in consideration of having the goods carried at a special reduced rate instead of the ordinary tariff chargeable for such consignment undertakes to hold the railway administration

> " harmless and free from all responsibility for any loss, destruction, or deterioration of or damage to the said consignment from any cause whatever except for the loss of a complete consignment or one or more packages forming part of the consignment due either to the wilful neglect of the railway administration, or to theft by or the wilful neglect of, its servants, transport agents or of carriers employed by them before, during and after transit over the said railway or other railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment, provided the term wilful neglect be not held to include fire, robbery from a running train or any other unforeseen event or accident."

It is not disputed that if the two bales were lost within the meaning of the risk note the onus of proving wilful neglect or theft by the company or its servants would rest with the plaintiff and that that onus has not been discharged. The question for determination raised in the order of reference depends upon whether there was a loss of the two bales within the meaning of the risk note. Two views have been expressed in the High Courts in India as to the meaning of the word " loss " in this form of risk note. One is that loss as there used means loss to the owner by reason of the fact that he has failed to get delivery of his goods. This is the view expressed in the case of *Great Indian Peninsular Railway Company* v. *Jitan Ram* (1) already referred to. A somewhat similar view was expressed in *Madras and Southern Mahratta Railway Company* v. *Haridoss Banmalidoss* (2) where it was held that a mis-delivery

(1) (1923) I. L. R. 2 Pat. 442. (2) (1918) I. L. R. 41 Mad. 871.

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of the goods to the wrong consignee would be covered by the word loss. That decision, however, is not a direct authority upon the question for determination here. The other view is that expressed by Page, J., in *East Indian Railway Company* v. *Jogpat Singh* (1) where it was held that the term loss as used in the risk note and in section 72 of the Indian Railways Act does not mean pecuniary or other loss suffered by the owner of the goods through being wrongfully deprived of the possession, use or enjoyment thereof, but means loss of the goods themselves whilst in transit and such loss occurs whenever the railway company to which the goods have been consigned for conveyance involuntarily or through inadvertence loses possession of the goods and for the time being is unable to trace them. I agree that the onus of proving that the goods were lost within the meaning of the risk note rests primarily with the railway company which seeks to exempt itself from liability to deliver by reason of the exemptions contained in the contract. If loss as used in the risk note includes pecuniary loss to the owner then that onus has been satisfied in this case. If, on the other hand, it must be restricted to a loss of the goods themselves then there is no evidence to shew that they were lost and were this merely a suit based upon failure to deliver them without any averment in the plaint except non-delivery I should hold that the railway company has failed to discharge the onus. But in my opinion the learned District Judge was right in holding that the case is concluded by the pleadings. It is true that the plaintiff alleges in paragraph 7 of his plaint that on account of non-delivery he has suffered a loss of Rs. 963-14-0 but in the earlier paragraphs of the plaint he alleges that he came to know that the goods had been lost owing to negligence on the part of the servants of the defendants and later refers to the two bales " which were not found ". The defendant whilst not admitting the allegations in the plaint

(1) (1918) I. L. R. 51 Cal. 615.

relies upon the provisions of the risk note which exonerate the company from liability and pleads that there was no negligence on the part of the servants of the company. Accordingly when issues were framed there was no issue as to whether the goods had been lost or not. In these circumstances it being admitted that there was a loss of the goods the onus no longer lay upon the defendants to call evidence upon the point which was admitted in the pleadings. This matter is not one of mere form for had there been no admission that the goods were lost and had an issue been raised upon this question it must be presumed that the defendants would have called evidence to explain as far as lay in their power how it came that the missing goods were not delivered, and even when the case was remanded for a further finding whether the railway company had established that the loss occurred by reason of the fact that the defendant company to which they had been consigned for conveyance involuntarily or through inadvertence lost possession of the goods and for the time being was unable to trace them the lower appellate court was directed to decide this point on the evidence already on the record. In my opinion for the reasons already given the decision appealed from was right and this appeal should be dismissed with costs, here and in all courts.

MULLICK, J.—I agree that the reference does not arise.

JWALA PRASAD, J.—I have had occasion to determine a point similar to that raised in the order of reference so far back as 1922 in the case of *The East Indian Railway Company* v. *Messrs. Kali Charan Ram Prasad* (1). I discussed the point in some detail and came to the conclusion that "loss" in sections 72 to 77 of the Railways Act or in the risk note does not include a case based on non-delivery of the article consigned to the Railway Company for transit. The question seems to have been the subject matter of decision in several cases in this and in other

(1) (1922) 3 Pat. L. T. 215.

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High Courts and has led to a sharp divergence of opinion. Shortly after Mr. Justice Das passed his order of remand on the 7th of July 1926 in the present case, indicating his views on the subject, the point again arose in the case of *Ganesh Das Bisheshwar Lal* v. *The East Indian Railway Company* (1) before Bucknill, J. and myeslf, and we considered all the authorities for and against and agreed with the view taken by my learned brother Das, J. I fully set out the reasons in support of my view in my judgment in that case and shall, therefore, deal with it briefly.

Sections 72 to 76 of the Indian Railway Act deal with the responsibility of the railway company in the matter of the carriage of goods. Clause (*1*) of section 72 makes the railway company liable as bailes under sections 151, 152 and 161 of the Indian Contract Act, 1872. Clause (*2*) of that section forbids any limitation of that responsibility except as provided therein. One of those provisos is, that the responsibility of the company can be limited by an agreement in writing executed by the person delivering the article in the form approved by the Governor-General in Council. Risk Note B was introduced by the railway company in order to define and describe the limited responsibility of the company with regard to goods conveyed at reduced rates. Generally speaking, the carriage of goods under this Risk Note is said to be at the owner's risk. Under the Risk Note the consignor agrees and undertakes

> " to hold the railway administration harmless and free from all responsibility for any loss, destruction, or deterioration of, or damage to the said consignment, from any cause whatever except for the loss of a complete consignment or one or more complete packages forming part of a consignment due either to the wilful neglect of the railway administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit..... Provided the term ' wilful neglect ' be not held to include fire, robbery from a running train or any other unforeseen event or accident."

(1) (1927) I. L. R. 6 Pat, 189.

This agreement, as set forth in the risk note, is an exception to the general libility of the railway company as a bailee under sections 151, 152 and 161 of the Contract Act. Section 151 requires the bailee to take as much care of the goods bailed to him as a man of ordinary prudence would in similar circumstances take of his own goods. Section 152 makes the railway company responsible as bailee for the loss, destruction or deterioration of the article bailed unless it has taken the amount of care described in section 151. Section 161 makes the railway company responsible as bailee for the delivery and tendering at the proper time to the bailor of the goods bailed, failing which the company is liable to the bailor for any *subsequent* loss, destruction or deterioration of the property. Section 160 imposes an obligation upon the bailee, to return or deliver, according to the bailor's directions, the goods bailed as soon as the time for which they were bailed has expired, failing which the bailee is liable for non-delivery. Section 72 deals only with the responsibility arising from loss, destruction or detcrioration of goods delivered to the railway administration for carriage and does not deal with the responsibility for non-delivery. Similarly the agreement in the risk note, based upon section 72, limits the general liability of the railway administration only in respect of loss, destruction or deterioration of goods consigned to it and not in respect of non-delivery of the goods. The responsibility to deliver the goods in the same quantity and condition as consigned to the railway administration arising under the common law and section 160 of the Indian Contract Act remains unaffected and such a responsibility cannot, in any way, be limited by any contract between the consignor and the consignee whether the care of the goods is undertaken on reduced rate or even free of any rate. Upon this principle a hotel keeper is liable for the loss of his guest's goods though no negligence on his part is proved. The risk note only affects the question of onus. Under the

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common law, as set forth in the Contract Act relating to the responsibility of a bailee, the onus is upon him to show that he used diligence and care in respect of the goods bailed. The risk note purports to shift this onus by providing that in case of loss of goods by the railway company, the onus will be upon the consignor or the bailor to show that the loss was due to theft by the latter. Until loss is proved by the company, the presumption under section 114 of the Evidence Act would be that the goods are in the possession of the railway company in the same condition in which they were delivered to the company until the contrary is proved. The risk note is an exception to the ordinary responsibility of the railway company for the loss, destruction or deterioration of the goods consigned. It must, in the first instance, be proved by the company that the circumstances in which exception from the ordinary responsibility is claimed existed in the case. In other words, the railway company must prove that the goods consigned were lost, destroyed or deteriorated before they can take advantage of the agreement contained in the risk note. It is not sufficient for the railway company to plead the execution of the risk note or to plead the loss, destruction or deterioration; but the railway company must prove that there was loss, destruction or deterioration such as is contemplated in the agreement set forth in the risk note. Unless this is primarily proved the ordinary responsibility of the railway company as bailee under sections 151, 152 and 161 does not cease. The object of this requirement for the railway company to prove loss, destruction or deterioration is that the consignor will then be in a position to know how his goods were dealt with and that the railway company exercised primarily the ordinary care that is required of it as a bailee. It is only after this is established that the railway company can plead exemption from the liability for the loss, destruction or deterioration of the goods under the risk note B. The words

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" loss, destruction or deterioration " in the risk note do not cover the case of non-delivery, mis-delivery, detention etc. The last words are expressly stated in the risk note in the case of *H. and C. Smith and Company, Limited* v. *The Great Western Railway Company* (1) referred to and relied upon by Mullick, J., in the case of the *Great Indian Peninsular Railway Company* v. *Jitan Ram Nimal Ram* (2). The risk note form in that case clearly shows that non-delivery and mis-delivery are quite different from loss, destruction or deterioration. The risk note must be construed strictly and if for some reason the Legislature did not think it proper to include cases of non-delivery or mis-delivery or detention, we cannot add those words to the risk note in order to amplify the scope of it and to limit the liability of the railway company with regard to goods consigned to it. Now the difference between non-delivery on the one hand and loss, destruction or deterioration on the other has been recognized in Articles 30 and 31 of Schedule I to the Indian Limitation Act. Before that, provision similar to article 30 only existed which related only to loss, destruction or deterioration. Questions were then raised as to whether cases of non-delivery would come under that Article or under Articles 149 and 150 of the Indian Limitation Act, the latter being applicable to cases where there is no express provision in the Act. It was with a view to set at rest the question raised that Article 31 was subsequently added to the Limitation Act. Inspite of that the words " non-delivery, mis-delivery or detention " were not added to the risk note B. The Indian Contract Act also makes a distinction between non-delivery, loss, destruction and deterioration. Sections 151 and 161 relate to loss, destruction and deterioration while section 160 relates to non-delivery. The risk note B is similar to the risk note in the case of *Hearn* v. *London & S. W. Railway Company* (3) where Baron

(1) (1921) L. R. 2 K. B. 237.
(2) (1923) I. L. R. 2 Pat. 442. (3) (1855) 10 Exch., 793, 799.

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Parke, J., held; " the word ' loss ' does not mean the loss of the monies of the carrier but the loss of the article itself or injury to it. In ordinary parlance this appears to mean the loss by the carrier of the articles committed to him or injury to them whilst in his care, not the loss sustained by the owner by non-delivery of the articles in due time or altogether the loss of the use of the article by him.....the carrier is exempted only from being responsible for a loss by him of the particular articles named ". In the case of *Millen* v. *Brasch* (1) Lindley, L.J., observed; " whether the goods not permanently lost are lost within the meaning of the Carrier's Act, must depend upon whether they have been lost by the carrier as distinguished from lost to the owner ". I would accordingly answer the question raised in the order of reference that the risk note applies only when the goods are lost by the railway company and have gone out of its possession or that the company cannot trace them so as to be able to deliver the same to the consignor. It does not include loss to the owner on account of the non-delivery of the article by the railway company in breach of its contract.

The plaintiff in the present case claims compensation in respect of two bales of cloth out of sixteen bales which were not delivered to him. The case as laid in the plaint is to my mind on account of non-delivery of the goods as is expressly stated in paragraph 7 of the plaint. This is also clear from the cause of action stated in paragraph 8 of the plaint. The cause of action was not based upon the loss of or injury to the goods.

The goods in the present case (sixteen bales of cloth) were booked at the Howrah railway station on the East Indian Railway to be carried and delivered to the plaintiff at Bhaptiahi station on the Bengal and North-Western Railway. The plaintiff took open delivery on the 26th of February 1921 at Bhaptiahi station and got only fourteen bales after

(1) (1882) 10 Q. B. D. 142.

a list of the same was made by the Delivery Inspector of the defendant No. 1, (the Bengal and North-Western Railway Company) and noted in the Delivery Register. The plaintiff did not get the two bales in question. Accordingly he states that the cause of action arose on the 26th February at Bhantiahi when and where the goods were to be delivered and were not delivered. The cause of action stated is in accordance with Article 31 of Schedule I to the Limitation Act which relates to non-delivery and states in column 3 that the cause of action in such a case arises from the date when the goods ought to be delivered. The plaintiff does not base his cause of action on loss of his goods, for, in that case he would have stated the cause of action to have arisen on the date when the loss or injury occurred as required by Article 31 of the Limitation Act.

In paragraph 3 of the plaint the plaintiff states that when he did not get delivery of the two bales of cloth at the Bhaptiahi railway station on the 26th February 1921, he came to know that the said two bales were lost or destroyed (noksan ho gaya) owing to the neglect on the part of the servants of the defendant companies. His statement in paragraph 3 could not possibly be his personal knowledge, for, as stated by the goods-clerk examined by the defendant the Bengal and North-Western Railway Company (Defendant no. 1) received only fourteen bales of cloth at the Mokameh Junction which they delivered to the plaintiff at their station at Bhaptiahi. The plaintiff could not know what happened to the goods between Howrah and Mokameh. In his evidence the plaintiff's gomashta who took delivery of the goods states that the Station Master of Bhaptiahi told him that the goods were stolen by the railway servants. The Station Maseer of Bhaptiahi station has not been examined by the defendants to challenge this statement. The defendants in his written statement does not admit the plaintiff's statement in the plaint regarding the loss of the goods. The

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defendant simply throws upon him the risk note B executed by him and claims exoneration from the liability on the basis of this note. Risk note B is an elaborate document and exonerates the railway company from liaiblity under various circumstances; for instance, the loss of goods to the railway company by running train, theft or robbery. Upon what particular portion of the risk note the defendants rely is not stated. They do not admit the loss of the goods due to negligence as stated by the plaintiff and they cannot be permitted to take a part of the admission in the plaint and say that the loss is admitted and the negligence on their part is not admitted. The admission of the plaintiff must be taken as a whole. The defendants' pleading must be construed strictly. The reliance simply on the risk note is not a sufficient pleading in the case as was held by Bucknill, J., in the case of *Ganesh Das Bisheswar Lal* v. *The East Indian Railway Company* (1). The plaintiff stated that on the 26th February 1921 when he did not get the two bales of cloth, the Station Master of Bhaptiahi told him that they were stolen by railway servants. This is a specific statement; yet the railway company did not challenge or rebut it nor did they say what became of the goods. They had special means of knowledge about it. The observations of Macleod, C.J. and Crump, J., in the case of the *Great Indian Peninsular Railway* v. *Himat Lal* (2) would apply. Their Lordships say " Under risk note form B the plaintiff must prove that the loss was due to theft by or wilful neglect of the railway servants. The railway company however, should produce before the court for examination those of their servants who were in a position to be acquainted with the facts relating to the disappearance of their customer's goods ". This was the view also reiterated by Ramsam, J., in the case of *B. B. C. I. Railway Company* v. *Firm, Nataji Pratap Chand* (3) wherein his Lordship says; " Under Risk

(1) (1927) I. L. R. 6 Pat. 189. (2) (1923) 78 Ind. Cas. 606.
(3) (1925) 87 Ind. Cas. 79.

Note Form B, the Railway Company must give prima facie or formal evidence that so far as they know the company or its servants through whose hands the goods have passed are not keeping back the goods. For this purpose they must tender their servants for cross examination and it is for the plaintiff, if he can, to prove, by such cross-examination, wilful neglect of or theft by the railway servants ". The railway company in the present case has not examined the Delivery Inspector or the Station Master upon whose statements the plaintiff alleges that he came to know that the goods were lost owing to the neglect on the part of the railway company and particularly on account of theft of their servants.

Thus upon the true import and scope of the pleadings in the case, I hold that the plaintiff's case is one of non-delivery and that the "loss" of the goods within the meaning of the terms in the risk note is neither admitted nor pleaded nor proved; and the risk note does not apply or exonerate the defendant from the liability to the plaintiff for non-delivery of the goods in question. I would accordingly set aside the decision of the lower appellate court, restore that of the trial court and decree the appeal of the plaintiff with costs.

DAS, J.—On an anxious consideration of the pleadings in the case and having regard to the fact that there was no issue on the question of loss I have reluctantly come to the conclusion that the reference does not arise. I would therefore dismiss this appeal with costs.

KULWANT SAHAY J.—I agree with my Lord the Chief Justice and am of opinion that the reference does not arise in the present case.

Appeal dismissed.

LETTERS PATENT.

Before Dawson Miller, C. J., and Kulwant Sahay, J.

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April, 26.

SRIKANTA MANJHI

v.

BALAK SINGH BHUMIJ.*

Chota Nagpur Encumbered Estates Act, 1876 (*Act VI of* 1876), *section* 3—*usufructuary mortgage of part of estate —suit by mortgagee against tenants for rent—decree obtained—Estate taken under charge—whether proceedings in execution of the rent decree are barred.*

Where a usufructuary mortgagee of part of an estate has obtained a decree for rent against the tenants of the mortgaged land and subsequently the estate is taken charge of under the Chota Nagpur Encumbered Estates Act, 1876, execution of the rent decree obtained by the mortgagee is not barred by section 3 of the Act.

The obligation of the tenants of mortgaged land to pay rent to a usufructuary mortgagee of the land is not a debt or liability of the estate, the recovery of which is barred under section 3.

Appeal under the Letters Patent by the defendant.

In this case the zamindar of Barahabhum granted a usufructuary mortgage of mauza Rangadih within his zamindari to the zamindar of Dumra. The Midnapur Zamindari Company were the assignees of the interest of the mortgagee, the zamindar of Dumra. In 1913 the Midnapur Zamindari Company brought a suit for rent against certain tenants of Rangadih, the Company being then in possession as assignees of the mortgaged interest. In that suit they succeeded and obtained a decree on the

* Letters Patent Appeal no. 52 of 1926 against a decision of Ross, J., dated the 25th May, 1926, overruling a decision of Maulavi Najabat Husain, Subordinate Judge of Purulia, dated the 22nd March, 1923, which reversed a decision of Babu Sachindra Nath Ganguli, Munsif of Purulia, dated the 10th March, 1920.

20th September, 1913. The defendants in that suit were represented by the plaintiffs in the present suit. In 1914 the Barahabhum estate was placed under a manager under the provisions of the Chota Nagpur Encumbered Estates Act, 1876, and in the following year the manager sued the plaintiffs for rent including the rent which was the subject of the suit brought by the Midnapur Zamindari Company in 1913. In that suit he also obtained a decree and the decretal amount was deposited by the plaintiffs and the decree satisfied. In 1916 the Midnapur Zamindari Company took out execution of their decree against the plaintiffs and the property was put up for sale and sold to the defendant no. 1 in the present suit, he being no party to the suit. In June 1917 the defendant no. 1 got delivery of possession of the property. In December 1917 proceedings were taken by the tenants to set aside the rent decree of 1913 and those proceedings were successful. The exact ground upon which the rent decree was set aside appeared to be somewhat doubtful. Apparently it was on the ground that there had been no proper service of notice of summons, and the suit was restored for re-hearing. In the result on re-hearing the suit was dismissed on the ground that at that time, namely, in 1917, there was no relationship of landlord and tenant existing between the Midnapur Zamindari Company and the plaintiffs, the reason for that being that the estate had been placed under the manager appointed under the Encumbered Estates Act in the year 1914. Although the decree of 1913 was set aside still the holding had been sold under that decree and purchased by the defendant no. 1 and when the tenants endeavoured to recover possession they found themselves opposed by the defendant no. 1 and they could not get possession. Further, although the decree had been set aside there had been no order setting aside the sale. The result was that the plaintiffs brought the present suit impleading as defendants the defendant no. 1 to whom reference had already been made and the Midnapur Zamindari Company the assignee of the mortgagee.

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The Munsif decided in favour of the plaintiffs and granted them a decree for possession.

The Subordinate Judge on appeal agreed with the Munsif and dismissed the appeal.

A second appeal was preferred to the High Court and was heard by Ross, J. As there had been no definite finding as to fraud and there was apparently no evidence upon the record from which fraud could be inferred the appeal was allowed, the decree was set aside and the case was sent back to the court of the Subordinate Judge and was heard by the successor of the previous Subordinate Judge. The points for consideration were:—

1. Has there been any fraud in the decree or the sale?

2. If so, is the right of the defendant no. 1 affected thereby?

3. Was the decree passed and sale held without jurisdiction?

On each of these points the Subordinate Judge found in favour of the defendant. He found that there was no fraud of any sort from first to last, that the sale was not held without jurisdiction and that the rights of the innocent purchaser for value at that sale were not affected by the fact that the decree had been set aside.

From that decision there was an appeal to the High Court which again came before Ross, J. In so far as the findings of the learned Subordinate Judge were concerned they were entirely in favour of the defendant and there was nothing more to be said. It was shewn that the sale was not without jurisdiction, that there was no fraud either in obtaining the decree or in the sale and the defendant no. 1 being an innocent purchaser for value his rights were in no way affected. A point, however, was raised before Ross, J., which had not been raised in either of the lower courts. It was contended that under section 3 of the Chota Nagpur Encumbered Estates Act the proceedings in execution of the rent decree were barred and were null and void and, therefore, no sale could

be deemed to have taken place and the purchaser acquired no title. That section provides as follows:—

"On the publication of an order under section 2, the following consequences shall ensue" (The order there referred to is the order vesting the property in a manager)." First, all proceedings which may then be pending in any Civil Court in British India or in any revenue Court in Bengal in respect to such debt, or liabilities" that is debts or liabilities of the disqualified proprietor "shall be barred; and all processes, execution and attachments for or in respect of such debts and liabilities shall become null and void."

The argument before the Divisional Bench in appeal from the decision of Ross, J., was that the sale in execution of the rent decree was an execution in respect of such debts or liabilities as those mentioned in section 3. The argument was this:—the usufractuary mortgagee was really the creditor of the proprietor; that by the terms of his mortgage he was entitled to collect from the tenants the rents by way of interest upon the mortgage debt and that that really was in the nature of a debt from the proprietor, the mortgagor. In other words instead of recovering the interest from the mortgagor himself he recovered it from the mortgagor's tenants by collecting the rents from them which otherwise would have been paid to the mortgagor. Therefore in that round about way the liability to pay rent to the mortgagees must be regarded as a debt due from the proprietor and any proceedings taken in execution of a decree for rent in such circumstances must be regarded as an execution in respect of such a debt. This argument commended itself to Ross, J., and he accordingly allowed the appeal of the tenants which came before him and set aside the decree of the Subordinate Judge.

From his decision the present appeal was brought by the defendant no. 1, the auction-purchaser, under the Letters Patent.

A. B. Mukerji and *B. B. Mukerji*, for the appellant.

A. K. Roy, for the respondent.

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DAWSON MILLER, C. J., (after stating the facts set out above, proceeded as follows) :—The first thing to be observed with regard to section 3 of the Chota Nagpur Encumbered Estates Act is that it refers to the debts and liabilities of the estate and to processes, executions and attachments in respect of such debts and liabilities. I do not think that the obligation of the tenants to pay rent to the mortgagee in possession can be said to be a debt or liability of the estate. The liability of the tenant cannot be regarded, in my opinion, as a debt of the estate at all. The liability of a tenant to pay his rent is certainly not in any sense of the word a liability of the landlord to anybody. Nor can it be said that this is a process or execution against the estate. The execution is not against the estate of the proprietor but against the estate of the proprietor's tenants. Their liability arose under a decree for rent and I have the greatest difficulty in seeing how the language of section 3 can in any way be applied to the liability of a tenant to pay rent or his liability to have his holding sold under a decree for rent by the mortgagee in possession. That liability arose before the landlord's estate was placed under management and from the moment the decree was passed the liability under it was a liability of the tenant under the decree and in no sense a debt or liability of the mortgagor under the mortgage. I think that the words in the section must be confined to what they say, that is to say, the debts or liabilities of the disqualified proprietor and not the debts or liabilities of somebody else. The result is that, with great respect to the learned Judge, I am unable to agree with the reasoning by which he arrived at his judgment. I think that the section does not cover this case and that the decision ought to be set aside and the appeal allowed. The judgment of the learned Subordinate Judge will be restored and the defendant no. 1 will be entitled to his costs throughout.

KULWANT SAHAY, J.—I agree.

Appeal allowed.

APPELLATE CRIMINAL.

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Evidence Act, 1872 (*Act I of* 1872), *sections* 8, 27 *and* 32(*1*)—*Dying declaration, admissibility of, in a charge of robbery and as part of the res gestae—statement to police leading to discovery, extent of admissibility of—Code of Criminal Procedure*, 1898 (*Act V of* 1898), *section* 164—*statement of accused not amounting to confession, admissibility of.*

Where, in answer to the investigating police officer, the accused states that he threw the weapon with which he assaulted the deceased at a certain place, and the weapon is discovered as the result of that disclosure, the statement consisting of the assertion that the weapon had been thrown at a particular place and that it was the weapon with which the offence was committed, is admissible in evidence under section 27 of the Evidence Act, 1872.

Sogiamuthu Padayachi, In re (1), followed.

Where, during an investigation, the police send the accused person to a Magistrate to have his confession recorded under section 164, Criminal Procedure Code, 1898, and the accused makes a statement to the magistrate which is not a confession, the statement is admissible as evidence of conduct.

A dying declaration is admissible under section 32(*1*) of the Evidence Act even when the offence charged is not homicide.

Queen v. *Bissorunjun Mookerjee* (2), followed.

A statement made by a person who has been robbed and fatally assaulted, immediately after the robbery, is admissible under section 8 of the Evidence Act as part of the res gestae.

*Death Reference no. 8 of 1927 and Criminal Appeal no. 69 of 1927, from a decision of J. A. Saunders, Esq., I.C.S., Sessions Judge of Muzaffarpur, dated the 2nd April 1927.

(1) (1926) 39 Ind. Cas. 42. (2) (1866) 6 W. R. (Cr.) 75.

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

B. C. De, for the appellant.

C. M. Agarwala, Assistant Government Advocate, for the Crown.

5th May, 1927.

MULLICK, A. C. J.—This case comes before us on a reference under section 374 of the Code of Criminal Procedure by the Sessions Judge of Muzaffarpur and also on appeal by the prisoner Lalji Dusadh alias Lalji Mallah.

The appellant is alleged to have robbed and killed a young man named Abdul about 8 p.m. on the 9th November, 1926. For the robbery he was charged under sections 392 and 397 of the Indian Penal Code and tried by a jury of five. For the offence of murder he was charged under section 302 of the Indian Penal Code and tried by the Sessions Judge with the help of the above jurors sitting as assessors.

The unanimous verdict of the jurors in the trial for the offences under sections 392 and 397 was that the appellant was guilty. The opinion of the assessors on the charge of murder was to the same effect.

The learned Sessions Judge, agreeing with the assessors, has sentenced the appellant to death for the offence of murder. Agreeing with the jurors he has also found the appellant guilty of the offences under sections 392 and 397 but he has passed no separate sentence.

The appellant is thirty years of age. His home was in Mauza Mushari in the district of Muzaffarpur and he belonged by birth to the Mallah caste. About two years before the murder he was outcasted in consequence of an intrigue with a Dusadh woman named Kanchania who lived in mauza Madhopur in the same district and he became a Dusadh. He lived with her for two or three months in Madhopur and then emigrated to the district of Dinajpur

taking her with him and one infant child. Later his mother joined him with his other child and thereafter for 5 or 6 months in 1926 he worked as a labourer in the service of one Anjor Sahai in mauza Nashipur in the district of Dinajpur.

The deceased Abdul was twenty-five at the time of his death. He came to Dinajpur when he was quite a child and worked there for about twenty years. He was a Goala by caste and the name given to him by his parents was Munia, but he became a Mussulman later on and took the name of Abdul. He lived at Nashipur and worked first as a grass-cutter and then as an agricultural labourer.

On the 8th November Lalji with his wife, mother and two children started from Dinajpur for Madhopur. Abdul accompanied them and the evidence is that Lalji told him that he would get him married as he had no wife. At about 11 a.m. on the 9th the party arrived at Shekra station which is ten miles from Madhopur. There was some trouble about Abdul's ticket. Apparently it could not be found and the result was that he had to leave his bundle behind containing some brass utensils, a chaddar, some clothes and some rice.

We have no evidence as to the subsequent movements of Abdul till about 9 p.m. when he arrived bleeding from several wounds on the head and body at the bathan (cattle pen) of Hitan Missir of Salaha which is about one mile from Madhopur. Adhin Goala, who has a neighbouring bathan and had come out to feed his cattle, saw Abdul go and sit in Hitan Missir's bathan. Adhin's cries brought Hitan Missir to the bathan. The chaukidar Chauhuddi was next fetched and other people came. Whether Abdul was able to make any coherent statement is a matter of controversy in this case and will be discussed later. The President Panchayat Ramphal Tewari was then fetched and drew up a short report which he handed over to Chauhuddi. Chauhuddi arrived at the Muzaffarpur police-station

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at 7 a.m. on the 10th and laid an information before the Writer Head Constable Sudhist Narayan Singh who was in charge. The Head Constable arrived at Salaha about 8 a.m. and found that Abdul was dead. He sent the body to Muzaffarpur for post-mortem examination and was engaged the whole day in making investigations.

On the bank of a circular piece of water called a "man" 250 paces from the bathan of Hitan Missir, the head constable found large patches of blood and a bundle containing two nets, some cotton thread, a pen-knife, a razor, a medicine bottle and a dhoti. Near the bundle was a small stick made of jute wood. It is in evidence that the nets belonged to the appellant Lalji.

On the 11th November the Sub-Inspector of Muzaffarpur took charge of the case and the appellant was arrested about 1-30 p.m. In consequence of a statement made by him, his wife Kanchania delivered up to the Sub-Inspector Rs. 39 and gold coin of the Muhammadan period in India which she was carrying upon her person. Also in consequence of information given by the appellant the "man" was searched, and in water about thigh deep a heavy hasua was found.

On the 13th the appellant was produced from jail before a Deputy Magistrate at Muzaffarpur in order that his confession might be recorded. The appellant, however, did not make a confession but he made an exculpatory statement in which he admitted that he had come with Abdul to Shakra and had then walked with him as far as the village of Titra (four miles from Shakra) where he had parted company with him. According to the appellant Abdul said that he was going to Muzaffarpur but it does not appear that Abdul had any home of his own at Muzaffarpur. The appellant says his mother halted on the 9th November in the house of a Dusadh at Titra. Where he and his wife slept on the night

of the 9th there is nothing to show, but on the 10th Abdul says he slept at the house of Sirtaj Singh of Madhopur.

It appears that the police found Kanchania in the house of her father at Madhopur on the 11th and on information given by her Lalji was found in a kharour (field of high grass) in Madhopur about half a mile or a mile from that house.

I do not think that there is any reason for doubting that the deceased Abdul came with Lalji from Dinajpur where they had been working together and that he was last seen in his usual health at Shakra station about 11 a.m. on the 9th November.

The " man " on the bank of which the blood was found is on the way from Shakra station to Madhopur. It is on the boundary between mauzas Baikutpur and Salaha and is about one mile from the house of Kanchania's father. It is 6 or 7 miles from Shakra and 2 or 3 miles from Titra where the appellant says he halted for a little time with Abdul. There are no houses anywhere near. The blood on the ground has by analysis been found to be human.

The witnesses Adhin and Hitan who next saw Abdul live in Salaha. Those who came afterwards live either in Salaha or Baikutpur or Madhopur.

Girdhari and Anjor, the two Dinajpur witnesses, identified as Lalji's the two nets found in the bundle which was discovered near the blood patches on the bank of the man. It may be said that one cannot rely on this identification as there do not appear to be any special marks but on the other hand the accused was originally a fisherman by caste and would be expected to know how to make nets and there is nothing to show that the two Dinajpur witnesses are deposing falsely. Girdhari and Anjor also establish that the gold coin handed over to the police on the 11th by Kanchania belonged to Abdul. It is an old Badshahi coin and not likely to be easily mistaken. Girdhari deposes that Abdul told him

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that he had bought it from a man called Kalhu Nonia for Rs. 26 and that he wanted to sell it; also that he had bought it to have it threaded to wear round his neck. Anjor also identifies the coin. The man Kalhu Nonia from whom the coin is alleged to have been bought has not been found.

With regard to the hasua found in the "man" on the 11th both Girdhari and Anjor identify it as the appellant's. They say that, although it is an ordinary hasua, they recognize it by the handle and by the blade and that Lalji used to cut bamboos with it in Dinajpur. It is a heavy weapon and capable of causing the injuries from which Abdul died.

These injuries were five severe wounds on the head and two slight wounds on the right shoulder. The Civil Surgeon deposes that death was due to shock and hæmorrhage caused by the wounds, especially those which caused the fracture of the skull.

Except the statement of the deceased which is alleged to have been recorded by the President Panch Ramphal Tiwari there is nothing to show where the deceased lived. In this statement it is recorded that he stated that his home was at Madhbalia, thana Masrakh, District Chapra. If that is correct then Shakra was not the station where Abdul would in the ordinary course have alighted and there is no reason why he should have gone to Muzaffarpur. It will be remembered that the appellant in his statement before the Magistrate on the 13th November said that he last saw Abdul in Titra when Abdul said that he was going to Muzaffarpur. I think this statement is only partially correct and that Abdul was with him up to the time of the assault. There is no evidence to show where the appellant spent the night of the 9th and I think the prosecution might with advantage have called Kanchania even though she is the appellant's wife. The appellant stated in his statement before the committing Magistrate on the 22nd December 1926 that he went to Sirtaj Singh on the 10th. This man might also with advantage

have been called and so also Ramdhani, the father of Kanchania. If the prosecution did not consider that these witnesses could be relied upon to speak the truth, they should have asked the court to examine them and the witnesses could have been cross-examined by both sides.

The trial was also defective in another respect. I find that the inquest report which the Writer Head Constable drew up immediately on arrival at the bathan of Hitan Missir states that the name of the deceased was not known. As the evidence given in court is that before he died the deceased gave his name, his father's name and his address to the President Punch, the Writer Head Constable should have been asked the reason for the omission in the inquest report. He should also have been asked why, if it was known then that Lalji was the man who had committed the murder, no attempt was made to arrest him on that day. The Writer Head Constable appears to have been very active in examining witnesses in the neighbouring mauzas for he deposes that he did not return to Muzaffarpur till midnight. The prosecution should also have given evidence as to when the Dinajpur witnesses were examined for the first time by the police so as to show that the dying declaration alleged to have been made by Abdul could not have been fabricated to accord with any information obtained from these witnesses.

The above omissions on the part of the prosecution have thrown considerable doubt upon the genuineness of the dying declaration made by the deceased and the learned Judge has not relied upon any of them; but I think there is internal evidence to show that the witnesses who depose to them are not intentionally giving false evidence. In the first place none of them are men of the appellant's caste. It is contended that the appellant had to leave his village because he had become a Dusadh and had formed an intrigue with Kanchania; but that did not affect men like Adhin Gope, Hitan Missir,

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Chauhuddi Gope, Dwarka Gope, Pirthi Kandu, Jag Lal Koeri, Bishundeo Missir, Nabu chaukidar (a Mussulman) and the President Panch, Ramphal Tiwari.

Adhin and Hitan who were the first to question the deceased, depose that Lalji's name was mentioned then; but Chauhuddi chaukidar does not support this and in his information at the police station he does not mention Lalji at all but merely states that the deceased had said that he had been attacked by his companion who had snatched away his necklace. The learned Judge has explained to the jury and the assessors that probably Adhin and Hitan were speaking from inferences drawn from facts subsequently ascertained and were actuated by a mistaken zeal in the cause of public justice.

We know that Chauhuddi was at the thana at 7 o'clock in the morning of the 10th so that he must have left home at the latest about 3 o'clock. He says in his first information that the President gave him the report at 11 p.m.; but he must have got it earlier because the President deposes that the second statement was made about half an hour after the first and in this document the President writes that it was recorded after the chaukidar had left. Abdul died after the President came home. There is no evidence as to the hour. Nabu chaukidar deposes that he was left in charge and that Abdul died soon after the President left.

The medical evidence shows that it was not impossible that the deceased might have lived for three or four hours; but that no definite opinion can be given.

I think the evidence shows that the first statement was recorded about 10 O'clock and the second about half past ten and that Chauhuddi chaukidar had by then already left with the first report. It is clear from the first information that Chauhuddi must have left for the thana before the man died. The

chaukidar was not asked when he arrived at the thana. The first information states that it was recorded as soon as the chaukidar arrived, but it appears from the chaukidar's evidence that he must have arrived during the night or that he halted somewhere on the road. The chaukidar states that he left after the Panch went home; but this is, in my opinion, a mistake. I have no doubt that all that the deceased did say to those who came before the chaukidar left for the thana was that he had been attacked by his companion and that a gold haulduli was snatched from his neck. A "haulduli" is a necklace of stones and a gold haulduli is obviously a misnomer for a gold coin worn as a locket; but the chaukidar had to make the best of what the deceased said and it was either his mistake or the deceased's. The chaukidar also states that by his conversation the deceased appeared to be a man from another part, but that he could not state his name and address. I think the chaukidar spoke the truth in his information to the police and that up to that time Lalji's name had not been mentioned. This is further corroborated by the written report sent by the President in which the President says merely that the wounded man could not give any satisfactory reply to his questions.

The second report written by the President has been attacked by the defence as a pure fabrication. This report shows that the deceased gave his name as Abdul and his father's name as Somer Ali, and his home as mauza Madhbalia, thana Masrakh, district Chapra, and that the deceased had been possessed of Rs. 62 and one mohur worth Rs. 26 and that his assailant was one Lalji whose house was in the district of Muzaffarpur. I cannot believe that a man of the President's standing and so many disinterested witnesses could have deliberately assisted in the fabrication of a piece of false evidence such as this. The President's explanation is that the man was given a drink of water after the chaukidar left and

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then revived sufficiently to give these details. If these details had not been given I do not see why Lalji was arrested at all on the 11th. It certainly seems to be a fact that on the 10th the President told his chaukidars to keep Kanchania under observation and if he knew nothing then about Lalji's connection with the deceased his action cannot be explained. Further, the Writer Head Constable himself deposes that he got the second report at 10 o'clock in the morning on arrival at the village. The value of the gold mohur is put down as Rs. 26 in the second report and it is extremely unlikely that the President put down this figure out of his own head; the same applies to the figure Rs. 62 which was given as the amount which Abdul brought from Dinajpur. The price of the gold mohur was not known to any one except the two Dinajpur witnesses and they appear to have been examined by the police long afterwards. It is also difficult to see how the President got the deceased's father's name and address unless it was given by the deceased himself. There is a village called Majhaulia but no village called Madhbalia and Majhaulia is now no longer in thana Mashrak. If the President had fabricated the document he would not have made a mistake about the name of the village and the thana. The circumstances show that the information given in the second dying declaration was obtained from the deceased.

There is of course the fact that the Writer Head Constable did not put down the name of the deceased in the inquest report and also the fact that he did not arrest Lalji on that day. In the absence of any explanation the only conjecture that I can make is that he did not trust the accuracy of the second report and of the witnesses who supported it.

In my opinion the learned Judge has erred on the side of over-caution and both the reports drawn up by the President are genuine.

But apart from the statements made by the deceased the circumstantial evidence is quite sufficient to support the conviction.

The deceased came with the appellant as far as Shakra and started from that station in his company. He is not seen again but his hasua is found in the "man" one mile from the house of the appellant's father-in-law. The appellant's bundle is found on the bank of the "man" and the earth close by is stained with human blood. Immediately upon arrest on the 11th the appellant makes a statement in consequence of which the deceased's gold coin is found in the possession of the appellant's wife and is given up to the police at his request and the accused's hasua is found in the "man". Also the appellant gives no account of where he went after he parted company with the deceased and where he slept on the night of the 9th; and his statement that he left the deceased at Titra must be false.

The learned Vakil for the appellant has attacked the evidence regarding the finding of the hasua. He says that Hira Dusadh, the man who got into the water and found the weapon, is at enmity with the appellant and put the weapon there. It is suggested that Hira is the headman of the Dusadhs of Madhopur and bears a grudge against the appellant for having misconducted himself with Kanchania. There is no evidence to support this suggestion. The evidence couclusively shows that when he was asked by the Sub-Inspector where the weapon was the appellant took the Sub-Inspector to the "man" and the weapon was found after some delay. The learned Vakil objects to the admissibility of that part of the statement which refers to the weapon as the one used for attacking the deceased; but in my opinion section 27 of the Indian Evidence Act is quite clear upon this point. It is contended on the authority of some cases that the prosecution is only entitled to prove that the accused in answer to a certain question gave information which led to the discovery of the weapon;

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but common sense requires that the discovery should be connected with and be relevant to the investigation. The omission to connect the weapon with the offence would render the provisions of section 27 of the Indian Evidence Act wholly nugatory. The whole confession of a prisoner in police custody cannot of course go in but where the confession includes a statement that a weapon was used for committing the offence charged that part of the confession can certainly go in if it leads to the discovery of the weapon. The most recent case on this point is *In re Sogiamuthu Padayachi* (1).

For the same reason evidence could have been given to show that the appellant stated immediately upon arrest that he had given the deceased's gold mohur and money to his wife. But as the record stands at present all we have got is that the appellant made a certain statement and that in consequence of that statement the gold mohur and Rs. 39 were given up by Kanchania.

But even on the record as it stands the discovery of the gold coin in Kanchania's possession taken with the other evidence in the case conclusively shows that the appellant was the person who caused the death of the deceased.

The learned Vakil has also taken a point that it was not permissible to the Crown to have the statement of the appellant recorded under section 164 of the Code of Criminal Procedure on the 13th as the statement was not a confession. The answer to this is that the accused was sent up to have his confession recorded and that he gave the police to understand that he would make a confession. After a night in jail he changed his mind, and when he appeared before the Magistrate it was open to him to say that he would make no statement; but he did not follow this course; he was warned and notwith-

(1) (1926) 93 Ind. Cas. 42.

standing that he proceeded to make a statement. This statement is certainly evidence of conduct.

A further legal point is taken with regard to the dying declarations.

It is contended that so far as the charges for the offences under sections 392 and 397 are concerned the dying declarations are not admissible under section 32(*1*) of the Indian Evidence Act inasmuch as the cause of the deceased's death does not come in question in the trial of those charges. It is contended that on this point the Indian law is the same as the English law and that a dying declaration as to the cause of the death is only admissible when the causing of the death is the subject of the charge. I cannot agree with this view. The words of section 32 are very wide and it is not necessary that the charge should be one of homicide. The evidence as to the cause of death was relevant to the charge of robbery and consequently the cause of death that is to say the assault committed by the appellant came in question in the trial. Before the Indian Evidence Act was enacted it was held in *Queen* v. *Bissorunjun Mookerjee* (1) that there was no necessity in India for following the very narrow rule of English law and that a dying declaration could be used as evidence in a charge of rape. One of the illustrations to section 32 of the present Indian Evidence Act expressly provides for such evidence where the charge is not culpable homicide but rape.

Moreover, in this case the dying declaration was also admissible under section 8 of the Indian Evidence Act as a part of the res gestae. A statement made by the deceased immediately after the robbery regarding the robbery and also regarding the assault committed in the course of the robbery was admissible though the person who made it cannot be called to depose to it on oath. The truth in sections 8 and 32 of the Indian Evidence Act may overlap in some cases,

(1) (1866) 6 W. R. (Cr.) 75.

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but they provide for different and distinct conditions. A statement for instance which would not be admissible under section 8 may be admissible under section 32.

The result, therefore, is that in my opinion the assessors and the jury were right in the view which they took of the guilt of the appellant. The appellant is guilty both of robbery and murder. Having regard to the injuries there can be no doubt that it was his intention to cause such injuries as would in the ordinary course cause death. His motive was robbery and he appears to have attacked his victim from behind without giving him a chance of protecting himself. I agree with the learned Sessions Judge that the sentence of death is the only possible sentence and the order of the learned Judge must therefore be confirmed.

The conviction for the offences under sections 392 and 397 are also affirmed but it is unnecessary to pass any separate sentence for these offences.

The appeal is dismissed.

WORT, J.—I agree.

Appeal dismissed.

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KARI GOPE

v.

MAHANTH MANMOHAN DAS.*

Penal Code, 1860 (*Act XLV of* 1860), *sections* 193 *and* 199—*false affidavit by identifier, whether deponent punishable—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XIX—service of summons, proof of by identifier's affidavit.*

Under Order XIX of the Code of Civil Procedure, 1908, and under the General Rules and Circular Orders of the

*Criminal Appeal no. 55 of 1927, against an order dated the 6th February, 1927, passed by H. B. Beevor, Esq., Sessions Judge of Darbhanga.

Patna High Court, the court issuing a summons has authority to receive an affidavit from an identifier as evidence of the fact of service of summons.

Held, that a false statement in an affidavit by an identifier is punishable under section 193 of the Penal Code if the intention of the deponent was that it should be used in a judicial proceeding.

Held, further, that the making of a false affidavit by an identifier is also punishable under section 199 which is wider than section 192 and applies to any affidavit which the court is bound or authorised to receive.

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

L. K. Jha and *K. N. Jha*, for the appellant.

C. M. Agarwala, Assistant Government Advocate (with him *R. K. Jha*), for the Crown.

9th May, 1927.

MULLICK, A. C. J.—This is an appeal under section 476B of the Code of Criminal Procedure. The appellant Kari Gope was an applicant in a proceeding under Act XIV of 1920 in which the respondent Mahanth Manmohan Das was summoned to appear before the Court on the 13th November, 1926.

It is alleged by the appellant that on the 11th November, 1926, summons was duly served upon the respondent and was refused by him. The respondent denies service and says that he was not at home and that the affidavit of the peon as well as the affidavit of the identifier were intentionally false.

The learned District Judge has after inquiry found that the appellant who was the identifier intentionally made a false affidavit and he has filed a complaint for his prosecution for an offence under section 193 of the Indian Penal Code.

There is evidence to show that the affidavit made by the appellant was false. All the witnesses for the prosecution were not examined by the court and it is not necessary at this stage to say more than this that there is a prima facie case which must be investigated.

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There is, however, a point of law taken which requires notice. It is urged that the affidavit of the identifier was not required for the purpose of proving service of summons upon the defendant, that it was a voluntary declaration and that no prosecution for giving false evidence can be based upon it. Anything that we may say will not debar the appellant from raising the point at his trial, and, therefore, it will be sufficient here to say that our present view is that the prosecution for offences under sections 193 and 199 of the Indian Penal Code will lie. The affidavit was sworn before an officer competent to take affidavits and the appellant was bound to state the truth. It may be that the peon's affidavit was sufficient and that no affidavit was required from an identifier; but if the affidavit was intended to be used in a judicial proceeding, then the offence of fabicating false evidence within the meaning of section 193 was complete. It makes no difference that the affidavit was voluntary. Voluntary statements made without any intention that the statement may appear in evidence in a judicial proceeding are not offences; so it has been held that a verification in a document not requiring to be verified is no offence; also that false statements made in an application for rehearing of an ex parte decree or for a new trial in a small cause court were not criminally punishable. The statements in themselves were not evidence and acquired no extra weight by being verified.

The affidavit in question is also punishable under section 199. It is clear that the court was authorised under the Circular Orders of the High Court and Order XIX of the Civil Procedure Code to receive an affidavit from an identifier as evidence of the fact of service of summons. Section 199 is wider than section 192 and applies to every kind of affidavit which the court is bound or authorised to receive. The Civil Procedure Code and the Circular Orders of the High Court authorise the court in this instance to receive the affidavit in question.

The result, therefore, is that the appeal will be dismissed and the proceedings will be continued from the stage at which they were left.

WORT, J.—I agree and have nothing to add.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mullick, A.C.J., and Wort, J.

MAHANTH BABA BADRI DAS

v.

KING-EMPEROR.*

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May, 13.

Police Act, 1861 (*Act V of* 1861), *sections* 30, 30A *and* 32—*Licence for procession subject to conditions—breach of conditions by processionists—liability of licensee.*

Where an application for a licence to take a procession through the town of Patna was granted subject to the condition that no member of the procession carried a lathi or sword,

Held, that it was the duty of the licensee to see not only that no member of the procession was carrying a lathi at the time when the procession started but also that no one subsequently joined the procession with a lathi.

The mere fact that section 30A confers upon certain officers the power to stop a procession which violates the condition of a licence does not relieve the licensee from his duty of strictly complying with the terms of the licence.

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

S. Sinha (with him *S. P. Varma* and *D. P. Varma*), for the petitioner.

Sultan Ahmed, Government Advocate, for the Crown.

MULLICK, A. C. J.—The petitioner has been sentenced to a fine of Rs. 100 under section 32 of

*Criminal Revision no. 196 of 1927, against an order of G. E. Owen, Esq., I.C.S., District Magistrate of Patna, dated the 2nd February, 1927, confirming an order of Mr. Fazle Rahman, 2nd Class Magistrate, Patna City, dated the 14th December, 1926.

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the Police Act (Act V of 1861). It is admitted that the petitioner took out a license for a procession to proceed from Bakarganj to Patna City, one of the conditions of which was that no member of it was to carry a lathi or a sword. The Inspector of Police joined the procession at Muradpur which is some distance from the starting point and found that some of its members were carrying swords and doing lathi play. He asked the petitioner to stop the lathi play but the petitioner made some unsatisfactory reply in the vernacular of which the English translation in the record is " they would play ".

It is urged on behalf of the petitioner that he was only responsible for seeing that no member of the procession carried a lathi at the time the procession started and that he was not called upon to control those who joined it on the way.

In my opinion that is not a correct view of the law. The object of a license under the Police Act is to ensure the preservation of public order and clearly the licensee must undertake the duty of maintaining order throughout the course of the procession. He takes the risk, as he must do, of persons joining the procession on the way and of circumstances arising which will require him to compel them to conform to the terms of the license. He cannot be heard to say that they joined without his leave and authority and that he was in no way responsible for them. If they get out of hand he should break up the procession or ask the assistance of the police.

But here the petitioner declined to assist the police and merely said that the lathi play would go on. In my opinion the inference is irresistible that the lathi players were members of the petitioner's assembly and that they were contravening the terms of the license with his permission if not under his direct orders. The conviction and sentence will therefore be affirmed and this application dismissed.

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The police might no doubt have declared the procession to be an unlawful assembly and called upon it to disperse but because they did not exercise that power the petitioner is not relieved from his duty.

WORT, J.—I agree. It has been argued that by reason of the provisions of section 30A of the Police Act, which gives Magistrates, District Superintendents and Inspectors of Police power to stop any procession which violates the conditions of a license. the licensee is thereby excused from controlling the persons who may have joined the procession and over whom the licensee states he has no control. This, however, is clearly fallacious. The section referred to gives the power to the officers mentioned to stop a procession in spite of the procession having been licensed, and thus gives them a power which they otherwise would not have in law as already indicated. This does not excuse a licensee from strictly complying with the conditions of his license, and, in the view which I take of the facts of this case and of the law, the conditions of the license were broken and the licensee was, therefore, properly convicted.

APPELLATE CIVIL.

Before Ross and Kulwant Sahay, JJ.

JAGDIP SINGH
v.
FIRANGI SINGH.*

1927.

May, 18.

Stamp Act, 1899 (*Act II of* 1899), *section* 36—*document admitted after objection, whether admissibility can be challenged subsequently.*

Section 36 of the Stamp Act 1899 which enacts—

Where an instrument has been admitted in evidence such admission shall not, except as provided in section 61, be called in question at any

*Appeal from Original Decree no. 227 of 1924, from a decision of Babu Ashutosh Mukerjee, Subordinate Judge of Patna, dated the 27th August, 1924.

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stage of the same suit or proceeding on the ground that the instrument has not been duly stamped,

applies whether the document was admitted with or without objection.

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

N. C. Sinha (with him *N. C. Ghosh*) for the appellants.

S. M. Mullick (with him *Md. Hasan Jan* and *S. Deyal*) for the respondents.

KULWANT SAHAY, J.—The suit out of which the present appeal arises was instituted by the plaintiffs appellants for partition of joint family properties, their share being 8 annas.

The defence of the defendants was that there had been a previous partition of all the joint family properties in Assin 1329 and a fresh partition could not be effected. The learned Subordinate Judge has given effect to the contention of the defendants and has dismissed the suit.

The learned Advocate for the appellants does not very properly contest the findings of the Subordinate Judge on the merits: in fact the evidence seems to be overwhelming in support of the findings of fact arrived at by the learned Subordinate Judge. The learned Advocate has, however, taken an objection to the effect that Exhibit B which purports to be a list showing the allotments of the properties to the plaintiffs and the defendants is either a deed of partition or an award. If it is a deed of partition, the document is invalid for want of registration; if it is an award, it is invalid for want of stamp duty, and in either case the document is not admissible in evidence, and if this document is excluded no oral evidence is admissible.

Now looking at the document, Exhibit B, it is clear that it is not a deed of partition, it is not a document executed by anybody, it is not signed by the parties to the partition, and it can in no sense be

treated as a deed of partition. It may be treated as an award of the arbitrators who effected the partition and it ought to have been stamped with the proper stamp duty. But the document has been admitted by the learned Subordinate Judge in evidence and section 36 of the Stamp Act provides that where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

It is contended that objection to the admissibility of the document was taken before the learned Subordinate Judge and section 36 would apply only to cases where a document is admitted without objection. There seems to be no justification for this contention. Section 36 is quite clear that once a document is admitted in evidence, the admission of such a document cannot be questioned whether the document was admitted with objection or without objection. It is, therefore, too late now for the learned Advocate for the appellant to contend that the document cannot be used as evidence in this appeal.

The learned Advocate for the appellant then refers to a passage in the judgment of the learned Subordinate Judge where it is stated that the defendants stated before him that they were ready to take for themselves the share given to the plaintiffs and that the plaintiffs were at liberty to take the shares given to them and he says that such exchange ought to be made now. The offer was made to them in the court below and the respondents refused to accept the offer. Now it is too late for them to compel the defendants to exchange the shares.

There is no substance in this appeal and it must be dismissed with costs.

Ross, J.—I agree.

Appeal dismissed.

Rel. 29 Pat. 243.

APPELLATE CRIMINAL.

Before Mullick, A.C.J., and Wort, J.

1927.

May, 16, 17, 18, 19.

KING-EMPEROR

v.

GHULAM NABI.*

Arms Act, 1878 (*Act XI of* 1878), *sections* 19(*a*) *and* (*f*)—"*Proceedings*", *meaning of—Abetment, conviction for, on charge of substantive offence.*

The mere submission of a charge sheet by the police does not amount to the institution of proceedings within the meaning of section 29 of the Arms Act, 1878.

"Proceedings" in section 29 means legal proceedings in court and not searches or arrests or investigations made by the police in the exercise of the power conferred upon them by the Code of Criminal Procedure, 1898, or other laws.

Emperor v. *Kutru* (1), referred to.

Semble, that a person charged with a substantive offence may, in a proper case, be convicted of abetment.

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

The three respondents were charged under section 19(*a*) and (*f*) of the Arms Act and were convicted by the City Magistrate of Patna. On appeal they were acquitted by the Sessions Judge. The Local Government appealed under section 417 of the Code of Criminal Procedure.

The case for the prosecution was that the Criminal Investigation Department having received information that there was a traffic in arms in Patna City, deputed Sub-inspector Lal and two other officers to make confidential enquiries as to the truth of the information. The officers were instructed to assume the characters of opium and cocaine smugglers and to endeavour to obtain the confidence of the suspects.

*Government Appeal no. 3 of 1927, against a decision of A. C. Davis, Esq., Sessions Judge of Patna, dated the 6th October, 1926, overruling a decision of Babu Ranjit Prasad, City Magistrate of Patna, dated the 20th August, 1926.

(1) (1925) I. L. R. 47 All. 575.

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The department supplied them with opium to enable them to sustain the parts they were to play.

In the course of the inquiry it was ascertained that an unlicensed revolver was in the possession of Rasuli, a shawl merchant and father of Nabi, one of the respondents. Sub-inspector Lal was instructed to negotiate for the purchase of the weapon, and to endeavour to obtain temporary possession of it for the inspection of his superior officers. On the 24th June, 1925, Sub-inspector Lal requested Rasuli to allow him to take the revolver to show to his companion for approval. Rasuli was persuaded by Ghulam Husain to hand the weapon to the sub-inspector who took it to his official superior. The weapon was photographed and returned to Rasuli. Subsequently the sub-inspector offered to purchase the revolver from Nabi, the son of Rasuli, the latter being away. Nabi said that he could not sell it until its price had been settled by Ghulam Husain. About the 20th June the latter came to Patna again from Gidhour, where he ordinarily resided, and he fixed the price at Rs. 130 and told Sub-inspector Lal that he could take delivery of the weapon any day he liked.

On the 27th June the C.I.D. advanced to Sub-inspector Lal Rs. 130 with which to purchase the revolver. Sub-inspector Lal made a declaration on oath before the City Magistrate that he had received the notes for the purpose of purchasing the revolver, and the numbers of the notes were recorded by the Magistrate.

On the night of the 28th June the sub-inspectors went to the shop of Nabi to complete the purchase. The notes were handed over to him and he handed them over to his brother-in-law, Md. Hussain, one of the respondents, a boy 14 years of age. The revolver was then brought from a room by Md. Hussain and given to Nabi who tendered it to Sub-inspector Lal. The latter, without accepting delivery of the weapon, engaged Nabi in conversation and both of them, together with one of Sub-inspector Lal's companions,

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sat on a charpai just outside the shop. In the meanwhile Sub-inspector Lal's other companion had signalled to a constable who had been stationed a short distance from the shop and the constable had passed on the signal to a raiding party concealed in the neighbouring police station.

The raiding party arrived and found on the charpai Nabi, the two sub-inspectors, the revolver, two small packets of cocaine and an umbrella. On the person of Md. Hussain were found the notes for Rs. 130. Nabi at once said to the officer commanding the raiding party that the Rs. 130 was the price of a shawl which he had sold. This was also the defence subsequently set out in the written statement filed by Nabi in the trial court and in the memorandum of appeal to the Sessions Judge. A witness for the defence deposed that on the 25th June he had seen two persons purchasing a pair of shawls at the shop of Nabi for Rs. 135; that Rs. 5 had been paid as earnest money; that the purchasers had said they would come with the balance of the price in a day or two and take the shawls. No account books were proved in support of this alleged sale.

Sanction for the prosecution of Nabi and Md. Hussain was obtained from the District Magistrate and a complaint was filed against Nabi and Md. Hussain on the 30th June in the court of the City Magistrate. The latter recorded the statement of the complainant Sub-inspector Lal and directed the police to investigate and report. During the investigation the house of Ghulam Husain at Gidhour was searched and he was arrested. The police, however, liberated him on bail to appear before the magistrate on the 17th. On the 13th August a charge sheet was submitted against Nabi and Md. Hussain and Ghulam Husain. In the order sheet the magistrate recorded the following order:

"Charge sheet received for 17-8-1925. Put up on the date fixed."

On the 14th an application for sanction to prosecute Ghulam Husain was made to the District

Magistrate and the sanction was filed in court on the 17th. The examination of the witnesses then commenced. During the trial the prosecution led evidence to prove that the sub-inspectors had posed as cocaine and opium smugglers; and that sub-inspector Lal had received assistance from Rasuli and Ghulam Husain in the Punjab which had enabled him to track down unlicensed revolvers in the Punjab and Calcutta. The Sub-inspector declined to answer questions in cross-examination relating to his cocaine dealings with the accused persons or to the transactions in the Punjab and Calcutta. The court upheld his refusal.

All three accused persons were charged under clause (*f*) of section 19 of the Arms Act with being in possession of the revolver on the 28th June, 1925, and, under clause (*a*), with having sold the revolver to Sub-inspector Lal on that date. The trial culminated in the conviction of all three accused persons on both charges. In appeal the Sessions Judge was of opinion that from the finding of the two packets of cocaine on the charpai, it was a fair inference that the Rs. 130 found on Md. Hussain represented the price of cocaine bought by the sub-inspectors from the accused persons and that the defence had been prejudiced by the action of the magistrate in disallowing the questions put to sub-inspector Lal in cross-examination as to the transactions in cocaine and the transactions in the Punjab and Calcutta. He held that the revolver had been planted on the charpai by the sub-inspectors and acquitted the accused persons.

C. M. Agarwala (Assistant Government Advocate) for the Crown :

Although there was no justification for shutting out cross-examination relating to the cocaine transactions the accused have not been prejudiced. The questions merely related to the statements of the sub-inspectors that they posed as smugglers. The Sessions Judge was apparently under the impression

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that the object of the questions was to elicit information on which to base a defence that the Rs. 130 represented the price of cocaine. This was never the defence of the accused persons themselves. The entire reasoning on which the appellate judgment is based is vitiated by this mistake as to the nature of the defence.

The evidence shows that the accused persons were in joint control of the weapon. It was in Nabi's possession but he could not sell it without the consent of Ghulam Husain. It was finally actually produced by Md. Hussain at the direction of Nabi. They are all, therefore, guilty under clause (*f*). Similarly they all took part at one stage or another in the incidents which terminated in the sale and are all guilty under clause (*a*).

Fazl Ali, for Nabi and Ghulam Husain: The accused have not had a fair trial as on material points cross-examination has been shut out. The Sessions Judge was right in acquitting them if he found that the transaction of the 28th was a transaction in cocaine and not in arms.

So far as Ghulam Husain is concerned there was no warrant for his arrest and the sanction for his prosecution was obtained too late to validate the trial. Section 29 of the Arms Act bars the institution of proceedings under section 19 (*f*) until sanction has been obtained. His arrest before sanction was therefore illegal.

[Mullick, A.C.J.: Does not the expression "no proceedings shall be instituted" refer to the institution of proceedings in court?]

No. The section intends to bar any kind of proceedings until sanction is obtained. In any case proceedings were instituted in court when the charge-sheet was submitted which was before sanction was obtained.

The evidence shows that Ghulam Husain was neither in possession or control of the revolver, and

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admittedly he was not even present on the 28th when the weapon is alleged to have been sold.

[Mullick, A.C.J.: I suppose he was not charged with abetting the sale?].

No, and, therefore, he cannot be convicted of abetment.

W. H. Akbari, for Md. Hussain: My client is a mere boy and was living in the house of Nabi as a dependent. Even if he did fetch the weapon from the room as directed by his brother-in-law this does not render him liable under either clause (*a*) or (*f*).

Agarwala in reply: The offences under clauses (*a*) and (*f*) of section 19 are cognizable offences and, therefore, the police could arrest without warrants. In any case section 29 refers to the institution of proceedings in court [See *Emperor* v. *Kutru* (1)].

[Mullick, A.C.J.: That case does not help much as the charge sheet was received by the magistrate on the 13th and sanction was not obtained until the 17th.]

But the magistrate did not take cognizance of the offence on the 13th. The police had allowed Ghulam Husain out on bail and directed him to appear on the 17th. The magistrate by his order of the 13th merely meant that he would consider on the 17th whether he should proceed against the persons named in the charge sheet or not. On the 17th he apparently decided to proceed against them and hence he commenced the examination of the witness. By that time the sanction had been filed.

If the court takes the view that Ghulam Husain was not a party to the sale it can convict of abetment [See *A. V. Joseph* v. *King-Emperor* (2)].

[Mullick, A. C. J.: There are authorities against you.]

Yes, but the principle is clear. If the allegations which the accused has to meet on the substantive

(1) (1925) I. L. R. 47 All. 575 (577). (2) (1925) I. L. R. 3 Rang. 11.

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charge are the very facts which constitute abetment, then he is not prejudiced by a conviction for the lesser offence. It would of course be different if the facts constituting the abetment differed from the facts alleged to constitute the substantive offence.

The distinction has been explained in *Yeditha Subbaya* v. *Emperor* (1).

With regard to Md. Hussain it can hardly be said that he was an innocent agent when he took part in a transaction by which a revolver worth a few rupees changed hands for Rs. 130.

19th May, 1927.

MULLICK, A.C.J. (after stating the facts proceeded as follows): The question is whether the learned Sessions Judge's findings are so clearly wrong that our interference is necessary in appeal.

In an appeal by Government from an acquittal the accused starts with a double presumption in his favour. Firstly there is the rule that it is for the prosecution to make out their case and that until they do so beyond all reasonable doubt the accused must be presumed to be innocent and, secondly, that the accused having succeeded in securing an acquittal from a court a superior court will not interfere until the Crown shew conclusively that the inference of guilt is irresistible.

We have been taken at great length through the evidence in this case and we think that having regard to the position which the police officers held at that time and their standing in the service and the punishment and disgrace which was bound to follow in the event of detection it is impossible to hold that they deliberately palmed off a revolver on two innocent men. The trial court appears to have been greatly influenced by the statements made by Brij Behari Lal of his successes in the Punjab and in Calcutta and the learned Magistrate appears to have assumed that Brij Behari with the assistance of Ghulam Nabi and Ghulam Husain actually bought other unlicenced

(1) (1912) 23 Mad. L. J. 722.

firearms there but the evidence shews no such thing and is extremely vague and flimsy upon this point. The learned Magistrate thought that the evidence such as it is was admissible under sections 14 and 15 of the Indian Evidence Act. We agree with the learned Sessions Judge that the learned Magistrate was under a total misconception of the law of evidence. There was no question here whether the firearm (Exhibit 1) was found on the charpai of Ghulam Nabi by accident. There might have been a question whether Ghulam Nabi knew that the firearm was smuggled and whether he intentionally sold a smuggled firearm but that issue was not clearly raised. Therefore to admit evidence of similar transactions if indeed there had been such evidence was altogether irregular and illegal. As a matter of fact there was no evidence at all of similar transactions and the question of admissibility does not really arise.

Then the learned Sessions Judge appears to have been strongly influenced by another obvious irregularity. The learned Magistrate allowed the officers of the Criminal Investigation Department to plead privilege in the matter of the alleged transactions in opium and cocaine between them on the one hand and the accused on the other from April 1924 up to March 1925. It is quite clear that as it was the intention of the prosecution to prove that the police officers had gained the confidence of the accused the defence were entitled to know what were the particular circumstances under which that relationship was established and if necessary to obtain details of the various alleged transactions in illicit cocaine and opium. There was a statement in the examination-in-chief of Brij Behari that the accused had purchased opium and cocaine from him but when the defence attempted to explore this allegation the court immediately stopped further cross-examination on the ground of privilege. It is quite clear that there was no privilege at all and the evidence was wrongly excluded. But fortunately in this case the exclusion has not made any

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appreciable difference. The purpose of the cross-examination was to shew that the police officers were not on confidential terms with the accused but to pursue that line became useless as soon as it was proved that the letters Exhibits 1, 2 and 3 were obtained by Brij Behari from Ghulam Husain in the winter of 1924.

It is also to be noticed that at no period was it the defence of the accused that the money which was found on Muhammad Hussain's person was paid by the detectives as the price for a quantity of illicit cocaine. The learned Judge appears to have made a case in this respect which was not the case of the accused. The cross-examination with regard to previous sales would have been material if that had been the defence but in the circumstances the exclusion of the evidence did not prejudice the accused.

Finally the learned Sessions Judge has also been much influenced by the fact that the City Magistrate after having taken the declaration of the 27th June, 1925, regarding the notes proceeded to try the case himself. It does appear from the copy of the order sheet which has been produced before us that the City Magistrate had some knowledge of the case while it was under investigation and perhaps it would have been better if he had declined to try the case. But we do not think that there has been such prejudice to the accused that we must either acquit them or order a retrial. It is obvious that the writing containing the numbers of the notes was not admissible by itself. The document cannot prove itself. But in this case evidence has been given by Brij Behari Lal that the notes which were found in Muhammad Hussain's pocket were the notes which he received from the Criminal Investigation Department and which he shewed to the City Magistrate on the 27th June and the numbers of which were taken down by the City Magistrate in the declaration which has been objected to. This evidence is quite sufficient if believed to

prove that the notes found in Muhammad Hussain's pocket at the arrest of the 28th June were the notes which the Sub-inspector had obtained from the Department on the 27th.

* * * * *

It is clear that upon this evidence if believed the conviction of Ghulam Nabi for the possession of an unlicensed revolver and its sale is fully justified.

With regard to Muhammad Hussain the question arises whether he was merely a servant. He appears to be only 14 years of age and to have been living in the house of Ghulam Nabi as a dependent member of the family. It is true that he took the notes and put them in his pocket and that he was standing close by when the police arrested Ghulam Nabi but having regard to his age and the fact that he did not take part in any of the previous negotiations I think he should be given the benefit of the doubt and that he should be acquitted.

With regard to Ghulam Nabi there is one more fact which requires notice. Immediately on arrest he said that the two men, pointing to the detectives, had come to him to purchase a shawl. If it had been proved at the trial that there was some substance in this defence and that the two Sub-inspectors either had had previous delaings in shawls with the accused or had arranged to buy a shawl on that night the possession of the 13 ten rupee notes by Muhammad Hussain would have been explained. But unfortunately the accused have given no satisfactory evidence of any contract of this kind. They say that they are shawl merchants on a big scale in Patna. The learned trial court says that they only sell shawls on commission but in any event they have account books and a certian number of account books were actually seized by the police. A sum of Rs. 3,000 was also found in their cash box so that it is clear that they are men of business habits and that the sale of a shawl for Rs. 130 is not likely to escape entry in their account books. No such

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entry has been shewn nor has any attempt been made to tender the account books. Instead of this a witness, (defence witness no. 5) has been called to shew that he was present on the 26th June when two men whom he did not know arranged to buy a shawl from Ghulam Nabi and promised to come the next day. Another witness (no. 6) Muhammad Hussain has been called to shew that about a year earlier which would be sometime in May or June 1925 he saw two men come and buy a shawl for Rs. 130 out of which Rs. 5 had already been paid as earnest money and Rs. 125 was paid in the witness's presence. The learned City Magistrate has examined this evidence very carefully and I agree with the reasons given by him for distrusting it. There is the fact that the best evidence, namely, that of the account books has not been produced and in the absence of that evidence oral evidence of this kind is of very little value.

* * * * *

In my opinion the story of the prosecution with regard to the presence of Ghulam Rasul in the shop in Patna on the 25th March has not been shaken by the re-butting evidence given by the defence.

There remains the case of Ghulam Husain. The first objection taken with regard to it is that the sanction given by the District Magistrate on the 17th August, 1925, was bad. The facts are these:—The complaint of the 30th June, 1925, made by Brij Behari did not ask for any proceedings against Ghulam Husain. Ghulam Husain, however, was under arrest in connection with another case and the police appear to have continued their investigations against him in the matter of the sale of the revolver (Exhibit 1) along with the case against Ghulam Nabi and Muhammad Husain and on the 13th August they submitted a charge sheet in which they reported to the City Magistrate that the case was complete not only against Ghulam Nabi, and Muhammad Hussain but also against Ghulam Husain. They had no authority to prosecute Ghulam Husain without sanction but, in my

opinion, no proceeding within the meaning of section 29 of the Arms Act had been instituted against Ghulam Husain before the District Magistrate gave his sanction on the 17th August. On that date an application based upon the charge sheet of the 13th August was made by the police to the District Magistrate and he accorded formal sanction for the prosecution of Ghulam Husain. Although Ghulam Husain had been in custody in connection with another case and although the police had been investigating the case against him the first application by the police for proceedings against him in court was made on the 13th August and that application was not considered by the Magistrate until the 17th August on which date he assumed jurisdiction over Ghulam Husain and examined some evidence for the prosecution. In the meantime sanction had already been received from the District Magistrate, and I think that the provisions of section 29 of the Indian Arms Act were complied with. No judicial or legal proceedings had been taken against Ghulam Husain before the 17th. It is true that the police had been investigating the case against him but I think they were empowered to do this without the sanction of the District Magistrate. As in the case of a suit, a proceeding is instituted when for the first time the adjudication of a court of competent jurisdiction is sought. " Proceedings " in section 29 mean legal proceedings in court and not searches or arrests or investigations made by the police in exercise of the powers conferred upon them by the Criminal Procedure Code or any other law. In *Emperor* v. *Kutru* (1) the opinion was expressed that " proceeding instituted " in sections 29 and 30 of the Arms Act means legal proceedings taken in court.

Then as regards the merits of the case against Ghulam Husain it is to be observed that he is charged with possession and sale on the 28th June. Having regard to the fact that it was he who was on the most intimate terms with Rambarat, that it was he who

(1) (1925) I. L. R. 47 All. 575.

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MULLICK, A.C.J.

arranged for the delivery of the revolver on approval on the 25th March, and that it was he who settled the price between the 19th and the 23rd June the inference is irresistible that he had control over the revolver and was in joint possession of it on the 28th June. It is also quite clear that upon the evidence on the record a conviction for abetment under section 109 of the Indian Penal Code read with section 19 of the Indian Arms Act would be justifiable if by any chance the substantive charges failed.

In my opinion the evidence is quite sufficient to shew that both Ghulam Nabi and Ghulam Husain were in possession of the revolver in March and in June 1925 and that they sold the same to Brij Behari Lal.

Therefore the conviction of Ghulam Husain by the City Magistrate under section 19 of the Arms Act was, in my opinion, correct.

The result is that agreeing with the learned Sessions Judge we affirm the acquittal of Muhammad Hussain but disagreeing with him we set aside the acquittal of Ghulam Husain and Ghulam Nabi and restore the convictions entered by the City Magistrate and affirm the sentences passed by him.

WORT, J.—I agree.

APPELLATE CIVIL.

29 Oct. 1042.

Before Kulwant Sahay and Ross, JJ.

1927.

May, 20.

SOMAR SINGH

v.

DEONANDAN PRASAD SINGH.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 1, *Articles* 181 *and* 182—*final decree in a mortgage suit, application to enforce, whether is an application for execution—proper article applicable—preliminary decree, appeal from—final decree, execution of—terminus a quo—Article* 182(2) *meaning of.*

*Appeal from Original Order no. 168 of 1926, from an order of Babu Kamla Prasad, Subordinate Judge of Patna, dated the 17th May, 1926.

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An application for enforcing a final decree for sale in a mortgage suit is an application for execution and is governed by Article 182, and not by Article 181 of the Limitation Act, 1908.

Balwant Singh v. *Budh Singh* (1), distinguished.

A preliminary decree in a mortgage suit was passed on 23rd August, 1921, and there was an appeal against this decree to the High Court. During the pendency of the appeal, the mortgagee decree-holder obtained a final decree for sale under Order XXXIV, rule 5, Code of Civil Procedure, 1908, The appeal to the High Court was dismissed on the 29th of October, 1925. The decree-holder filed the present application for execution of the final decree on 2nd February, 1926. The judgment-debtor contended that the application was barred by limitation.

Held, that limitation ran from the date of the final disposal of the appeal by the High Court, and, therefore, that the application for execution was within time.

Held, further, that the words "where there has been an appeal" in clause (2) of Article 182 do not mean that the appeal must be against the decree sought to be executed, but imply that if there has been an appeal which in any way imperils the decree sought to be executed then the date of the final disposal of the appeal should be the date from which the period of limitation ought to be computed.

Christiana Sens Law v. *Banarashi Prashad Chowdhury* (2), not followed.

Rai Brijraj v. *Nauratan Lal* (3), distinguished.

Ashfaq Hussain v. *Gauri Sahai* (4), followed.

Appeal by the judgment-debtors.

This was an appeal against an order of the Subordinate Judge of Patna, dated the 17th May, 1926, dismissing the judgment-debtors' objections to the execution of a decree. A preliminary mortgage decree was passed on the 23rd August, 1921. There was an appeal against this decree to the High Court by the defendants. During the pendency of the appeal the mortgagee decree-holder obtained a final

(1) (1920) I. L. R. 42 All. 564.

(2) (1914-15) 19 Cal. W. N. 287.

(3) (1918) 3 Pat. L. J. 119.

(4) (1911) I. L. R. 33 All. 264.

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decree for sale under the provisions of Order XXXIV, rule 5, of the Code of Civil Procedure on the 28th October, 1922. The appeal to the High Court against the preliminary decree was dismissed on the 29th of October, 1925. The present application for execution was made on the 2nd February, 1926. The principal objection of the judgment-debtors was that the application was barred by limitation. The learned Subordinate Judge has held that under clause (*1*) of Article 182 of the Schedule to the Limitation Act time began to run from the date of the decree of the High Court, and the application was, therefore, not barred by limitation.

It was contended on behalf of the appellants that the Article applicable was Article 181 and not Article 182. It was next contended that if Article 182 applied, then time should be computed from the date of the final decree, *i.e.*, 28th October, 1922, and not from the date of the decree of the High Court in the appeal against the preliminary decree.

Pugh (with him *B. C. Sinha* and *G. S. Lal*), for the appellants.

N. C. Sinha and *B. P. Sinha*, for the respondents.

KULWANT SAHAY, J:—The argument of the learned Counsel for the appellants is, that in a mortgage decree the application to enforce the decree is not an application in execution, but it is an application to carry out the decree, and as no period of limitation is provided elsewhere in the Indian Limitation Act for such an application, Article 181 is the only Article which can apply. The point for decision, therefore, is as to whether an application to enforce a mortgage decree for sale is an application in execution. It is contended that the provisions of the Transfer of Property Act relating to the passing of decrees for sale and making orders absolute for sale contained in sections 88 and 89 of the Act have been transferred to the Code of Civil Procedure and the provisions of

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Order XXXIV are self-contained and the enforcement of a final decree for sale under Order XXXIV, rule 5, which took the place of the order absolute for sale under the Transfer of Property Act, is not an execution of the decree but simply amounts to carrying out the order for sale, and the application for carrying out the order for sale is governed by Article 181 of the Indian Limitation Act.

I am of opinion that this contention is not sound. The transfer of the provisions of the Transfer of Property Act to the Code of Civil Procedure did not in any way affect the period of limitation for execution of a decree passed under Order XXXIV, rule 5 of the Code. A final decree for sale under Order XXXIV, rule 5 stands in the same position as any other decree for sale that might be passed by a Civil Court. The provisions as regards execution of decrees are contained in part II and in Order XXI of the Code of Civil Procedure. Section 51 of the Code confers upon the Court the power to order execution of a decree by attachment and sale or by sale without attachment of any property. Order XXI, rule 11, sub-rule (*2*), prescribes the particulars which an application for execution should contain, and one of the particulars prescribed is contained in clause (*j*), viz., the mode in which the assistance of the Court is required, whether by the attachment and sale or by the sale without attachment of any property. The provisions of Section 51 and Order XXI, rule 11, therefore, contemplate the execution of a final decree for sale made under the provisions of Order XXXIV, rule 5, of the Code. Mr. Pugh contends that a final decree for sale itself contains an order for sale and it is not necessary to make an application to the Court executing the decree for an order for sale. It is, however, to be noted that an application for execution of a decree under Order XXI, rule 11, does not necessarily ask the Court to make an order for sale, it may merely ask the Court to effect the sale without attachment of the property which had been ordered to be sold in the final decree for sale under Order XXXIV, rule 5.

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Reference is made to the decision of the Allahabad High Court in *Balwant Singh v. Budh Singh* (1). In that case an application for execution of a final decree for sale in a mortgage suit was pending, and during the pendency of that application a suit was instituted to set aside the decree on the ground of fraud. The execution was stayed by an order dated the 9th December 1914 during the pendency of the suit. The suit was dismissed in April 1915 and an appeal against the decree dismissing the suit was also dismissed in April 1917. The next application for execution was made on the 11th June 1918. Their Lordships of the Allahabad High Court observed: "If we assume (and we think that it may fairly be so assumed) that the present application is one in continuation of the former, even then Article 181 of the Limitation Act must apply, and it was necessary for the appellant to come into Court within three years of the removal of the bar which prevented his carrying on the execution of his decree. That bar was removed by the decision of the first Court on the 26th of April 1915". Now, their Lordships applied Article 181 not to the application to enforce the decree but to an application to continue a previous execution which had been stayed. I am of opinion that applications for enforcing final decrees for sale in mortgage suits are applications for execution and are governed by Article 182 and not by Article 181 of the Schedule to the Indian Limitation Act.

The second contention of the learned counsel for the appellants is that the words "when there has been an appeal" in Article 182 refer to an appeal against the decree which is sought to be executed, and that, in order to enable the decree-holder to compute the period of limitation from the date of the decree of the Appellate Court, it is necessary that the appeal should be against the decree which is sought to be executed and not against any other decree. In the present case the appeal to the High Court was against

(1) (1920) I. L. R. 42 All. 564.

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the preliminary decree which had been made on the 23rd of August, 1921, and not against the final decree which was made on the 28th October, 1922, and which is now sought to be executed. Clause (*2*) of Article 182 prescribes:

"(where there has been an appeal) the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal."

There is nothing here to show that the appeal must be against the decree sought to be executed. In my opinion the intention of the Legislature in making this provision was that if an appeal in any way imperils the decree sought to be executed then the date of the final disposal of the appeal should be the date from which the period of limitation ought to be computed.

Mr. Pugh refers to *Christiana Sens Law v. Banarashi Proshad Chowdhury* (1). In that case the plaintiff sued a number of defendants on a mortgage, and obtained a decree against all the defendants excepting defendants nos. 24-26 whose property was exempted from liability and the plaintiff was directed to pay their costs. Therefore, there were two decrees in the suit: (*1*) a mortgage decree in favour of the plaintiffs against all the defendants other than the defendants 24-26, and (*2*) there was another decree for costs in favour of the defendants 24-26 against the plaintiff. The defendants, other than the defendants 24-26, preferred an appeal against the decree which was passed against them. The defendants 24-26 applied for execution of their decree for costs against the plaintiff after the disposal of the appeal of the other defendants. The application was made beyond three years from the date of the original decree. It was held that the appeal of the other defendants did not save the decree of the defendants 24 to 26 from the bar of limitation, and their Lordships observed that the words "where there has been an appeal" in Article 182, clause (*2*), mean "where there has been an appeal against a decree or order for the execution of which the application is made". This is reading

(1) (1914-15) 19 Cal. W. N. 287.

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something into the Article which is not there. The rest of the judgment of their Lordships, however, in that case goes to show that when the appeal imperils the whole decree, such an appeal will prevent limitation running against the judgment debtors who have not appealed.

KULWANT SAHAY, J.

Reference has also been made to *Rai Brijraj* v. *Nauratan Lal* (1). In that case it was held that the words " where there has been an appeal " in clause (2) of Article 182 means " where there has been an appeal against a decree in the suit " and do not include an appeal against an order made on an application to set aside that decree. This case also does not help the appellants in the present case inasmuch as the appeal to the High Court in the present case was against the decree in the suit.

In *Ashfaq Husain* v. *Gauri Sahai*(2) a decree for sale was made against several defendants on the 25th of August, 1900, and an order absolute for sale under the provisions of the Transfer of Property Act was made on the 21st December, 1901. An application was made to set aside the decree by one of the defendants against whom the decree was ex parte, and it was set aside as against him on the 11th March, 1902. Subsequently the suit was tried as against him and a decree was made against him on the 15th of August 1902, and an appeal against that decree was dismissed on the 16th November, 1904. On the 27th November, 1905, another order absolute for sale was made against this defendant. On the 21st December, 1905, application for execution was made against all the defendants based on the original decree of the 25th August, 1900, on the appellate decree made against one of the defendants after restoration of the suit against him on the 16th November, 1904, and on the two orders absolute for sale dated the 21st December, 1901, and 27th November, 1905. Objection was taken that the application was barred, and it was held by their Lordships of the Privy Council that the decrees

(1) (1918) 3 Pat. L. J. 119. (2) (1911) I. L. R. 33 All. 264.

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of the 25th August, 1900, and the 16th November, 1904, were steps in granting the plaintiff the relief to which he was entitled. The latter decree supplemented and completed the former and for the first time justified the plaintiff in applying for the joint execution of the decree, and time under the Limitation Act began to run from the date of the latter decree or rather from the date it was made absolute, i.e., the 27th November, 1905, and consequently the application was not barred. In the case now before us the final decree for sale which was made on the 28th of October, 1922, during the pendency of the appeal against the preliminary decree was clearly imperiled by the appeal and the decree made by the High Court on the 29th October, 1925, clearly supplemented and completed the decree of the 28th of October, 1922. In my opinion the learned Subordinate Judge was right in holding that time began to run from the 29th of October, 1925, and the application was not barred by limitation.

The other objections taken by the judgment-debtors related to certain mistakes in the application for execution and to the fact that the decree under execution was passed against certain dead persons. The learned Subordinate Judge disallowed these objections. It now appears that the application for execution, which is now before us, has been allowed to be dismissed and a fresh application has been made correcting the errors which had crept into the present application for execution. It is not necessary, therefore, to consider those objections; and the other objections raised by the judgment-debtors need not, therefore, be inquired into in the present appeal and they must be left open for consideration in the fresh application for execution which has been made.

The result is that this appeal is dismissed with costs.

ROSS, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Jwala Prasad and James, JJ.

1927.

May, 24.

JAGDEO SINGH

v.

MUSSAMMAT RAJA KUER.*

Hindu Law—widow—Will by widow—no title conferred on legatee.

Although a transfer inter vivos by a Hindu widow, of property of which she is in possession as heir to her husband, confers upon the transferee the right to hold the property during the life of the widow, and even after her death unless the reversioners elect to treat the transferee as a trespasser after the widow's death, a Hindu widow cannot legally bequeath such property by will for a will takes effect only from the death of the testatrix, and from the moment of her death the widow ceases to have any interest in the property which reverts to her husband's heirs.

Durga Sundari Sen Gupta v. *Ram Krishna Poddar*(1), *A. R. Srinivasachariar* v. *A. Raghavacharuar*(2), *Tirath Ram* v. *Kahan Devi* (3) and *Gadadhar Bhat* v. *Chandrabhagabai* (4), followed.

Tagore v. *Tagore*(5), *Bijoy Gopal Mukarji* v. *Krishna Mahishi Debi* (6) and *Kesho Prasad Singh Bahadur* v. *Chandrika Prasad Singh* (7), referred to.

Appeal by the plaintiffs.

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*Appeal from Appellate Decree no. 1358 of 1924, from a decision of Babu Kamla Prasad, Subordinate Judge of Muzaffarpur, dated the 1st July, 1924, reversing a decision of Babu Hargobind Prasad Singh, Munsif of Muzaffarpur, dated the 1st February, 1924.

(1) (1913) 18 Cal. L. J. 162.
(2) (1924) 79 Ind. Cas. 1011.
(3) (1920) I. L. R. 1 Lah. 588.
(4) (1893) I. L. R. 17 Bom. 690.
(5) (1872) 18 W. R. 359.
(6) (1907) I. L. R. 34 Cal. 329, P. C.
(7) (1922) 68 Ind. Cas. 394.

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JAGDEO SINGH v. MUSSAMMAT RAJA KUER.

This was an appeal by the plaintiffs to recover possession of 7-gandás 4-kouri pakka share which was represented by 2-annas 8-gandas kham share of Mauza Jalalpur. The plaintiffs claimed this property as legatees under a will executed by Mussammat Kasturi Kuer on the 27th January, 1914. The testatrix Kasturi Kuer, who held the properties as heir of her deceased husband Mithu Singh, had given the property in dispute to Sheolochan Kuer, widow of her deceased husband's brother by way of maintenance after a litigation between the two widows. Sheolochan Kuer transferred the property to Mahadeo Singh, predecessor, in interest of the defendant. Kasturi Kuer questioned this transfer and by a decree of the Calcutta High Court it was declared that the transfer was operative only until the death of Sheolochan Kuer and that the property would revert to Kasturi Kuer. Sheolochan Kuer died on the 10th September, 1910, four or five years before the death of Kasturi Kuer.

The defendant was holding the property under a transfer from Sheolochan Kuer which was held to be invalid; and if Kasturi Kuer had been alive she would have been entitled under the decree dated the 28th May, 1894, to get recovery of possession of the property and to hold it as a Hindu widow's estate during her life time, subject to the rights of the reversioners, if any. She, however, died before she could enforce her rights under the decree and obtain possession of the property; but before she died she executed a will on the 27th January, 1914, bequeathing this property to the plaintiffs. The plaintiffs had obtained probate of the will and now sought to obtain possession of the property on the ground that they were the representatives of Kasturi, and that the defendant had ceased to have any right after the death of Sheolochan Kuer and was a mere trespasser.

The trial Court decreed the plaintiffs' suit, holding that the will created in their favour a right to obtain possession of the property as against

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trespassers, and that it did not matter that the widow's interest in the property ceased with her death; in other words, the trial Court held that the lady was competent to dispose of the property by will. In support of this view the learned Munsif relied upon the decision of the Judicial Committee in *Bijoy Gopal Mukarji* v. *Krishna Mahishi Debi* (1) and *Kesho Prasad Singh Bahadur* v. *Chandrika Prasad Singh* (2) a decision of the Patna High Court based upon the aforesaid decision. The reasoning employed was that if the widow could make a gift of the property which would be operative even after her death unless the reversioners questioned it, there was no reason why the widow should not be able to make a will of the same property subject to the right of the reversioners.

On appeal the learned Subordinate Judge of Muzaffarpur disagreeing with this view set aside the decision and dismissed the suit.

A. B. Mukarji, *B. B. Mukarji* and *U. N. Banerji*, for the appellants.

C. Prasad (for *S. Dayal*) for the respondents.

JWALA PRASAD, J. (after stating the facts set out above proceeded as follows): The learned Advocate for the appellant in attacking the view of the Court below has adopted the reasoning employed by the learned Munsif. Reliance is placed upon a passage in the judgment of the Judicial Committee of the Privy Council in *Bijoy Gopal Mukarji v. Krishna Mahishi Debi* (1) wherein their Lordships observe—

"A Hindu widow is not a tenant for life but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being

(1) (1907) I. L. R. 34 Cal. 329, P. C. (2) (1922) 68 Ind. Cas. 394.

complied with. Her alienation is not, therefore, absolutely void, but it is prima facie voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court and he shows his election to do the latter by commencing an action to recover possession of the property".

It is to be observed that although their Lordships made a distinction between the estate of a Hindu widow and that of a life tenant their decision did not declare that acts of a Hindu widow which would affect the property after her death would be valid. In the case of transfers inter vivos, the widow confers upon the transferee the right to hold the property during her life: she has a full right to do so; but where she confers a right which is valid during her life time and gives effect to it by delivery of possession, a distinction is made between the rights acquired by the transferee before the death of the widow and those which he enjoys after her death. He enters into possession of the property under a valid title and his occupation thereof is not ipso facto or ab initio void. The interest which may survive after the death of the widow is not in the circumstances absolutely void, by reason of the fact that the title was validly created at the beginning, but it is voidable at the instance of the reversioners. It is for them to ratify or confirm the act of the limited owner or to treat the occupier as a mere trespasser after the death of the widow. In fact their Lordships did treat the transaction as a trespass upon the property and the holders thereof as trespassers after the death of the widow; for Article 141 of the Limitation Act, which governs the case of the plaintiff seeking to eject a trespasser from an immovable property was applied. That case cannot be cited as an authority for the proposition that the widow can create a valid interest or even voidable title in favour of any person to take effect after her death, that is, by means of testamentary bequest.

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JWALA PRASAD, J.

'Will' has been defined in the Hindu Wills Act as meaning

" the legal declaration of the intention of the testator with regard to his property which he desires to be carried into effect after his death."

Mr. Abani Bhusan Mukharji quoted the definition of 'will' given by their Lordships of the Judicial Committee in *Tagore v. Tagore* (1) in support of his contention that a will like a gift transfers the property from the date of its execution with this difference only that in the latter the possession is immediately taken and in the former the possession is deferred till after the death of the donor. The passage upon which he relies is as follows :

"Will means a continuous act of gift up to the moment of the donor's death and though revocable in his lifetime, is, until revocation, a continuous act of gift up to the moment of death, and does *then* operate to give the property disposed of to the persons designated as beneficiaries".

These words cannot be held in any way to imply that the property bequeathed by the testator is vested in the legatee from the date of the execution of the will. The essential difference between a will and a settlement or deed inter vivos, as appears from the definition of 'will' given in the Act and that given by their Lordships of the Judicial Committee lies in the fact that a will only takes effect after the death of the testator. A deed is an assurance of property from living persons to living persons but a 'will' is an assurance of property from the dead to the living. The gift inter vivos operates from the date of its execution, but a will is not operative till after the death of its maker. In the former title is vested from the date of the deed or as indicated therein, in the latter it invariably vests after the death of the testator, for before his death he can revoke the will at any moment he likes. Therefore the legatee under a will made by a Hindu widow does not take any interest until the death of the widow when the widow

(1) (1872) 18 W. R. 359, P. C.

herself ceases to have any interest in the property which reverts to the heirs of her deceased husband. Hence the widow has no property at her death to dispose of, as was held in the case of *Durga Sundari Sen Gupta* v. *Ram Krishna Poddar* (1) where the Chief Justice, Sir Lawrence Jenkins, and Sir Ashutosh Mookerjee upheld the decision of N. R. Chatterji, J. This case was followed by the Madras High Court in *A. R. Srinivasachariar* v. *A. Raghavacharuar* (2). There it was definitely laid down that disposal of her husband's property by a widow confers no title on the legatee to eject even a trespasser. This ruling applies exactly to the present case. The plaintiffs have acquired no title under the will and cannot eject the defendant even if he is a trespasser. The same conclusion was arrived at by the Lahore High Court in *Tirath Ram* v. *Kahan Devi*(3) and by the Bombay High Court in *Gadadhar Bhat* v. *Chandrabhagabai* (4).

The distinction between a widow's estate and a life estate seems to be that in the former the exact successor after the death of the widow is not known until she dies, whereas in the life estate the next successor, the holder of the remainder, is known; and the remainder may vest before the death of the life tenant. In the widow's estate which is peculiar to Hindu Law nothing vests in the reversioners during her life: the entire property vests in the widow; with this important difference that her personal heirs do not succeed after her death, but the heirs of her husband, the previous full owner, succeed to the property. But the widow who holds a widow's estate and one who holds a life estate are both subject to this limitation that they cannot create any interest beyond their life time. The view taken by the Court below seems to be correct. The decree is accordingly affirmed and the appeal is dismissed.

JAMES, J.—I agree.

Appeal dismissed.

(1) (1918) 18 Cal. L. J. 162.
(2) (1924) 79 Ind. Cas. 1011.
(3) (1920) I. L. R. 1 Lah. 588.
(4) (1893) I. L. R. 17 Bom. 690.

APPELLATE CRIMINAL.

Before Mullick, A. C. J., and Wort, J.

1927.

May, 24.

KING-EMPEROR

v.

BANDHU SINGH.*

Penal Code, 1860 (*Act XLV of* 1860), *sections* 141, 441 *and* 452—*Criminal trespass—unlawfully remaining on property unlawfully entered—resisting attempts of rightful owner to re-enter—liability for resistance distinct from liability for original entry.*

When a person in possession of property is forcibly ousted therefrom by a trespasser, then, unless the former acquiesces in the dispossession, the intruder does not acquire such possession as he is entitled to defend against the person ejected.

Browne v. *Dawson* (1), followed.

Where the true owner has not so acquiesced, the continuance in possession of the trespasser is a recurring wrong and constitutes a new entry every time that the true owner goes upon the property or as near to it as he dare to make a claim for it.

Under section 441 of the Penal Code a person who unlawfully continues in occupation of property upon which he has unlawfully entered is as liable to punishment as a person who remains unlawfully on property which he has entered lawfully provided he is actuated by one of the intentions mentioned in that section; and he is liable to be convicted in respect of such unlawful continuance even though he has already been convicted in respect of the original unlawful entry inasmuch as each time that the true owner goes upon the property or makes a claim under circumstances sufficient in law to constitute re-entry, and the trespasser opposes him with the intention required by section 441, a new offence is committed and a new liability arises.

Where a person forcibly enters upon property in the possession of another and others, under his order or directions,

*Government Appeal no. 2 of 1927, against a decision of Rai Bahadur A. N. Mitter, Sessions Judge of Gaya, dated the 5th February, 1927, overruling a decision of Babu L. Missra, Subdivisional Magistrate of Nawada, dated the 20th December, 1926.

(1) (1840) 12 A. & E. 624.

assemble to resist by criminal force or show of criminal force the attempt of the rightful owner to re-enter, then, if they are five or more in number, they constitute an unlawful assembly within the meaning of section 141, the common object being to enforce their supposed right to possession.

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

Sultan Ahmad, Government Advocate, for the Crown.

S. M. Gupta (with him *N. K. Sinha*), for the respondents.

MULLICK, A. C. J.—This is an appeal by Government against the acquittal of eleven persons who were charged before the Subdivisional Magistrate of Nawadah with offences under sections 143 and 452 of the Indian Penal Code. Sixteen persons were placed on their trial before the Subdivisional Magistrate who acquitted five and convicted the remainder sentencing the respondents Jhaman, Kesho, Bhola and Bandhu to six months' rigorous imprisonment and Akhal, Bhattan Kahar, Ganga Ram, Chakauri, Mahadeo, Canu and Hardeyal to three months' rigorous imprisonment each under section 143 of the Indian Penal Code; no separate sentences were passed under section 452 of the Indian Penal Code.

The occurrence arose out of a dispute relating to the property of Rai Jai Mangal Prasad Sahi who died in October 1920 leaving a will by which he appointed his dewan Bundi Lal and others as trustees for the administration of his estate. He appears to have had strong religious convictions and to have dedicated all his immovable property comprising several mauzas to certain Hindu deities giving by his will directions to his trustees for the administration of the trust. The probate of the will was resisted by the testator's heirs; but the trustees finally succeeded in July 1922.

On the 28th February, 1923, the Subdivisional Magistrate of Nawadah found that the heirs who in

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these proceedings have been styled as the Sahis were in possession and he directed the trustees under section 107 of the Code of Criminal Procedure to give security to keep the peace. The trustees then applied for registration in the Land Registration Court and after a reference to the District Judge under section 55 of the Land Registration Act the question of possession was decided in their favour and delivery of possession was made by the bailiff of the Civil Court with the aid of the military police on the 8th September 1923.

It has been found by the learned Subdivisional Magistrate that thereafter the trustees remained in undisturbed possession till July 1926.

But on the 26th June, 1926, the Sahis filed a civil suit for declaration of title and possession. The plaint thereof was returned for want of adequate court-fee and a review application is now pending against the civil court's order. Next, on the 1st July, the trustees apprehending trouble, applied for police assistance and two constables were sent to the zamindari kutcherry at Singer, commonly called Singer Garh (Singer Fort).

On the 10th July, notwithstanding the presence of the constables, about 100 men belonging to the Sahis forced their way into the kutcherry and took possession with violence and turned out the servants of the trustees who were in possession.

An information was lodged before the police and some of the trespassers have been convicted

Next, on the 12th July an attack was made by the Sahis at a place called Chotha.

Next, on the 25th July Kashi Singh, a peon in the service of the trustees, went to the Singer kutcherry to see whether the Sahis were still there. He found a large number of men armed with lathis who threatened to beat him. He then retired and in mauza Chotha he met the Superintendent of Police with an Inspector and a Sub-Inspector. He laid an

information and returned with the police to the Garh. The police found the main door locked from the outside and 4 or 5 men armed with lathis on guard. The voices of a large number were heard inside the kutcherry and those outside declined to allow Kashi or his fellow servants to enter and the respondent Ganga Ram threatened to murder Kashi's companion Bishun Lal. Thereupon under the orders of the Superintendent of Police Bandhu Nepali, Akal Dusadh, Ganga Ram,Chotu and Bhattan Ram were arrested and taken away. As the Superintendent of Police had only six armed constables with him he did not consider it safe to arrest those inside the kutcherry. But he returned on the 27th July with a large force and arrested the other respondents and some others. He found them inside the "garh" where a large number of lathis and a large quantity of brickbats were being stored.

The respondents have been charged with having between the 10th and the 27th July been members of an unlawful assembly the common object of which was to commit the offence of house trespass.

They have also been charged with having between the 10th and the 27th July commited house trespass by entering into Singer Garh which was in the possession of the trustees after having made preparations for causing hurt to the employees of the trustees.

On appeal the learned Sessions Judge of Gaya has found that on the Sahis having obtained possession of the kutcherry on the 10th July the respondents could not be convicted of committing criminal house trespass between the 10th and the 25th July by being in possession under the orders of or with the leave of those who entered on the 10th July.

He has also held that as the offence of criminal house trespass could not be committed, the common object charged did not exist and, therefore, there

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could be no conviction under section 143 of the Indian Penal Code. He has therefore acquitted all the respondents.

The learned Sessions Judge finds, and I think there can be no doubt about it, that the trustees were in possession till the 10th July and that on that date their men were forcibly ejected by the employees of the Sahis among whom were the respondents Bhuttan Kahar and Chakauri.

The date when the respondents other than those two men entered the kutcherry has not been found by either Court. But they both seem to be of opinion that it was sometime after the 10th and before the 27th and that such entry was made with the leave and license or under the orders of the Sahis. I will accept that position.

Now the first question to be decided is who was in possession on the 25th and 27th July.

In my opinion it is quite clear that the trustees were in possession. "A mere trespasser" said Lord Donman, "cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title if he can, without delay, reinstate himself in his former possession." [*Browne v. Dawson* (1)]. It depends on the facts in each case what can be considered to be reasonable delay.

The owner may, if he does not acquiesce, re-enter upon the land and reinstate himself provided he does not use more force than is necessary. He must not commit a breach of the peace so as to render himself liable for an indictment under the Statutes of forcible entry and this entry will be viewed as a resistance to an intrusion upon a possession which he had never lost.

(1) (1840) 12 A. & E. 624.

Therefore, possession being with him, he may, in India, prosecute the intruder for committing criminal trespass within the meaning of section 441 of the Indian Penal Code provided the necessary intention exists and he may also if he secures a conviction apply to the Court for the ejectment of the intruder under section 522 of the Code of Criminal Procedure.

He may also resort to the preventive sections of the Code of Criminal Procedure, namely, sections 107 and 145 of that Code.

If he takes the risk of a forcible entry and uses more violence than is necessary he will not be able to plead the right of private defence; but he cannot be sued by the trespasser who has entered by force or fraud either for recovery of possession under section 9 of the Specific Relief Act or for ejectment upon the strength of his temporary prior possession. Section 9 requires legal possession and the owner who re-enters without delay has in law never lost possession. And when two persons are on a field each claiming it, he who has title is in law deemed to be in possession.

If the true owner acquiesces or acts otherwise, so that legal possession vests in the trespasser, then he must resort to the Civil Court and bring a suit either under section 9 or in ejectment, or in trespass for damages. The continuance in possession of the trespasser is a recurring wrong and constitutes a new entry every time that the true owner goes upon the land or as near to it as he dares, to make a claim to it. There is a fresh cause of action each time he is resisted although the point from which limitation will run may depend on the express provisions of the law of limitation. This I think is the law both in India and England.

Now what is the position of a trespasser who has been convicted of an offence under section 447 of the Indian Penal Code if he continues to remain on the land after a forcible entry against the true owner.

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In England the Statutes of Forcible Entry provide punishment for forcible entry "with a strong hand or with multitude of people" even when the intruder has a right. They also make forcible detainer a substantive offence if preceeded by a forcible entry. Thirdly they make forcible detainer after peaceable entry an offence; (5 Richard II Ch. VII, 15 Richard II Ch. II, 8 Henry VI, Ch. IX). In my opinion section 441 of the Indian Penal Code substantially reproduces the English Law. It provides that if the trespasser having entered lawfully remains unlawfully on the property with intent to annoy he will be said to commit criminal trespass. In my opinion no less punishable is an unlawful entry followed by an unlawful continuance of occupation. It may be said that the intruder or trespasser pays the penalty once for all upon conviction for the act of entry and that he cannot be again punished for continuance of occupation. I think the answer to this is that each time that the true owner goes upon the land or makes a claim under circumstances sufficient in law to constitute re-entry and the trespasser opposes him with the intention required by section 441 a new offence under that section is committed and a new liability arises.

In this view of the case the respondents Bhattan Kahar and Chakauri who have already been convicted for trespass upon the kutcherry on the 10th July are again liable to conviction for having resisted the owner between that date and the 27th July.

Much more so are the other respondents liable to conviction for an entry subsequent to that date and it makes no difference that they entered with the permission of those who first occupied the kutcherry on the 10th.

The discovery of the lathis and the brickbats in the kutcherry is sufficient proof of the intention to annoy the trustees and there is also clear evidence of their threatening behaviour both on the 25th and the

27th. On both these dates the resistance offered to Kashi Singh was a dispossession in law. I fully believe the evidence of the witnesses for the prosecution as to the behaviour of the respective respondents on the 25th and 27th. There can be no doubt that their conduct even in the presence of the police indicated an intention to annoy and intimidate.

The conviction under section 452 of the Indian Penal Code therefore must be upheld.

With regard to the convictions under section 143 of the Indian Penal Code the case is still clearer.

Assuming that the petitioners had a right to possession on the 25th and 27th, which in my opinion they had not, they committed an offence under section 143 of the Indian Penal Code by enforcing that right by means of criminal force. They were members of an unlawful assembly within the meaning of section 141 of the Indian Penal Code the common object being to enforce that right in a tumultuous and forcible manner.

It is true that this is not the common object charged and if we had taken a different view of the question of possession it might have been necessary to amend the charge.

But as I think that possession was with the trustees and the conviction under section 452 of the Indian Penal Code was correct I must also hold that there was no error in stating the common object to be to commit an offence under that section. In my opinion the learned Subdivisional Magistrate was right in convicting the petitioners of an offence under section 143 of the Indian Penal Code.

The sentences passed by the learned Magistrate were not unduly severe and being satisfied that the learned Session Judge has taken an erroneous view of the law I set aside the order of acquittal passed by him and restore the convictions and sentences

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entered and passed by the subdivisional Magistrate. The District Magistrate will take the necessary steps to secure the arrest of the respondents and their recommitment to proper custody.

WORT, J.—I agree.

Acquittals set aside.

Accused convicted and sentenced.

CRIMINAL MISCELLANEOUS.

30 Pat. 115.

Before Mullick, A. C. J., and Wort, J.

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May, 31.

KRISHNA CHANDRA JAGATI

v.

KING-EMPEROR.*

Bail—non-bailable offence—grounds on which bail should be granted or refused—Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 498.

In deciding whether a person charged with a non-bailable offence should or should not be enlarged on bail during the trial the following circumstances, inter alia, should be taken into consideration, namely, the nature of the accusation; the nature of the evidence in support of the accusation; the severity of the punishment which conviction will entail; the character of the sureties, that is to say, whether they are independent or indemnified by the accused; the character and behaviour of the accused.

Tampering with the prosecution witnesses may be a good reason for refusing bail.

In re *Robinson* (1), not followed.

Nagendra Nath Chakrabarty v. *King-Emperor*(2), referred to.

*Miscellaneous criminal application against an order passed by B. K. Ghosh, Esq., Sessions Judge of Cuttack, dated the 13th May, 1927, upholding an order, dated the 6th May, 1927, passed by Babu A. C. Das, Subdivisional Magistrate of Kendrapara.

(1) (1854) 23 L. J. Q. B. 286. (2) (1923) 38 Cal. L. J. 388.

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Hasan Imam (with him *G. P. Das*), for the petitioners.

C. M. Agarwala, Assistant Government Advocate, for the Crown.

MULLIK, A. C. J:—Hari Krishna Mahanty is now under trial before the Subdivisional Magistrate of Kendrapara for an offence under section 372 of the Indian Penal Code for having sold his daughter Kanak Dei for Rs. 500 to Krishna Chandra Jagati and Rangadhar Rai who are said to have made the purchase for the proprietor of the Aul estate in Orissa. It is said that the girl was below eighteen years of age and that the sale took place about seven months ago and that the girl died within one month of her arrival at the palace of the proprietor. Krishna Chandra Jagati and Rangadhar Rai have been arrested for an offence under section 373 of the Indian Penal Code.

The petitioners applied for bail to the Subdivisional Magistrate which was refused. They then applied to the Sessions Judge; but as they were unsuccessful also in that Court, they have made the present application under sections 497 and 498 of the Code of Criminal Procedure. The application has been resisted by the Crown.

The principles on which the Courts should exercise their discretion in regard to non-bailable offences have been set out in *Nagendra Nath Chakrabarty* v. *King-Emperor* (1) and in this respect it has been said that there is no difference between the English and the Indian practice. Bail is not to be withheld merely as a punishment and the requirements as to bail are merely to secure the attendance of the accused at the trial. In my opinion the test is to be applied by reference to the following considerations amongst others:—

(*1*) The nature of the accusation.

(1) (1923) 38 Cal. L. J. 388.

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(2) The nature of the evidence in support of the accusation.

(3) The severity of the punishment which conviction will entail.

(4) The character of the sureties, that is to say, whether they are independent or indemnified by the accused.

(5) The character and the behaviour of the accused.

It was said [In re *Robinson*(1)] that the character or behaviour of the accused is irrelevent; but other authorities are of a contrary opinion, and in Inida I think any allegation that the accused is tampering or attempting to tamper with witnesses and thereby obstructing the course of justice would, in my opinion, be a very cogent ground for refusing bail.

I will first of all consider what is the evidence before us in support of the charge. Evidence in Court has not yet been heard in the presence of the accused, but the police diaries have been produced by the Crown. Ordinarily I do not think we ought to interfere if a prima facie case is established but I do think that here there are special circumstances.

At the same time it is not desirable that I should say more than is necessary with regard to the weight of the available evidence lest I should in any way prejudge the trial. I will only say that it appears from the materials before us that the following points will arise for consideration :—

Is the father's defence that he did not sell the girl for illicit intercourse but gave her in phulbebahee marriage true? In this connection *Explanation* no. 2, recently added to section 372 of the Indian Penal Code, must be considered. It is urged that it is the practice for the proprietors of certain hill states in Orissa to contract phulbebahee marriages. In such cases the wife is not a concubine and has a distinct legal status.

(1) (1854) 23 L. J. Q. B. 280.

It is urged on behalf of the petitioners before us that there is another form of marriage called chauki bebahee marriage which is preliminary to a phulbebahee marriage and that in this case the girl Kanak Dei died before the phulbebahee marriage was celebrated but that it was the intention of the accused Krishna Chandra and Rangadhar to have the phulbebahee marriage celebrated at the proprietor's palace.

It has next to be considered whether, even though no legal marital relationship can be established, there was a quasi-marital relationship which protects Hari Krishna Mahanty from prosecution under section 372. In some parts of the country such relationship is established by exchange of betel leaf and by payment of money. In the present case there is evidence that there was a formal gathering of castemen and that the ceremonies in the father's house were conducted with some publicity.

The next circumstance to be considered is that the father belongs to a caste from which phulbebahee wives are obtained and that there was no object why a sale should have been resorted to. It is contended by the Crown that there is evidence that a phulbebahee or a chauki marriage cannot be contracted where the girl is below the age of puberty. But the decision on this point will depend on evidence of custom and I notice that of the two witnesses already examined under section 164 of the Code of Criminal Procedure one has admitted that among poor families the giving of a daughter of immature age is permitted. We are informed by the learned Assistant Government Advocate that there is evidence to show that the father was contemplating the giving of another girl in phulbebahee marriage to the proprietor and that a protest meeting was held by the members of his caste at which he promised not to give any of his other daughters in marriage to the proprietor.

It is said that he made some admission of guilt at the meeting; but this is not clear from the evidence

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now before us. It may be that the prosecution will at the trial be able to prove that the ceremonies performed in the father's house were mere pretence to cloak a sale; but I think on the whole the application of Krishna Chandra and Rangadhar Rai should be allowed.

With regard to Hari Krishna, there is evidence that he has been attempting to instigate a witness to after a palm-leaf document on which the date of the birth of Kanak Dei is recorded. This, if true, is clearly a circumstance to be taken into account against him in the matter of bail; but as the principal question in the case will be whether he was entitled to give an immature girl in phulbebahee marriage his conduct in attempting to tamper with the witness is not really material. Some inference might no doubt be drawn form his act to prove his intention in giving the girl; but having regard to all the cricumstances I think that bail should be granted in his case also.

The petitioners will, therefore, be released on bail to the satisfaction of the Subdivisional Magistrate till the conclusion of the cross-examination, if any, of the prosecution witnesses.

WORT, J.—I wish to say only this. The case of *In re Robinson* (1) decided by Lord Coleridge cannot be regarded as an authority in England and certainly not in India for the proposition that an alleged tampering with the prosecution witnesses is not any ground for refusing bail. First, Lord Coleridge merely said that he would not regard that argument which is not the same thing as saying that that argument may never be regarded in any case. Secondly, the English Courts have an untrammelled discretion in refusing or granting bail and owing to the criminal procedure in England it is almost impossible to get an authoritative decision on the question of what grounds there should be in a case where bail is to be granted or

(1) (1854) 23 L. J. Q. B. 286.

refused. For these reasons, as I have already stated, the case of *In re Robinson* (1) cannot be looked upon as an authority for the proposition urged in this case and, in my view, having regard to the state of the law in England, it would be impossible for any party to get a decision from a divisional Court of the King's Bench Division laying down dogmatically and exhaustively the limits or grounds upon which an application for bail should be treated.

APPELLATE CIVIL.

Before Das and Allanson, JJ.

FIRM NAYAMAT RAM PUJARA LAL

v.

LAL RAMESHWAR NATH SHA DEO.*

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June, 1.

Chota Nagpur Tenancy Act, 1908 (*Beng. Act VI of* 1908), *section* 181A—*decree for rent obtained by landlord—transfer of decree but no assignment of interest in land—assignee, application for execution by, whether maintainable.*

I obtained a decree for rent against *R* and others under the Chota Nagpur Tenancy Act. The decree was subsequently transferred to *N*, but there was no assignment of the landlord's interest in the land to the assignee of the decree. The latter, however, applied for the execution of the decree as a money decree. The judgment-debtors contended that the application was barred by section 181A, Chota Nagpur Tenancy Act, 1908, which provides as follows :

" An application for the execution of a decree for arrears of rent obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest in the land has become and is vested in the assignee."

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*Appeal from Appellate Order no. 239 of 1926, from an order of G. Rowland, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 9th July, 1926, reversing an order of Babu Pramatha Nath Bhattacharji, Subordinate Judge of Ranchi, dated the 24th April, 1926.

(1) (1854) 23 L. J. Q. B. 286.

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The subordinate judge, relying on *Forbes* v. *Maharaj Bahadur Singh*(1) overruled the objection of the judgment-debtors and allowed the application to proceed.

On appeal, the Judicial Commissioner reversed the decision of the Subordinate Judge and, on the authority of *Sudhanya Kumar Poddar* v. *Gouranga Chandra Saha Chowdhary*(2), held that the assignee could not execute the decree even as a money decree.

Held, in second appeal, that the application for execution was barred by section 181A of the Chota Nagpur Tenancy Act.

The facts of the case material to this report were as stated above.

Sambhu Saran, for the appellant: There is no bar to a decree for arrears of rent being executed as an ordinary decree for debt at the instance of the assignee of the decree. *Forbes* v. *Maharaj Bahadur Singh* (1) has been wrongly distinguished by the Judicial Commissioner. There is no distinction between an ex-landlord and an assignee of a decree for rent, so far as the execution of that decree is concerned. I rely on *Manurattan Nath* v. *Hari Nath Das*(3) and *Rajani Kanta Ghose* v. *Rama Nath Roy* (4).

[DAS, J.—The decree has been obtained under the Chota Nagpur Tenancy Act and not under the Civil Procedure Code. The distinguishing feature in this case is that you must be bound by the provisions of the Act.]

Sudhanya Kumar Poddar v. Gouranga Chandra Saha Chowdhury(2) has been wrongly decided. In *Gurucharan Nath Bepari* v. *Kartik Nath*(5) on which *Sudhanya Kumar Poddar* v. *Gouranga Chandra Chowdhury*(2) is based, the question was whether the assignee could proceed to execute the decree under the

(1) (1914) I. L. R. 41 Cal. 926, P. C.
(2) (1917) 41 Ind. Cas. 542.
(3) (1905) 1 Cal. L. J. 500.
(4) (1914) 20 Cal. L. J. 200.
(5) (1905-06) 10 Cal. W. N. 44.

provisions of the Bengal Tenancy Act. The matter was referred to a Full Bench but the point was left undecided as the reference was held to be not in order. See *Gopal Chandra Kundu* v. *Drastulla Sheikh*(1). A landlord who has obtained a decree for arrears of rent is at liberty to execute it in the first instance as a money decree without first enforcing the charge against the tenure or holding [*See Fotick Chundra Dey* v. *E. G. Foley* (2), followed in *Sailaja Prasad Chatterjee* v. *Gyani Das*(3)].

In *Chandra Nath Tewari* v. *Pratap Udai Nath Sahi*(4) it was held that a decree for rent can be executed as such or as a simple decree for money. The words "notwithstanding anything contained in section 233, Code of Civil Procedure.....", in section 148(*h*) of the Bengal Tenancy Act, do not occur in the Chota Nagpur Tenancy Act.

Abani Bhusan Mukerjee, Government Pleader, for the respondent: The transferee cannot execute the decree because the policy of the legislature is not to allow strangers to come on the land. By an assignment the character of the decree cannot be changed. In *Forbes* v. *Maharaj Bahadur Singh*(5), when the landlord brought the suit, he had ceased to be the landlord. It was, therefore, pointed out by their Lordships that the decree obtained in that suit was not a decree for rent, but was from the very inception an ordinary decree for money. *Sudhanya Kumar Poddar* v. *Gouranga Chandra Saha Chowdhury*(6) reconciles the supposed conflict in the authorities. Section 182, Chota Nagpur Tenancy Act, debars a decree for arrears of rent from being executed by any court other than that specially empowered in that behalf. The civil court therefore cannot execute it as a decree for

(1) (1918) 28 Cal. L. J. p. 33*n*.
(2) (1888) I. L. R. 15 Cal. 492.
(3) (1913) 18 Cal. L. J. 29.
(4) (1913-14) 18 Cal. W. N. 170.
(5) (1914) I. L. R. 41 Cal. 926, P. C.
(6) (1917) 41 Ind. Cas. 542.

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money under the provisions of the Code of Civil Procedure which do not apply to the Chota Nagpur Tenancy Act [vide *Lal Nilmoni Nath Sahi Deo* v. *Rai Bahadur Baldeo Das Bista* (1)]. The case of *Chandra Nath Tewari* v. *Pratap Udai Nath Sahi*(2) does not apply to the facts of the present case. There it was held that the decree did not fulfil the requirements of the Bengal Tenancy Act, and, therefore, it was an ordinary decree for money.

A decree for rent is a decree on the contract *plus* the condition that there must be the relationship of landlord and tenant.

Sambhu Saran, replied.

S. A. K.

Cur. adv. vult.

DAS, J.—In my opinion the decision of the learned Judicial Commissioner is right and must be affirmed. Section 181A of the Chota Nagpur Tenancy Act is really conclusive of the matter. That section provides as follows:

> "An application for the excution of a decree for arrears of rent obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest in the land has become and is vested in the assignee."

It is contended before us that as the landlord is entitled to execute his decree for rent as a money decree, so the assignee is free from the complications raised by section 181A of the Chota Nagpur Tenancy Act. But in this case the landlord has obtained a decree for arrears of rent; he has assigned that decree to the appellant and it is conceded that the landlord's interest in the land has not vested in the assignee. That being the position section 181A of the Chota Nagpur Tenancy Act applies to the facts of the case.

I would therefore dismiss this appeal with costs.

ALLANSON, J.—I agree.

Appeal dismissed.

(1) (1919) C. W. N. (Pat.) 145. (2) (1913-14) 18 Cal. W. N. 170.

APPELLATE CIVIL.

Before Das and Allanson, JJ.

BAJRANGI PRASAD SINGH

v

KESHO SINGH.*

1927.
June, 1.

Limitation Act, 1908 (*Act IX of* 1908), *section* 20—*mortgage—part payment—endorsement by karta of joint family—fresh period of limitation.*

An endorsement of part payment by the karta of a Hindu joint family, on a mortgage bond, provides a fresh period of limitation for a suit against the family on the bond.

Sarada Charan Chakravarti v. *Durgaram De Sinha* (1), *Har Prasad Das* v. *Bakshi Harihar Prasad Singh* (2) and *Chandra Kanta Bhattacharjee* v. *Behari Lal Bhattacharjee* (3), followed.

Narayana Ayyar v. *Venkataramana Ayyar* (4), distinguished.

Appeal by the plaintiffs.

This appeal arose out of a suit instituted by the appellants to enforce two mortgage bonds executed by Baldeo Singh, Kesho Singh, Musst. Deva Kuer and Murli Singh. Baldeo Singh who was dead was represented in the action by his son Ram Swarup Singh, the only contesting defendant. Kesho Singh was the brother of Baldeo Singh and he did not contest the claim of the plaintiffs. Musst. Deva Kuer was the mother of Baldeo Singh and Kesho Singh and Murli Singh was the cousin of Baldeo Singh and Kesho Singh and joined in the mortgage transactions as having an interest in the mortgaged properties. The earlier of the mortgage bonds was executed on the 3rd March, 1902, and was for Rs. 1,000 with interest at 18 per cent. per annum with yearly rest. The second of the mortgage bonds in suit was dated the

* Appeal from Original Decree no. 225 of 1923, from a decision of Babu Ram Chandra Chaudhuri, Subordinate Judge of Monghyr, dated the 30th April, 1923.

(1) (1910) I. L. R. 37 Cal. 461. (2) (1913-14) 19 Cal. W. N. 860.
(3) (1920) 31 Cal. L. J. 7. (4) (1902) I. L. R. 25 Mad. 220.

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23rd June, 1902, and was for Rs. 1,500 with interest at 18 per cent. per annum with yearly rest. The Subordinate Judge found that the bonds in suit were executed in accordance with law and were for consideration and for valid joint family necessities. He, however, dimissed the suit on the ground that it was barred by limitation.

The plaintiffs relied on various part payments made by the defendants from time to time as saving limitation. The bonds in suit supported the contention of the plaintiffs in so far as there were endorsements of part payments in the handwriting of Kesho Singh duly entered on the bonds.

It was not disputed that the endorsements were in the handwriting of Kesho Singh. Kesho Singh, who, after the death of Baldeo Singh, was the karta of the joint family, did not dispute the genuineness of the endorsements; nor did he deny the part payments alleged to have been made by him from time to time. The Subordinate Judge however, took the view that Kesho Singh was in collusion in this matter with the plaintiffs so as to injure Ram Swarup, the son of Baldeo Singh. In addition to the endorsements of part payments on the back of these bonds, there were also two adjustments of accounts in each case signed by Kesho Singh. The Subordinate Judge came to the conclusion that no part payments were made as alleged and that these endorsements were made by Kesho Singh with a view to enable the plaintiffs to sue upon the mortgages after their claim had become barred by limitation. He refered to the fact that no payment was made towards the earlier bond till six years from the date of its execution and that no payment was made towards the second bond till the eleventh year of its execution and the comment which he made on the circumstance of the payments was:

"The mortgagors who for full eleven years kept quiet allowing the interest with compound interest to swell became so suspiciously regular in payment as to continue paying tolerably large amounts every year without fail till 1328. From 1321 to 1328 payment was also made every

year excepting 1323 towards the other bond too. At any rate some explanation should have been offered by plaintiffs for this apparently strange and unusual conduct on the part of Kesho Singh. But it was not done."

He dismissed the suit.

Pugh (with him *S. N. Roy* and *J. P. Singh*), for the appellants.

S. P. Sen (for *S. M. Mullick*), for the respondents.

Das, J. (after stating the facts set out above proceeded as follows): In my opinion the argument which found favour with the learned Subordinate Judge is far too speculative to deserve any serious consideration. It is within the bounds of possibility that a money-lender may become anxious to save his claim from being barred by limitation and therefore demand part payment before the claims are about to be barred by limitation. The learned Subordinate Judge says that there is quarrel between Kesho Singh and Ram Swarup Singh and he refers to a case between them eight years ago. What happened was this: Kesho Singh purchased some property in the name of his son who applied for mutation of his name in the land-registration department. Ram Swarup claimed that the property was acquired out of joint family funds and that the name of the son of Kesho Singh should not be recorded in the land registration department. The objection of Ram Swarup was dismissed by the land registration officer; and we do not know whether Ram Swarup instituted any suit to enforce his claim in regard to the property purchased; but the learned Subordinate Judge fastens upon this circumstance to found a case of enmity between Kesho Singh and Ram Swarup and his conclusion is that this enmity is sufficient in itself to induce Kesho Singh to enter into a conspiracy with the plaintiffs in this action as against Ram Swarup; but it seems to me that Kesho Singh could not possibly injure Ram Swarup without injuring himself. The properties are the properties of the joint family and

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Kesho Singh as the karta of the joint family is as much interested in these properties as Ram Swarup. It seems to me idle to contend that Kesho Singh should enter into a conspiracy with the plaintiffs in order to injure himself.

The learned Subordinate Judge next regards the attitude of Kesho Singh in this case with suspicion. He says as follows:

"Both parties, i.e., plaintiffs and defendant no. 2 accuse each other of being in collusion with Kesho Singh. One has merely to peruse the written statement of Kesho Singh filed in this case to find out which of the two aforesaid versions is correct. This written statement was filed not only by Kesho alone but also on behalf of all his minor sons including the minor son of Murli Singh also who was an executant of the two disputed bonds. What is the defence of these defendants? A practical admission of the whole case of the plaintiffs. It is therefore absurd on the part of the plaintiffs to contend that Kesho Singh is in collusion with Ram Swarup, the only defendant, who in spite of odds presented a bold front to these plaintiffs and contested their claim keenly. It is therefore needless for me to labour this point. Suffice to say that Kesho Singh is proved to have been completely on the side of the plaintiffs. This is another important circumstance in favour of Ram Swarup and forms another link in the chain of his defence regarding limitation."

I am wholly unable to understand the argument of the learned Subordinate Judge. If Kesho Singh did make the part payments as alleged by the plainiffs, it would not only be idle but dishonest on his part to defend the suit on behalf of the joint family. But apparently the learned Subordinate judge is under the impression that every suit should be contested whether there be a defence or not. With this veiw I do not agree.

Lastly the learned Subordinate Judge is suspicious of the adjustment of accounts in 1324 and 1328. He says as follows:

"Next we come to the alleged adjustment of hisabs in 1324 and 1328. Payments used to be made according to plaintiffs' case towards interest regularly from 1316 in the first bond and from 1320 in the second bond. These payments used to be duly entered on the back of the bonds and signed on every occasion by Kesho Singh. Admittedly Kesho did not want to make full payment of the dues of the two bonds on the dates on which the hisabs are said to have been written and signed by him in 1324 and 1328. It is therefore inexplicable why on those dates there was any adjustment of the entire dues of these two bonds."

For myself I have no difficulty in understanding the position. The parties wanted to have the liability of the mortgagors ascertained and that is the reason why the accounts were adjusted on two occasions—once in 1324 and once in 1328. They admittedly bear the signature of Kesho Singh and I can find no explanation why Kesho Singh should enter into a conspiracy with the plaintiffs to injure himself. In my opinion the decision of the learned Subordinate Judge on this point is entirely speculative and should carry no weight with us.

The learned Subordinate Judge next says that the part payments even if made by Kesho Singh will not save limitation so far as Ram Swarup and his sons are concerned and he relies upon the decision of the Madras High Court in *Narayana Ayyar* v *Venkataramana Ayyar* (1). That was a case of an acknowledgment under section 19 of the Limitation Act and not of part payment under section 20 of the Limitation Act. That case was moreover decided on its own facts and they are not applicable to the facts of the present case. For myself I prefer to follow the decisions of the Calcutta High Court in *Sarada Charan Chakravarti* v. *Durgaram De Sinha* (2), *Har Prosad Das* v *Bakshi Harihar Prosad Singh* (3) and *Chandra Kanta Bhattacharjee* v *Behari Lal Bhattacharjee* (4). In my opinion the karta of a joint family is the agent of the entire family duly authorised to make part payments on behalf of the family. I hold that the suit is not barred by limitation and that the plaintiffs are entitled to a decree as claimed.

On the question of estoppel the learned Subordinate Judge has come to the conclusion that so far as Ram Swarup is concerned, the defence is not available to him; but so far as the defendants second party, namely, the subsequent purchasers, are concerned,

(1) (1902) 25 Mad. 220.
(2) (1910) 37 Cal. 461.
(3) (1913-14) 19 Cal. W. N. 860.
(4) (1920) 31 Cal. L. J. 7.

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the defence is available to them. The point arises in this way. The defendants first party took a ticca of some properties belonging to the plaintiffs and as a security for the ticca rent payable by them they gave a mortgage of certain properties to the plaintiffs. The mortgage included certain jote lands which had already been mortgaged by them to the plaintiffs under the bond of the 23rd June 1902. The ticca rent was not paid and the plaintiffs sued upon their mortgage. They obtained a decree in due course and proceeded to sell the mortgaged properties. Now it appears that they did not disclose the fact that the jote lands were already the subject of a prior incumbrance. The defendants second party have purchased these lands and they claim that the plaintiffs not having disclosed their incumbrance in the proceedings to which I have already referred are estopped from enforcing the security so far as the jote lands are concerned in this suit as against them. The answer to the argument is that the defendants second party did not purchase the jote lands at the sale held in execution of the decree obtained by the plaintiffs as against the defendants first party. In my opinion no question of estoppel arises in this suit.

I would allow the appeal, set aside the judgment and the decree passed by the Court below and give the plaintiffs the usual mortgage decree on the foot of the mortgage bonds of the 3rd March, 1902, and the 23rd June, 1902. The interest, however, is excessive and it has not been shown that there was any necessity to borrow money at the high rate of interest charged. We reduce the interest to 12 per cent. per annum with yearly rest. We fix the date of payment six months from the date of this judgment. Interest at 12 per cent. per annum with yearly rest must be calculated up to the date fixed for payment, and thereafter at six per cent. per year. The plaintiffs are entitled to their costs throughout.

ALLANSON, J.—I agree.

APPELLATE CRIMINAL.

Before Allanson and Sen, JJ.

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June, 8, 9, 21.

Trial by Jury—Non-direction, when amounts to misdirection—Code of Criminal Procedure, 1898 (Act V of 1898), Section 307—submission of case to High Court, Judge's power discretionary—Non-interference by High Court.

Non-direction amounts to misdirection only when it is such that there are grounds for thinking that the jury, by reason of it, may have been put on the wrong track and made to arrive at a wrong conclusion.

Whether a case tried by jury should or should not be referred to the High Court under section 307 of the Code of Criminal Procedure, 1898, is a matter entirely within the discretion of the Judge.

It is only when the Judge is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, that he should submit it; where he is not clearly of that opinion, and does not submit it, the High Court will not in appeal interfere with his decision.

Earn Khan v. *King-Emperor* (1), followed.

Queen-Empress v. *Curuvadu* (2) and *Saroda Charan Mistry* v. *King-Emperor* (3), distinguished.

Queen v. *Sham Bagdee* (4), *Reg* v. *Khanderav Bajirav* (5), and *Eknath Sahay* v. *King-Emperor* (6), referred to.

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*Criminal Appeal no. 59 of 1927, from a decision, dated the 15th February, 1927, of J. G. Shearer, Esq., I.C.S., Additional Sessions Judge of Bhagalpur.

(1) (1923) I. L. R. 50 Cal. 658 (662).
(2) (1890) I. L. R. 13 Mad. 348.
(3) (1925) 41 Cal. L. J. 320.
(4) (1873) 13 Ben. L. R. App. 19.
(5) (1876-77) I. L. R. 1 Bom. 10.
(6) (1916) 1 Pat. L. J. 817.

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

W. H. Akbari (with him *S. Hussain*), for the appellants.

C. M. Agarwala, Assistant Government Advocate, for the Crown.

21st June, 1927.

SEN, J.—In this case there were four persons charged under section 395 of the Indian Penal Code. Of these four, Madhu Mian has been acquitted the Judge accepting the unanimous verdict of the jury in his favour. As regards the other three accused, the jury by a majority of four to one, were of opinion that they were guilty under section 395 of the Indian Penal Code. The learned additional Sessions Judge took time to consider the verdict and finally passed an order accepting the verdict and convicting the accused Bishu Tatwa, Bajit Mian and Baijnath Jolaha under the said section and sentencing them to rigorous imprisonment for four years each. This appeal is on behalf of two of the three accused so convicted and sentenced, namely, Bajit Mian and Baijnath Jolaha.

There are two grounds urged. The first is that having regard to the view of the learned additional Sessions Judge that the verdict was against the weight of evidence he should have submitted the case to the High Court under section 307 of the Code of Criminal Procedure. The second is that even if in the opinion of this court the learned additional Sessions Judge was not bound to make a reference under section 307, the order of conviction and sentence should be set aside inasmuch as the verdict of the jury was the result of misdirections on some of the most important issues in the case.

I propose to deal with the second ground first. It is necessary to consider some of the facts of the case in order to appreciate the arguments advanced under this head by learned Counsel appearing for the appellants. The dacoity in question is

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alleged to have taken place on the night of the 17th August, 1926, in village Basaita in the house of one Mahadeo Gangota. Mahadeo Gangota was sleeping on the osara of the southern room of his house. After midnight he was roused by someone striking him with a lathi. Whereupon he entered the room opening on to the osara where his sons, Chedi, the first informant in the case, and Harihar were. The dacoits effected an entrance into the room and dragged out Mahadeo and Chedi into the angan. Mahadeo thereafter, entreated the dacoits to let him go offering to make over a hasuli to them. He went into the southern room, brought out a hasuli belonging to his wife, which had been hidden in the bedding, and made it over to the dacoits. Chedi in the meantime had effected his escape and ran into the fields. After the hasuli had been handed over, the dacoits began to intimidate Mahadeo's wife Mussammat Surji and tried to extract information from her as to where her valuables were hidden. They lighted a fire, threatened to burn her if she did not comply with their requisition, and even went to the length of scorching her leg in the fire they had lit for the purpose. Ultimately, when they discovered that there was not much else to be had from the house they retreated after taking such other small articles as they could get hold of. Chedi remained out in the fields the whole night. In the morning he sought out the village chaukidar and, with him and one Bhutan Gangota, proceeded to Kishunganj thana where he arrived at 6 p.m. on the 19th August, 1926. It happened, however, that there was no one at the thana who had power to institute a case. There was only a literate constable in charge of the thana who made an entry in the station diary and sent on Chedi and his companions with a copy of this entry to village Lachmipur. They reached Lachmipur at 11 p.m., and there the writer head constable drew up a regular first information report. A great deal of the argument

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advanced in this court turns upon this first information. Chedi while lodging the first information report stated that he himself did not know who the dacoits were. All that he could say was that his father had said that there were eight dacoits in all, that they were speaking Urdu and that all of them were young. He added,

> "I could not see on account of darkness if they had applied anything to their faces."

Later on, however, there appears to have been some development inasmuch as Mussammat Surji is alleged to have identified Bajit, Baijnath and also Bishu Tatwa, the last named with particular reference to his gold stopped teeth. It may be noted that in view of this evidence, given in the course of the trial the question naturally arose as to whether if Mussammat Surji had so definitely recognised the three accused, their names would not have been stated in the first information report lodged by Chedi. It was suggested on behalf of the prosecution that it was just possible that Chedi had not come back home from the fields before going to the police station to lodge the first information. This theory, however, as appears from the charge to the jury administered by the learned additional Sessions Judge, could not stand for a moment. In point of fact Chedi, it is suggested in the charge, must have come home and had a consultation with his father and mother and seen what damage the dacoits had done to the house and the yard, and having so apprised himself of the main facts and circumstances connected with the dacoity he must have proceeded to the police station to lodge the first information. The learned Additional Sessions Judge makes special reference to the fact that Chedi, having been away in the fields most of the time when the dacoits were in the house, could not possibly have given the details of the occurrence and of the damage done to the house, etc., of his own knowledge had he not returned to the house first and then proceeded to the police station. In all these matters it is perfectly

clear that the learned Additional Sessions Judge made a full and fair and adequate charge to the jury finally conveying his opinion to the jury that

> "It is impossible to believe that Chedi had no talk with Mahadeo and Mussammat Surji before he left the village. He must have had, because he himself was not present throughout the occurrence and many of the details given in the first information report must, and could only, have been derived from his parents."

Learned Counsel, appearing for the appelants, contends, however, that this dogmatic expression of the Judge's own opinion would rather take away from its weight and convincingness; the better course, and in fact the only proper course, for the learned Additional Sessions Judge was to place the direct evidence on the subject. He points out a passage from the deposition of Mussammat Surji in which she said,

> "Chedi also came back. One Bhutan of lower Lowngaon came with him. Chedi went to the thana. It was about midday when he left."

He also points out a passage from the deposition of Chedi in which he said,

> "I have known Bisu Tatwa for 10 years or so. I have known Bachhu and Baijnath for about 5 years. I have known Bajit Mian for the last 4 years I went to see them occasionally at the hat or on the road * * * I recognised them by their voices. They were Bajir, Bisu, Baijnath and Madhu, the accused. I asked why they were maltreating us but they went on shouting 'stop, you sala or we will kill you'.

On the strength of these two passages, one in the deposition of Chedi and the other in that of Mussammat Surji, learned Counsel contends that if the Judge had put these statements before the jury which constituted the direct evidence in the case, instead of giving his inference in a dogmatic manner as above mentioned, the jury would have been in a position from such direct evidence to come to right conclusions on the question as to whether the omission of the names from the first information would not sufficiently establish the innocence of the accused in regard to any part in the dacoity in question. In other words, instead of telling the jury

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that it was impossible to believe that Chedi had not returned home before proceeding to the thana the learned Additional Sessions Judge should have given the jury Mussammat Surji's evidence to the effect that Chedi did come as a matter of fact and that he, therefore, had sufficient opportunity to know the names of the accused. Further, he argues that the evidence of Chedi himself that he had actually recognised the accused, if put to the jury, would have led them at once to view with very great suspicion the first information report the absence from which of the names of the accused would in that case be perfectly unaccountable.

A third contention which he raises is that the learned Sessions Judge was equally dogmatic in that portion of the charge where he discussed the question as to whether such a dacoity did actually take place or not. He expresses the definite opinion that a dacoity had in fact occurred at the place and on the date as alleged. The learned Additional Sessions Judge observed,

> "It is impossible to believe that his son would, if no dacoity had taken place at all, have lodged the first information on which the present case was instituted."

He also said :

> "It seems to me impossible not to believe that a dacoity was actually committed and that a reasonably veracious account has been given of what the dacoits did at Mahadeo's house."

After having so delivered the charge on the subject of the occurrence itself the learned Sessions Judge proceeded to remark that the real question at issue, however, was whether the four persons in the dock were among the dacoits. This according to the learned Counsel for the defence is denying the jury the right to form their own judgment on the question as to whether a dacoity did take place as alleged. Having failed to infect them with his own belief so dogmatically expressed, it was not to be wondered that the learned Additional Sessions Judge was eventually surprised at the verdict of the jury against all the accused.

These are the main objections on the ground of misdirection to the jury. Barring these features which in his opinion are objectionable though perfectly unintentional, learned Counsel concedes that the charge is, as it reads, a charge for acquittal and the learned Additional Sessions Judge has clearly and unambiguously expressed his opinion that on the evidence adduced in the case it would hardly be possible to bring the charge home to the accused. It is difficult to judge from the heads of charge to the jury which must necessarily be an abstract, and not a verbatim report of the summing up of the Court, as to whether the passages in question in the deposition of Mussammat Surji and Chedi were or were not placed before the jury [*Eknath Sahay* v. *King-Emperor* (1)]. But the learned Additional Sessions Judge, in my opinion, has not merely in a dogmatic manner expressed his belief in the matter of Chedi's return home and also in the matter of Chedi's supplying himself with material facts for the first information from his parents. In one portion of his summing up he observes,

> "It is not reasonable to suppose and *there is evidence to the contrary*, that Mussammat Surji did not communicate to her son before he left the village all that she knew of the occurrence and in particular of the identity of the decoits."

The "evidence to the contrary" may certainly refer to the evidence of Mussammat Surji that Chedi came back home before going to the thana. I am, therefore, constrained to think that there is no substance in the contention that by omitting to refer to any material evidence in the case the Court prevented the jury from arriving at the right conclusion. As I have already observed the summing up of the learned additional Sessions Judge from beginning to end is so clearly in favour of acquittal that it would be straining too much to say that the jury did not receive adequate assistance from the Court. It is only when the non-direction is such that

(1) (1916) 1 Pat. L. J. 317.

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there are grounds for thinking that the jury by reason of it may have been put on the wrong track and made to arrive at a wrong conclusion that such non-direction can amount to a misdirection. I fail to see any such non-direction in the summing up.

Nor do I think that there is much force in the contention put forward that the opinion expressed by the learned Additional Sessions Judge that a dacoity in fact took place as distinguished from his opinion that it was highly doubtful whether the accused took part in it would amount to a misdirection. If any thing, it would, in my opinion, more pointedly refer to the innocence of the accused notwithstanding the fact, as it seems to have been established by the evidence, that a dacoity had taken place. The result, therefore, is that I do not think that there is any occasion for this Court to interfere on the ground of misdirection.

It remains now to consider the other contention, namely, that in the circumstances of this case the learned Additional Sessions Judge should have made a reference under section 307 of the Code of Criminal Procedure. There are three things which appear clearly from the provisions of section 307 and from the rulings thereon. First, it is entirely within the discretion of the Judge as to whether he should make a reference or not. Secondly, a reference is called for when the judge " is clearly of opinion that it is necessary for the ends of justice to submit the case in respect of such accused person to the High Court" and he shall in that event submit the case accordingly, recording the grounds of his opinion. Thirdly, the Judge must disagree with the verdict of the jurors or of a majority of them. In the present case the learned Additional Sessions Judge took time to consider whether the case should be referred to the High Court under section 307 of the Code of Criminal Procedure. He did so, as he states in his order, on account of the fact that at the time he had a suspicion that the methods adopted by the police

had been reprehensible. Subsequently, he made a more careful study of the police diaries and found that his suspicion was not well grounded. Accordingly, he modified his original view and felt satisfied that the appellants had taken part in the offence charged against them. In these circumstances he recorded an order as follows :—

"Although therefore, I still think that possibly the conviction of Bajit and Baijnath is against the weight of evidence on the record, I have modified my original view and am satisfied that these persons took part in the crime. There is thus no reason why a reference should be made to the High Court. I accept the verdict and convict the accused."

It is to be noted that although he was originally minded to dissent from the verdict, at the moment of the order he was certainly not in a position to dissent from it. On the contrary, he had fully satisfied himself as to the guilt of the accused. I fail to see how in these circumstances it could be a fit case for reference under section 307. Learned Counsel for the appellants, however, urges that inasmuch as there was still some doubt in his mind as to whether the conviction of Baijit and Baijnath was not against the weight of evidence on the record the only course left to him was to submit the case to the High Court. Reliance is placed on the case of *Queen-Empress* v. *Guruvadu* (1) in which it is laid down that the discretionary power to refer cases under section 307 should always be exercised when the Judge thinks that the verdict is not supported by the evidence inasmuch as a failure to do so results in the conviction of persons on evidence as to the sufficiency of which the Court is doubtful. The facts of that case, however, were different. The learned Sessions Judge in that case being doubtful as to whether the verdict was justified by the evidence thought that it was not incumbent upon him to send the case to the High Court observing that "probably there would be an appeal." The High Court in that case pointed out that the learned Sessions Judge should have

(1) (1890) I. L. R. 13 Mad. 343.

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remembered that there was no appeal on the facts when once the trying Court had accepted the verdict and based its conviction thereon; thus there was no justification for the failure to submit the case to the High Court on the ground that probably an appeal would be preferred. Another case upon which strong reliance has been placed is the case of *Saroda Charan Mistri* v. *King-Emperor* (1). In that case the jury brought in an unanimous verdict of guilty under section 302 of the Indian Penal Code in respect of one of the accused and under section 328 of the Indian Penal Code in respect of the other accused. The learned Judge observed that there was no justification for the differentiation of the cases of the two accused and that if the accused were at all guilty they would then both be certainly guilty of murder. On this point, therefore, there appeared to be a clear, full and complete dissent on the part of the learned Judge from the verdict of the jury. The other point involved in the case was as to whether or not the two accused knew that the drug they were administering to the deceased was poison. They had been given that drug by a third person as a medicine. The case of the defence was that the accused did not know while they administered the drug that they were administering poison. The jury unhesitatingly rejected the case of the defence as to such absence of knowledge. The learned Judge was inclined to think that he would rather give the accused the benefit of the doubt. But ultimately when passing the order he observed that considering that the jury had unanimously brought in a verdict of guilty he did not think he was justified in pressing "the slight doubts" that still remained in his mind to the extent of referring the case to the High Court under section 307 of the Criminal Procedure Code. With reference to the last mentioned point the High Court came to the conclusion that the disagreement of the learned Judge with the jury was not such a complete

(1) (1925) 41 Cal. L. J. 320.

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dissent as to lead him to consider it necessary for the ends of justice to submit the case to the High Court. But with reference to the former the High Court held that there was such a clear and complete dissent as to the liability of the two accused under the same section that he was obviously unable to do justice to the accused by accepting the verdict and, therefore, there was no option left to him but to refer the case to the High Court under the provisions of section 307. The present case bears some resemblance to the case of *King Emperor* v. *Saroda Charan Mistri* (1) in so far as it relates to " the slight doubts " that still remained in the mind of the Court. Such doubts have been expressed by the learned Judge in the words :

" Possibly, the conviction of Bajit and Baijnath is against the weight of evidence on the record."

In the next sentence, however, he observes,

" I have modified my original view and am satisfied that these persons took part in the crime."

This takes the case completely beyond the scope of the provisions of section 307 of the Code of Criminal Procedure. But it cannot be said that he disagrees with the verdict. Nor that he is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court. This principle has been affirmed in the later case *Eran Khan v. Emperor*(2) which lays down that "section 307 quite clearly gives to the Judge a discretion in the matter, and it is only when he is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court that he shall so submit it. If he is not clearly of that opinion his failure to submit the case is not a subject for interference by this Court on appeal."

In this connection it would be well to remember the principle laid down in one of the earliest cases of jury trial in India : "If we are to interfere in every case of doubt, in every case in which it may

(1) (1925) 41 Cal. L. J. 320.
(2) (1923) I. L. R. 50 Cal. 658, 662.

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with propriety be said that the evidence would have warranted a different verdict, then we must hold real trial by jury is absolutely at an end and that the verdict of the jury is of no more weight than the opinion of assessors," *Queen* v. *Sham Bagdee* (1). In the present case it was unexpected that the jury should have returned a verdict of guilty by a majority of four to one. But the jurors are entitled to their own view of the case and the rule of law is not to disturb their verdict unless it be for special reasons and under special circumstances. The principle underlying that rule is well expressed as follows: "We adhere generally to the principle notwithstanding our large discretionary powers first, on the constitutional ground of taking as little as possible out of the hands to which it has been primarily assigned by the Legislature, and secondly, because any undue interference may tend to diminish the responsibility which it is desirable that a jury should cherish", *Reg* v. *Ghanderav Bajirav* (2).

The appeal must be dismissed and the convictions and sentences affirmed.

ALLANSON, J.—I agree.

REVISIONAL CRIMINAL.

Before Allanson and Sen, JJ.

1927.

June, 29.

GENDO URAON

v

KING-EMPEROR*.

Penal Code, 1860 (*Act XLV of* 1860), *sections* 142, 147 *and* 353—*unlawful assembly, liability of members of—Burden of proof—separate convictions under section* 147 *and* 353.

A person who intentionally joins or continues in an unlawful assembly is liable to conviction under section 142 of

*Criminal Revision no. 348 of 1927, from an Order of G. Rowland, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 21st May, 1927, affirming an order of K. C. Ritchie, Esq., Subdivisional Magistrate of Chatra, dated the 17th February, 1927.

(1) (1873) 13 Ben. L. R. 19. (2) (1876) I. L. R. 1 Bom. 10.

the Penal Code, and if he pleads that he was there innocently, or merely as a harmless spectator, he must prove that he was there owing to no fault of his own and that he could not get out of the crowd.

Where the common object of the members of an unlawful assembly was to compel Excise officers to abandon the search of certain houses and, after this object was achieved, some of the members proceeded to assault the officers, *held*, that there could be no doubt that the assault was made in furtherance of the common intention of the assailants and, therefore, that they were liable to be convicted not only under section 147 but also under section 353/34.

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

Sir Ali Imam (with him *B. C. De*) for the petitioners.

C. M. Agarwala, Assistant Government Advocate, for the Crown.

ALLANSON, J.—The 21 petitioners have been convicted under sections 147 and 353/34 of the Indian Penal Code and sentenced to six months' rigorous imprisonment under each section, the sentences to run consecutively. The petitioner Gendo has also been fined Rs. 50.

On the 5th November, 1926, an Excise Inspector and Sub-Inspector with a number of Excise subordinates went to make house searches for illicit liquor and illicit distilling apparatus in village Haphua. The accused, who are all Oraons, belong to this village. The houses of Gendo and Mirwa accused were searched and also the house of one Dukhi, and illicit liquor or distilling apparatus were found in each of these houses. While the search was going on in the house of the accused Somra there was an alarm, and a mob of 40 or 50 men started smashing and removing the articles which had been already attached and which had been left in charge of an Excise Head Constable. The Excise Inspector and his men remonstrated, but they were attacked by the excited mob and nine of them were injured and the whole party had to run away. The only names that could

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be given in the first information were those of the persons whose houses had been searched. But at subsequent test identifications a number of persons, including the present petitioners, were, indentified by various members of the Excise party.

ALLANSON, J. The prosecution witnesses who were not previously acquainted with the petitioners were not in a position to say what overt act each person did, that is which of them smashed the handis or which of them struck which of the excise party. They could only identify them as among the rioters. The learned Judical Commissioner on appeal ignored the evidence of two witnesses, who in their depositions merely said that at the test identification they identified certain persons. This was really a faulty record by the Magistrate. The witnesses ought to have said that they identified these persons as among the mob. No defence witnesses were examined.

Sir Ali Imam on behalf of the petitioners urged that as the occurrence took place in the village, and as the Excise officers were picketing certain houses and not allowing egress and ingress, the villagers, must have been looking on, and no one can be convicted unless an overt act is proved against him. I find no evidence or suggestion that among a crowd of onlookers certain persons suddenly formed an unlawful assembly. The smashing of the handis and the subsequent attack on the Excise officers was, according to the evidence, the work of a number of men. Moreover in an occurrence of this kind, in which the witnesses did not know from before the persons taking part, but were only able to pick them out at a subsequent test identification, clearly it would be the persons nearest to the witnesses who would be likely to be identified. It would be curious if, instead of identifying as among the rioters those persons whom they really saw in the unlawful assembly, the prosecution witnesses should have picked out innocent onlookers who would presumably be at some distance. Any person who,

when the smashing of the handis began, intentionally joined or remained in the unlawful assembly was a member of that unlawful assembly. Such a person could not help being aware that the action of those men was unlawful. Any person who has innocently got into a crowd and is unable owing to pressure of numbers to escape from it, of course is not a member of the unlawful assembly; but he would have to make out his case on that point. There is no question here of such a crowd that innocent onlookers could not get out of it. No one who intentionally joins or continues in an unlawful assembly can be allowed to say that he was merely a harmless spectator. He must prove that he was there owing to no fault of his own and that he could not get out of the crowd. The whole object of the provisions of section 142 of the Penal Code would otherwise be defeated. There is nothing to show that any of the accused were innocent onlookers or that the witnesses have identified as rioters persons who were merely looking on. None of the accused pleaded he was an innocent onlooker.

The other point argued on behalf of the petitioners is that they have really been convicted twice over for the same offence. But the common object of the unlawful assembly was to compel by criminal force the Excise officers to stop the house searches, and this was effected by smashing up the handis, etc. When the Excise officers expostulated with the rioters, they proceeded to attack them. The common object of the unlawful assembly was not to assault the officers, but the occurrence subsequently developed into such an assualt. There can be no doubt that the assaults were made in furtherance of the criminal intention of the accused, namely, to drive away the Excise officers. It was held in *Prokash Chandra Kundu* v. *Emperor* (1) which was also an Excise case, that separate convictions are legal under sections 147 and 353, even when the common object of the unlawful

(1) (1914) I. L. R. 41 Cal. 836.

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assembly was to assault the public servants. The persons actually assaulting could also be sentenced under section 353. In the present case the assault on the public servants was not the common object of the unlawful assembly. The assault took place later; but from the evidence it is clear that it was done in furtherance of the common intention of the mob and each of the accused is liable under section 353/34. As was remarked in the above case, the question is rather an academic one, as the sentences passed could have been given under section 147 only.

The aggregate sentences are not excessive. The assaults on the Excise officers, the interference with their work, and the destruction of the evidence of illicit distilling that had been detected were quite unjustifiable. The occurrence was of a serious nature and the work of Excise officers would be brought to a standstill and their persons endangered, if they were liable to be attacked with impunity by a large body of aboriginals when they go to make searches in a village.

The application is rejected.

SEN, J.—I agree.

Rule discharged.

APPELLATE CRIMINAL.

Before Allanson and Sen, JJ.

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June, 29.

CHHANKA DHANUK

v

KING-EMPEROR*.

Penal Code, 1860 (*Act XLV of* 1860), *sections* 147 *and* 351 *—Unlawful assembly—common object charged "to assault" certain persons—whether the charge covers hurt—Code of Criminal Procedure*, 1898 (*Act V of* 1898), *sections* 224 *and* 231*—alteration of charge—right of accused to have prosecution witnesses recalled for cross-examination.*

*Criminal Appeal no. 87 of 1927, from a decision of J. G. Shearer, Esq., I.C.S., Additional Sessions Judge of Bhagalpur, dated the 28rd March, 1927.

Where the offence alleged to have been committed by the members of an unlawful assembly in furtherance of their common object is hurt, whether simple or grievous, it is sufficient to state in the charge that the common object of the members of the unlawful assembly was "to assault" the persons to whom hurt was caused. It is not necessary to state that the common obeject was to cause simple or grievous hurt, as the case may be.

Where a charge is altered or added to, however unnecessary and misconceived the alteration may be, the court is bound to recall any witness whom the prosecution or the accused desires to examine with reference to the alteration or addition.

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

Fazl Ali (with him *N. C. Roy*), for the appellants.

C. M. Agarwala, Assistant Government Advocate, for the Crown.

ALLANSON, J.—The two appellants have been convicted under sections 302/149 and 148 I. P. C. by the Additional Sessions Judge of Bhagalpur agreeing with two out of four Assessors and have been sentenced to transportation for life.

Jagarnath Chaudhuri is a big raiyat of village Morsanda. For sometime before the occurrence which took place on the 10th of November 1924, Jagarnath had been on very bitter terms with Santokhi Potdar, the 8-anna malik of the village. In April 1924 an order was issued under section 144 of the Code of Criminal Procedure against both parties, but it was set aside by the District Magistrate. Santokhi was convicted in a riot case, but was acquitted on October 30th 1924. On the 1st November, 1924, Jagarnath filed a petition before the District Magistrate, alleging that Santokhi was hiring lathials to take possession of the disputed land. Two days later the chaukidar reported that lathials had appeared in the

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village, and the Sub-Inspector asked for proceedings under section 144. Meanwhile a constable was sent to the village a day or two before the occurrence.

The prosecution story is that on the night of the 9th November there were nine persons sleeping in Jagarnath's temporary hut at Morsanda. There is only a small basti in this village, and big non-resident cultivators put up these temporary huts for cultivation purposes. The above nine persons included two nephews of Jagarnath Chaudhuri, a brother-in-law of Jagarnath's brother, several servants and labourers and a stranger named Bharosi Kurmi who was spending the night there. In the morning before sunrise a large body of men, led by Santokhi Potdar and Bauku Kumar on horseback attacked the inmates of the hut. They were armed with deadly weapons. Bharosi was transfixed with a spear thrust and died shortly after the occurrence. A boy 11 years old was brutally murdered with spear thrusts, three other persons received serious injuries and two slight injuries. The constable arrived on the spot after the rioters had departed. The rioters carried away with them the body of the boy which was found next day in a sack buried in the mud of a shallow stream $2\frac{1}{2}$ miles from the place of occurrence. Mahadeo Chaudhuri, one of Jagarnath's nephews, started for the thana, but hearing on the way that the Sub-Inspector was at Chanda, four or five miles away, he went there and gave his first information to the writer head constable at 9-30 a. m. The writer head constable then proceeded to the village and found the seriously injured persons lying in the kamat house. The first information contains the names of ten accused persons including the two appellants. The police did not send up a charge sheet, as the evidence was regarded as insufficient and suspicious. Further inquiry was ordered by the learned Sessions Judge on the 1st April 1925. There was a judicial inquiry and a charge sheet was called for on the 26th June 1925. Only Santokhi surrendered, and he was tried and

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acquitted on the 29th March 1926. In the trial out of which the present appeal arises four persons were charged, two of whom have been acquitted.

There can of course be no doubt that a very serious outrage took place that night at the kamat house. The sole question for decision is whether the appellants were identified as among the rioters. Certain general considerations have to be borne in mind. There was the bitterest of enmity between Santokhi and Jagarnath. It had been reported that Santokhi was collecting lathials, and there must be grave suspicion that Santokhi was behind the occurrence of that night. It is true that there had been dacoities in the neighbourhood before and after that day, but it is improbable that ordinary dacoits would have raided a temporary hut like this where there are no valuables or if they had done so would have made such savage attacks on a number of persons and have succeeded in carrying off only property worth Rs. 8. On the other hand Jagarnath's party would, whether or not they did recognise their assailants, have attributed the occurrence to Santokhi and his men. One of the difficult points in the case is the hour. The first information gives the hour as "morning before sunrise". It is light for sometime before actual sunrise, but nowhere is it stated whether it was light or dark. The constable says that he was awakened by the hulla at about 4-15 a.m. He said in a previous trial that it was dark and misty, and one could not see two yards in front. The learned Sessions Judge says that in the present case there has been an attempt by the prosecution witnesses to put the hour later than it really was. The fact remains that it is impossible to ascertain whether the occurrence took place before it was light. The learned Sessions Judge says that it is improbable that an indiscriminate and murderous attack would have been made in this way in a hut of this description unless it was light, as the attacking party might injure each other. Moreover some of the head injuries show that it was light enough for the

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assailants to see where they were striking. These reasons however are not decisive as to the hour and visibility. Santokhi would know that the occurrence certainly would be attributed to him and his men. Yet a large body of his men arrive at early dawn without any pretence at concealment, and make a murderous attack. One of the remarkable incidents in the case is the carrying away of the dead or dying boy. Even though the country over which the murderers would go was jungly, it is extraodinary that in day light they should have embarrassed themselves with the body of the boy. It is said that they presumably carried away the body in order to do away with it, yet they had left on the spot several men very seriously injured, one of whom died shortly afterwards. The body is said to have been found next day as the result of clues dropped by the rioters. It is unnecessary to say anything more about this incident.

Five persons have identified the appellants. The evidence of identification by two of them, the informant Mahadeo Chaudhuri and Hardut Chaudhuri, both of whom are nephews of Jagarnath Chaudhuri, has been discarded by the learned Sessions Judge. I agree with him that both these persons were in the village that night. I am not sure that either of them was at the kamat house. Jagarnath Chaudhuri was conveniently easing himself when the mob came, and so he hid behind a bush, which afterwards becomes a patch of khur grass, 100 feet or more from the house. The learned Sessions Judge says rightly that he could have identified nobody from that distance, the morning being misty. Hardut Chaudhuri says he succeeded in escaping from the house and hiding behind a bush, which bush (like his brother's bush) does not seem to have existed in reality. He had no injuries. The constable says that Hardut told him that he was out attending his buffaloes at the time that the occurrence took place. Hiya Lall (P. W. 6) is a brother-in-law of Jagarnath's brother whose servant he is. He received only slight injuries

and says he hid behind some grass. He named both the appellants. Meghu Dusadh, who is also a servant and who was seriously injured, says the appellant Rahim assaulted him with a pharsa on the head. Before the police he could not say who assaulted him. He does not identify the other appellant. P. W. 9, another servant, identifies the appellant Chhanka Dhaunk but does not identify Rahim. He says he saw Chhanka strike Bharosi; he did not tell the police that; for some unexplained reason, this witness was only tendered for cross-examination and it was left to the Court to bring out his examination in cheif. He was an important witness, and should have been examined by the prosecution. The position therefore is that the informant, who says that he identified the appellants and eight other persons has been disbelieved. The other nephew of Jagarnath has also been disbelieved, and there remains the evidence just referred to, of three servants. Santokhi has already been acquitted in a previous trial. In the present trial two other persons named in the first information have been acquitted. The two persons convicted are both peons of Santokhi. Therefore of the five persons out of ten named in the first information who have been tried, three have been acquitted. The learned Sessions Judge has pointed out at some length the various improvements made in the prosecution story and the difficulties of the case. I have already said that the occurrence would at once be attributed to Santokhi and his people. I see that in the report of the Sub-Inspector dated the 13th April, 1924, asking for section 144 proceeding against both the parties, the names of both appellants appear in the list of Santokhi's party. I doubt whether the occurrence took place in circumstances in which there could have been an identification. I believe it took place when the people in the kamat house were asleep. It is almost certain that the first informant did not see the occurrence or at any rate identify anybody. In all the circumstances of the case, it would be, in

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my opinion, very unsafe to convict either of the present appellants.

It is necessary to comment on a legal point that was taken in appeal. One of the common objects of the unlawful assembly as given in the charge was to assault the inmates of Jagarnath Chaudhuri's kamat house. At the argument stage the defence pointed out that under the provisions of section 224 of the Code of Criminal Procedure the word "assault" could only be taken to have the meaning that it bears in section 351 of the Indian Penal Code. The learned Sessions Judge thereupon amended that part of the charge to "voluntarily causing hurt". When the defence asked to be allowed to recall the witnesses, the learned Sessions Judge refused on the ground that the defence could not show on what points further cross-examination was necessary. In the first place I would point out that any alteration of the charge was unnecessary. The charge was quite correct. It is the usual form of charge when the common object is to do violence to some person. It is immaterial whether the offence to commit which there was a common object was assault, simple hurt, or grievous hurt. In such circumstances it is quite sufficient to say that the common object was to assault a person or persons. But once a charge has been altered or added to the provisions of section 231 apply. The learned Sessions Judge was bound to recall any witness which the prosecution or the accused desired to examine with reference to the alteration or addition. I agree that it is difficult to see what further questions could have been asked, but the provisions of the section are peremptory.

The appeal is allowed and the convictions and sentences of the appellants are set aside and they must be released.

SEN. J.—I agree.

Appeal allowed.

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Where, therefore, the partition of a joint estate consisting of different properties had been submitted to arbitration out of court and the parties agreed to a division by stages and asked that the properties remaining undivided should be the subject of a further award to be made by the same arbitrators, and the arbitrators followed the direction of the parties but were unable themselves to perform the work of partitioning the remaining properties in a separate award.

Held, that it was competent to the parties to agree before the arbitrators to the division being made by steps and that, therefore, the partition as to the property divided was final.

A party or an executor can refer pure questions of law or the construction of a will to the decision of an arbitrator.

Where, therefore, under the terms of the reference, the arbitrators were asked to construe a will, wherein there was a direction that a donee was not to enjoy a vested

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share in full until he attained a particular age, and the parties further agreed that the wishes of the testator with regard to the postponement of the bequest should not be observed, and the arbitrators, on the construction of the will, found that the donee had an absolute interest and, accordingly, made over possession of his shares in the property,

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Held, that a suit to set aside the sale could not be maintained having regard to section 33 of the Act:

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Held, (*i*) that where, after a purchase by a co-sharer, there is a partition between the co-sharers and part of the holding is allotted to the purchaser co-sharer and the remainder to the other co-sharers, the status of the purchaser co-sharer in the part allotted to the other co-sharers is not affected; (*ii*) that the interest conferred by section 22(2) on a transferee co-sharer is not affected merely by his making a settlement with a tenant. *Raja Kirtya Nand Sinha Bahadur* v. *Ram Lal Jube* 194

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Provincial Settlement plaintiff was recorded in respect of 143 acres of land including an area of .010. In the Revisional Settlement the defendant was entered in respect of this latter area and plaintiff sued for a declaration of his title and for recovery of possession.

Both settlements were made under the Bengal Tenancy Act, 1885, section 103B of which gives a statutory presumption of correctness to the entries in a Record-of-Rights. *Held*, that where there are two Records-of-Rights prepared at different times, entries in both of them will be presumed to be correct entries of facts existing at the time the entries were made, and that there is nothing in law which entitles a party to say that the entry in the subsequent record is rebutted by the entry in the previous record.

The statutory presumption attaching to an entry in a Record-of-Rights is not rebutted by the mere fact that both parties to a litigation challenge its accuracy. *Abhiram Bedanta* v. *Chintamani Bedanta* 342

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The provision for notice under section 158B(2) to the co-sharer landlords is for the benefit of the co-sharer landlords, and the notice is not essential to the validity of the sale; omission to serve the notice is a mere irregularity. *Durga Singh* v. *Mussammat Ram Dasi Kuer* 80

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The position of a landlord purchasing a holding at a rent-sale is different from that of an ordinary purchaser, who in fact steps into the shoes of the original tenant and becomes a tenant of the landlord. A tenant-purchaser of a non-transferable occupancy holding cannot on the ground of non-transferability affect a mortgagee whose incumbrance has not been annulled under section 167.

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A purchaser at a rent sale who has not under section 167 annulled a mortgage of the holding is, however, entitled to redeem the mortgage; but the mortgagee cannot redeem or otherwise exercise his right of redemption as against the auction-purchaser. *Hargobind Das* v. *Ramchandra Jha* ... 235

6————*Scope of—Landlord purchaser of holding, whether position of, different from that of tenant purchaser. See* no. 5 285

7————*Section 173, application under does not fall within section 47, Code of Civil Procedure. See* Orissa Tenancy Act, 1913, no. 6 366

8————*Schedule III, Article 6—Rent decree—Execution—Limitation—application dismissed—subsequent application, whether in continuation of former application.* On the 30th May, 1924, an application was made for execution of a rent decree, dated the 31st May, 1921, for less than Rs. 500. The decree-holder sought to attach and sell five plots of land. The 15th May, 1925, was fixed for the sale. On the 9th May, 1925, the claim of an auction-purchaser under a previous decree was allowed and the execution case was dismissed. On the 8th June, 1925, the decree-holder again applied for execution and prayed that the application should be treated as being in continuation of the previous application. It was sought to sell the properties specified in the previous application and also some additional properties.

Article 6 of Schedule III of the Bengal Tenancy Act, 1885, prescribes a period of limitation of three years from the date of the decree for the execution of a decree in a suit between landlord and tenant and not being a decree for a sum of money exceeding Rs. 500.

Held, that the order dismissing the execution case being wholly illegal should not operate to the prejudice of the decree-holder; and that inasmuch as if that order had not been passed, and the decree-holder had, on or before the 15th May, 1925, applied for time to ascertain which properties other than those purchased by the auction-purchaser under the previous decree were available to satisfy his rent decree, the application would have been reasonable and time would have been granted, the present application having been made within a reasonable time from the date on which the auction-purchaser's claim was allowed, should be treated as being in continuation of the previous execution. *Bishundeo Sahu* v. *Mahadeo Prasad Sahu* 274

BURDEN OF PROOF.—

1————*Person present at riot—onus. See* Penal Code, 1860, no. 4 828

2————*in criminal trial. See* Criminal Trial, no. 1 ... 627

CESS.—*Decree for sale of tenure or holding in execution, effect of. See* Chota Nagpur Tenancy Act, 1908, no. 1 ... 317

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CESS ACT, 1880.—*Sections 4 and 41(3)—" cultivating raiyat " definition of—person cultivating land and paying rent not exceeding Rs. 100 per annum, whether " cultivating raiyat "—rate at which cess is payable.* Where a person cultivates land and pays rent not exceeding Rs. 100 per annum, such a person is a " cultivating raiyat " within the meaning of section 4, Cess Act, irrespective of the character of his holding under the Bengal Tenancy Act; and he is liable to pay cess at half the rate paid by a tenure-holder. *Shaikh Abul Hasan* v. *Shaikh Taj Ali* 13

CHARGE.—*Alteration of—Right of accused to re-call witnesses for cross-examination. See* Penal Code, no. 5 892

CHARGE TO JURY. *See* Trial by Jury, no. 2 572

CHOTA NAGPUR ENCUMBERED ESTATES ACT, 1876.—*Section 3—usufructuary mortgage of part of estate—suit by mortgagee against tenants for rent—decree obtained—Estate taken under charge—whether proceedings in execution of the rent decree are barred....* Where an usufructuary mortgagee of part of an estate has obtained a decree for rent against the tenants of the mortgaged land and subsequently the estate is taken charge of under the Chota Nagpur Encumbered Estates Act, 1876, execution of the rent decree obtained by the mortgagee is not barred by section 3 of the Act.

The obligation of the tenants of mortgaged land to pay rent to an usufructuary mortgagee of the land is not a debt or liability of the estate, the recovery of which is barred under section 3. *Srikanta Manjhi* v. *Balak Singh Bhumji* 742

CHOTA NAGPUR TENANCY ACT, 1908.—

—Sections 3(23), 10, 139 and 208—cess, suit for the recovery of, whether cognizable by Deputy Commissioner—section 139A, clause (3), scope of—decree for cess, when operates as a rent decree—tenure or holding, sale of, in execution of a decree for cess, effect of—Bengal Rent Recovery Act, 1865 (Bengal Act VIII of 1885), section 16, applicability of. Under section 3(XXIII) of the Chota Nagpur Tenancy Act, 1908, " rent " includes cess. Therefore a suit for the recovery of cess is a suit for rent within the meaning of section 139(3) and is cognizable by the Deputy Commissioner.

Provided certain formalities are adopted, the decree in a suit for cess operates as a decree for rent.

By reason of section 208 of the Chota Nagpur Tenancy Act, section 16 of the Bengal Rent Recovery Act, 1865, applies to a sale of a tenure or holding held under the former Act in execution of a decree for arrears of cess, and the purchaser acquires the property free from all encumbrances subject to the proviso to that section. *Srimati Tulsi Mahatani* v. *Gujadhar Marwari* 817

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CHOTA NAGPUR TENANCY ACT, 1908—*contd.*—

2———*Sections* 46, 139*A*—*suit for ejectment of under-tenant, maintainability of.* No suit for the ejectment of an under-tenant by his immediate landlord lies in the civil court under section 139A read with section 46(4), Chota Nagpur Tenancy Act, 1908. *Madhab Poddar* v. *Lall Singh Bhumij* 69

3———*Sections* 68. 71, 139(*5*) *and* 139*A*—*Dispossession of tenants by landlord—application for restoration dismissed—suit for declaration of title and possession, whether barred.* In 1916 the defendants, the landlords, forcibly dispossessed the plaintiffs, their tenants. The latter then applied to the Deputy Commissioner under section 71, Chota Nagpur Tenancy Act, 1908, for restoration of possession. The application was rejected on the 24th January, 1918. The tenants instituted the present suit on the 11th January, 1924, for a declaration that they were occupancy raiyats of the land in suit and for recovery of possession. The suit was decreed by the Munsif and his decision was upheld in appeal by the Subordinate Judge.

The defendants appealed to the High Court and Adami, J., reversed the decision of the lower courts and dismissed the suit on the ground that the civil court had no jurisdiction to try the suit. The plaintiffs appealed under the Letters Patent.

Sections 68 and 71 of the Chota Nagpur Tenancy Act, 1908, enact that—

> 68. No tenant shall be ejected from his tenancy or any portion thereof, except in execution of a decree or an order of the Deputy Commissioner passed under this Act.
>
> 71. Any tenant ejected otherwise therein as aforesaid may present an application to the Deputy Commissioner praying to be replaced in possession of his tenancy and the Deputy Commissioner may..... replace him in possession.

Section 139(*5*), before its amendment in 1920, provided :

> (*5*) All applications to recover the occupancy or possession of any land from which a tenant has been unlawfully ejected by the landlord or any person claiming under or through the landlord..... shall be cognizable by the Deputy Commissioner and shall be instituted and tried under the provisions of this Act and shall not be cognizable in any other court except as otherwise provided in this Act.

By section 36 of the amending Act of 1920 the words " all suits and applications " were substituted for the words " all applications " in clause (*5*). The amendment came into operation on the 1st March 1924.

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The amending Act also introduced into the Act section 139A which came into operation on the 5th November, 1920, and provides:

> 139A. ..... no court shall entertain any suit concerning any matter in respect of which an application is cognizable by the Deputy Commissioner under section 139.....

Held, agreeing with Adami, J., that the present suit was not barred by section 139(5) as the amendment of that section did not become operative until after the present suit had been instituted.

Held, further disagreeing with Adami, J., that the suit was not barred by section 139A, inasmuch as (*i*) section 139A and section 139(5) as amended, bar the jurisdiction of the civil courts only in summary suits for possession and not in title suits in which possession is claimed as consequential relief, (*ii*) at the time when section 139A came into operation the plaintiff's cause of action had already accrued and there is nothing in the amending Act of 1920 to show that the Legislature intended to give retrospective effect to the new section. *Chaudhry Gursaran Das* v. *Akhouri Parmeshwari Charan* 296

4———*Section* 139(2), *significance of—suit by landlord against tenure-holder for rent of agricultural land, whether cognizable by Deputy Commissioner.* Plaintiff was the proprietor of an estate in Chota Nagpur which included a tenure *K*. This tenure, which was liable to plaintiff for the payment of a certain annual rent, was put up for sale on account of arrears of rent due from the tenure-holder. A portion of the tenure, however, was exempted from sale under the proviso to section 208, Chota Nagpur Tenancy Act, and the remaining portion of the tenure was sold and purchased by *B*, who obtained possession of it. On account of this sale the plaintiff had to apportion the rent in respect of the portion excluded from the sale and the portion sold. The defendant tenure-holder having defaulted in the payment of rent the plaintiff brought the present suit for the recovery of the rent apportioned. The Deputy Collector was of opinion that he had no jurisdiction to apportion the rent in a case of this nature under section 139, Chota Nagpur Tenancy Act.

Section 139(2) provides that

> "all suits and applications for the determination of the rent payable by any tenant for agricultural land" "shall be tried or heard under the provisions of this Act, and shall be instituted, be cognizable in any other court, except as otherwise provided in this Act."

Held, (*i*) that the suit was cognizable by the Deputy Collector under section 139(2), Chota Nagpur Tenancy Act; (*ii*) that the mere fact that the defendant was not a raiyat

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but a tenure-holder would not exclude the case from the operation of section 139, provided he was collecting rent in respect of agricultural land.

In order that section 139(*2*) may apply it is not necessary that the defendant should be an agricultural raiyat, but it is necessary that the rent should be payable for agricultural land. *Maharaja Pratap Udainath Sah Deo* v. *Lal Gobind Nath Sah Deo* 48

5——*Sections* 139(*5*) *and* 139*A*, *scope of—suit for declaration of title and recovery of possession of occupancy holding—whether can be entertained by a civil court.* Section 139 of the Chota Nagpur Tenancy Act, 1908, declares:

"the following suits and applications shall be cognizable by the Deputy Commissioner and shall be instituted and tried or heard under the provisions of this Act and shall not be cognizable in any other court except as otherwise provided in this Act.

* * * * * *

(*5*) all applications to recover the occupancy or possession of any land from which a tenant has been unlawfully ejected by a landlord or any person claiming under or through the landlord."

Section 139A provides:

"....no court shall entertain any suit concerning any matter in respect of which an application is cognizable by the Deputy Commissioner under section 139, and the decision of the Deputy Commissioner on any such application.....shall be final."

Where, therefore, the plaintiff sued to recover possession of a certain holding on the ground that he had been dispossessed by the defendant who had been put in possession by the landlord, and also asked for a declaration that he had a right of occupancy in the holding.

Held, that the suit was of the nature mentioned in section 139(*5*) and, therefore that it was barred by section 139A.

Held, further, that the question whether the plaintiff had an occupancy right or not in the land was merely a point in the evidence and that the suit was not excluded from the operation of section 139A by the mere fact that the declaration of the plaintiff's title as occupancy raiyat was asked for. *Bhuplal Sahu* v. *Bhekha Mahton* ... 64

6——*Sections* 139(*5*) *and* 139A—*possession of land voluntarily given up by tenant—suit by tenant to recover possession not barred.* The plaintiff was tenant of certain lands to which the Chota Nagpur Tenancy Act, 1908, applied. He placed those lands in charge of the defendants during his absence. On his return the defendants claimed the lands as their own and refused to quit them. Plaintiff sued for recovery of possession. It was contended that the suit was barred by sections 139(*5*) and 139A of the Act.

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Section 139A enacts:

"No court shall entertain any suit, concerning any matter in respect of which an application is cognizable by the Deputy Commissioner under section 139.....".

Under section 139(5):

"All applications to recover the occupancy or possession of any land from which a tenant has been unlawfully ejected by the landlord or any person claiming under or through the landlord",

are cognizable by the Deputy Commissioner.

Held, that the plaintiff never having been ejected from the lands the suit was not barred by sections 139(5) and 139A. *Bara Hapan Manjhi* v. *Gopi Manjhi* 486

7————*Section* 139A. *See* nos. 2 and 6 ... ... 69, 48

8————*Section* 181A—*decree for rent obtained by landlord—transfer of decree but no assignment of interest in land—assignee, application for execution by, whether maintainable.* *I* obtained a decree for rent against *R* and others under the Chota Nagpur Tenancy Act. The decree was subsequently transferred to *N*, but there was no assignment of the landlord's interest in the land to the assignee of the decree. The latter, however, applied for the execution of the decree as a money decree. The judgment-debtors contended that the application was barred by section 181A, Chota Nagpur Tenancy Act, 1908, which provides as follows: "An application for the execution of a decree for arrears of rent obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest in the land has become and is vested in the assignee." The Subordinate Judge, (*i*) overruled the objection of the judgment-debtors and allowed the application to proceed.

On appeal, the Judicial Commissioner reversed the decision of the Subordinate Judge and held that the assignee could not execute the decree even as a money decree.

Held in second appeal, that the application for execution was barred by section 181A of the Chota Nagpur Tenancy Act. *Firm Nayamat Ram Pujara Lal* v. *Lal Rameshwar Nath Sah Deo* 807

CIVIL COURTS ACT, 1887.—*Section* 21(1)—*suit valued at less than Rs.* 5,000—*appeal by plaintiff to High Court on ground that value is above Rs.* 5,000, *whether appeal to the High Court maintainable.* *See* Suits Valuation Act, 1887 ... 420

CODE OF CIVIL PROCEDURE, 1908.—

1————*Section* 2(2), *and Order XLI, rule* 23—*Issues decided by lower court and suit dismissed—appeal to District Court—certain issues framed and case remanded—appeal to High Court, whether maintainable.* Where the

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CODE OF CIVIL PROCEDURE, 1908—*contd.*

trial court decides a suit after determining all the issues, and, in appeal, the District Judge frames certain other issues and remands the case to the court of first instance for decision of those issues, the order of remand is neither an order under Order XLI, rule 23, nor a decree, but an order made under the Court's inherent powers and, therefore, is not appealable. *Chaudhary Chandrika Prasad Singh* v. *Mithu Rai* 380

2 ———*Section 2(2)—order of remand setting aside decree, whether is a decree. See* Remand, no. 1 160

3———*Section 47—Joint decree—purchase of property by one of the decree-holders in execution—decretal amount and compensation deposited in court—application by purchaser to withdraw the compensation deposited opposed by the other decree-holder—application allowed—appeal, whether maintainable.* One of two joint decree-holders obtained permission to bid at the sale held in execution of their decree, and purchased the property put up to sale. Subsequently the judgment-debtor deposited the decretal amount together with 5 per cent. as compensation payable to the auction-purchaser, and the latter applied to withdraw the compensation money. The application was opposed by the other decree-holder but eventually allowed, ex parte. An appeal was then preferred to the High Court.

Held, that the question having arisen not between the parties to the suit but between decree-holders, the order allowing withdrawal of the compensation money was not an order under section 47 and, therefore, was not appealable.

The compensation paid by a judgment-debtor under Order XXI, rule 89, is payable to the auction-purchaser for compensation for the disappointment caused to him by having the sale set aside and is not compensation paid to the decree-holders as such. *Munshi Rai* v. *Rup Narain* 386

4———*Section 47—application under Orissa Tenancy Act, section 227(3) or Bengal Tenancy Act, section 173, not governed by. See* Orissa Tenancy Act, 1918, no. 6 ... 366

5———*Section 60(c)—Agriculturist's house whether attachment of illegal.* The decree-holder having attached the judgment-debtor's residential house, the latter objected to the attachment on the ground that the house was protected by section 60(*c*) of the Code of Civil Procedure, 1908, which exempts from attachment and sale in execution of a decree houses and buildings belonging to an agriculturist and occupied by him. In a previous execution of the same decree the judgment-debtor had entered into an agreement with the decree-holder that he would pay the amount of the decree by instalments, and, as security, he declared that he mortgaged his residential house. No mortgage, however, was registered. *Held*, that the judgment-debtor was estopped from pleading that the house was not saleable. *Ganga Bishun Ram Gajadhar Ram* v. *Jagmohan Ram* 254

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CODE OF CIVIL PROCEDURE, 1908—*contd.*

6———*Section* 100—*finding of fact not based on evidence but on finding in another suit—not binding. See* Orissa Tenancy Act, 1913, no. 1 698

7———*Section* 109(*a*)—*Order setting aside compromise decree, whether is a final order.* An order setting aside for defect of procedure a decree passed in terms of a compromise entered into between the parties to a suit is not a final order within the meaning of section 109(*a*) of the Code of Civil Procedure, 1908. *F. A. Savi* v. *Srimati Sabitri Thakurain* 282

8———*Order refusing leave to appeal in forma pauperis, whether a final order.* An order of the court refusing leave to appeal in forma pauperis is not a final order within the meaning of section 109(*a*) of the Code of Civil Procedure, 1908. *Ram Prasad Sah* v. *Mussammat Fulpati Kuer* ... 67

9———*Section* 110—*Appeal to His Majesty in Council—Valuation under Rs.* 10,000, *whether costs may be included.* Costs of the suit are in no sense the subject-matter of the suit in the court of first instance, and, therefore, cannot be added to that subject-matter in order to bring the valuation up to the appealable amount under section 110 of the Code of Civil Procedure, 1908. *East Indian Railway Company* v. *Badri Narain* 444

10———*Section* 144 *and Order XLV, rule* 15, *whether applies to an application for restoration—Order in Council, copy of, filed subsequently but before order is passed—irregularity.* Order XLV, rule 15, does not apply to an application for restitution.

Where an applicant for restitution was unable to put before the trial court a copy of the Order in Council in his favour, but, before the order for restitution was passed, the trial court had been furnished with a copy of the Order, *held*, that there was no irregularity. *Jugal Kishore Marwari* v. *Homeshwar Singh* 252

11———*Section* 151—*Inherent powers—compromise decree obtained by fraud—suit to set aside, whether maintainable. See* no. 13, post 108

12———*Section* 151—*inherent power of High Court to order refund of Court-fee. See* Court-fee, no. 2 599

13———*Section* 151, *Order XXIII, rule* 3—*order to record a compromise, omission to make—decree made in pursuance of the compromise, legality of—case, hearing of, on a date prior to that fixed without consent of parties, effect of—application filed beyond court hours without consent of parties, whether valid presentment—compromise decree obtained by fraud, whether can be set aside under section* 151—*court, inherent powers of.* Order XXIII, rule 3, of the Code of Civil Procedure, 1908, enacts:

"Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any

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lawful agreement or compromise..... the court shall order such agreement, compromise..... to be recorded and shall pass a decree in accordance therewith....."

Held, that before recording a compromise under this rule the court should enquire into and be satisfied that the compromise has been lawfully arrived at and should direct that the compromise be recorded only after having been so satisfied; omission to comply with the requirements of the rule goes to the root of the jurisdiction of the court to pass a decree in accordance with the compromise. Where, therefore, the court without directing the compromise to be recorded made the following order " Petition of compromise filed..... put up to-day with the consent of parties, Ordered—suit be decreed in terms of the compromise ",

Held, that, the order was without jurisdiction and the decree made in pursuance of the compromise was illegal.

A case fixed on a particular date cannot be taken up prior to that date unless the parties or their duly constituted agents consent to it.

Where a petition was handed over to the Subordinate Judge at the railway station, after court hours, and without any previous appointment consented to by the parties, *held*, that there was no valid presentment of the petition.

A court has inherent powers under section 151, Code of Civil Procedure, 1908, to set aside a compromise decree if it is brought about on account of any fraud practised upon it. *Sreemati Sabitri Thakurain* v. *F. A. Savi* ... 108

14——————*Order IX, rule 13 and Order XLIII, rule 1(d)—Application to set aside ex-parte decree, dismissal of—whether appeal lies.* An appeal lies from an order dismissing an application to set aside an ex-parte decree whether the dismissal be on the merits or otherwise. *Mussammat Bodhia* v. *Ram Chandra Marwari* 474

15——————*Order XIX—service of summons, proof of, by identifier affidavit. See* Penal Code, 1860, no. 8 ... 760

16——————*Order XXI, rules 11 to 14—Step-in-aid of execution, what amounts to. See* Execution of Decree, no. 1 ... 440

17——————*Order XXI, rule 22—service of notice under, whether is a step-in-aid of execution. See* Limitation Act, 1908, no. 11 277

18——————*Order XXI, rule 54—execution of decree—Notice of sale, whether publication necessary in every mouza to be sold—Proceeding to set aside sale—question of valuation may be raised.* Where a large number of mouzas are to be put up for sale in execution of a decree it is not necessary that notice of the sale should be published in every mouza.

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CODE OF CIVIL PROCEDURE, 1908—*contd.*

In a proceeding to set aside an execution sale on the ground of irregularities in publishing and conducting it, the judgment-debtor is not precluded from raising the question of valuation merely because the question has already been decided when the sale proclamation was settled. *Maharaj Bahadur Singh* v. *Rai Bahadur P. C. Lall Chaudhury* 588

19———*Order XXI, rules* 69(2) *and* 72—*decree-holder allowed to bid—absence of express permission by the court, effect of—property under hammer for more than a week—whether "adjourned" sale—Order XXI, rule* 69(2), *applicability of.* Where the decree-holder filed a petition before the executing court asking for permission to bid at the sale and no order was passed on the petition but the decree-holder was allowed to bid throughout the course of the sale, *held*, that although there was no express permission in writing, the court must be deemed to have permitted the decree-holder to bid, and that the decree-holder could not be made to suffer on account of the mistake of the court unless it could be shown that the properties were not sold for a proper price.

Where property was put up to sale on the 16th January and the highest bid being Rs. 25,000, the court ordered the nazir to endeavour to obtain a higher bid and unsuccessful attempts to increase the bid were made on several days between the 16th and 27th, on which latter date the property was knocked down for Rs. 25,000, *held*, that the sale had not been "adjourned" within the meaning of Order XXI, rule 69(2), Code of Civil Procedure, 1908, and, therefore, no fresh sale proclamation was required. *Murlidhar Khetan* v. *Nawab Saiyid Muhammad* 432

20———*Order XXXIV, rules* 4 *and* 5—*Final decree, whether necessary after consent decree declaring amount due to decree-holder. See* Consent Decree 388

21———*Order XXI, rule* 90, *appearance on an application under, whether is a step-in-aid of execution. See* Limitation Act, 1908, no. 12 280

22———*Order XXXIV, rules* 4, 5—*Mortgage suit—preliminary decree—appeal—application for final decree—Limitation—terminus a quo. See* Mortgage Decree, no. 1 24

23———*Order XXXIV, rule* 5—*final decree, application for—Limitation—execution, terminus a quo. See* Limitation Act, 1908, no. 12 780

24———*Order XLI, rule* 23—*Issues decided by lower court and suit dismissed—appeal to District Judge—certain issues framed and case remanded—appeal, whether maintainable. See* no. 1 380

25———*Order XLIII, rule* 1(*d*)—*dismissal of application to set aside ex-parte decree—appeal. See* no. 2, *supra* 474

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26————*Order XLIV, rule 1, proviso, scope of—court, power of, to consider whether decree contrary to law or usage or otherwise erroneous or unjust, after notice is issued.* When an application for leave to appeal in forma pauperis has been admitted and the court has ordered notices to be served on the opposite party and the Government Pleader, it is no longer open to the court to consider whether the provision to rule 1, Order XLIV, Code of Civil Procedure, 1908, applies, that is to say, it cannot examine the question whether the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. *Raghunath Prasad Sahu* v. *Mussammat Rampiar Kuer* ... 687

27————*Order XLV, rule 15, whether applies to application for restitution. See* no. 10, supra 252

28————*Schedule II, paragraphs 20 and 21. See Arbitration* 556

CODE OF CRIMINAL PROCEDURE, 1898.—

1————*Section 17—Subdivisional Magistrate, subordination of, to District Magistrate. See* no. 9 30

2————*Section 109—"taking precautions to conceal his presence", whether continuous act of concealment is contemplated.* Under section 109(*a*) of the Code of Criminal Procedure, 1898, when a magistrate receives information "that any person is taking precautions to conceal his presence within the local limits of such magistrate's jurisdiction and that there is reason to believe that such person is taking such precautions with a view to committing any offence", he may call upon such person to execute a bond with sureties for his good behaviour. *Held, (i)* that clause (*a*) is not limited to cases in which the person proceeded against has not been brought under arrest; *(ii)* that it is not necessary, in order to bring a person within the operation of that clause, to show that he has followed a continuous course of conduct in taking precautions to conceal his presence.

Held, further, however, that the fact that a person was found at night in a bagicha talking to a number of other men, some of them being persons of bad character, and that they all ran away on the approach of police officers, is not sufficient to show that such person was taking precaution to conceal his presence. *Rambrich Ahir* v. *King-Emperor* 177

3————*Section 110—"by habit", habitually, meaning of.* The words "by habit" and "habitually" are used in section 110, Criminal Procedure Code, 1898, in the sense of depravity of character as evidenced by the frequent repetition or commission of the offences mentioned in the section.

Certain tenants, pending the preparation of a record-of-rights, agreed inter se that those amongst them whose names should be entered in the record-of-rights would divide

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CODE OF CRIMINAL PROCEDURE, 1898—*contd.*

the land allotted to them with certain other tenants who had contributed towards the expenses of litigation which had resulted in the settlement of the land by the landlord. Some of the parties to this agreement, in trying to enforce its terms, committed offences of loot and assault against recalcitrant parties and were called upon to execute bonds for good behaviour under section 110 on the ground of the above mentioned offences, coupled with previous acts of aggression committed against the landlord prior to the settlement referred to above. *Held*, that the mere fact that some of the parties to the agreement resorted to improper means to enforce the terms did not prove them to be habitual offenders within the meaning of section 110 (*a*) to (*e*), but that the evidence of their conduct towards the recalcitrant parties to the agreement showed that they had become so desperate and dangerous as to render their being at large without security hazardous to the community in which they lived and, therefore, that they were liable to be bound down under section 110(*f*).

As, however, some of the persons proceeded against had in the meantime been convicted on substantive charges and their sentences had not expired, the High Court held that these latter were not " at large " within the meaning of section 110(*f*), and therefore, that there was no necessity for an order against them under that clause. *Bhubaneshwar Kuer* v. *King-Emperor* 1

4———*section* 133—*Nuisance—conditional order—matter referred to another magistrate for disposal—Encroachment on public road—discharge of conditional order illegal.* The magistrate who passes a conditional order under section 133 of the Code of Criminal Procedure, 1898, may refer the matter to another magistrate for disposal.

Where it is found that an encroachment has in fact been made upon a public road, a conditional order under section 133 must be made absolute. To discharge the conditional order in such a case on the ground that the encroachment causes no inconvenience is illegal. *Jagroshan Bharthi* v. *Madan Pande* 428

5———*Section* 144—*Disobedience of temporary injunction issued by Subdivisional Magistrate—complaint by the magistrate—withdrawal of complaint, whether District Magistrate or Sessions Judge has power as to.* *See* no. 9 89

6———*Sections* 145 and 526(8)—*Dispute regarding possession of immovable property—Proceeding under section* 145 *—application for transfer—whether applicant entitled to postponement.* A party to a proceeding under section 145 of the Code of Criminal Procedure, 1898, is not entitled under section 526(8) to a postponement for the purpose of enabling him to move the High Court to transfer the case. *Loka Mahton* v. *Kali Singh* 553

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CODE OF CRIMINAL PROCEDURE, 1898—*contd.*

7———*Sections* 162, 208 *and* 215—*magistrate, order of, to furnish copies of statements to accused—section* 162(1), *meaning of—Enquiry prior to commitment—right of accused to cross-examine after copies of statements are furnished—section* 208(2), *failure to comply with, whether vitiates commitment—section* 215—*magistrate, refusal of, to issue process on defence witness—legality of—section* 208(3), *scope of.* In an inquiry into an offence triable by a Court of Session, the accused has no right to reserve cross-examination.

But where the accused applied for copies of statements made by the prosecution witnesses to the police during the investigation, and, the magistrate having ordered such copies to be furnished to him under the proviso to section 162(1) of the Code of Criminal Procedure, 1898, the accused declined to cross-examine the prosecution witnesses until such copies should be handed over to him, *held*, that the magistrate was bound to postpone the cross-examination and to afford the accused an opportunity to cross-examine the witnesses under section 208(2) after he had received copies of their statements.

Where, therefore, the magistrate had omitted to afford such an opportunity, the High Court quashed the commitment under section 215.

In an enquiry prior to commitment the refusal of the magistrate to issue process on the defence witnesses, his reasons for the refusal being recorded, is not an illegality as the case is covered by section 208(3).

Per *Macpherson, J.*—The question of furnishing to the accused a copy of the statement of a witness recorded by the police in the course of the investigation into an offence does not arise until the witness is called for the prosecution at the inquiry or trial in respect of the offence.

The court is not competent to direct that the accused be furnished with a copy of such a statement unless it contains something which constitutes a contradiction of a statement made by the witness in his deposition at such inquiry or trial.

These two circumstances must co-exist before an accused is entitled under the proviso to section 162(1) to such a copy.

Furthermore, where, on application being made for a copy of the statement of witness, the defence is informed forthwith that the contradictions, if any, are not material, the mere subsequent grant of a copy of the statement does not entitle the defence to cross-examine, after the copy has been supplied, a witness who might have been, but was not cross-examined at an earlier stage of the proceedings. *Saadat Mian* v. *King-Emperor* 829

8———*Section* 164—*statement of accused, not amounting to confession, admissibility of. See* Evidence Act, 1872, no. 1 747

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CODE OF CRIMINAL PROCEDURE, 1898.—*contd.*

9———*Section 195—Disobedience of temporary injunction issued by Subdivisional Magistrate—complaint by the magistrate—withdrawal of complaint, whether District Magistrate or Sessions Judge has power as to.* An order under section 144 of the Code of Criminal Procedure, 1898, not having been obeyed by the petitioner, the Subdivisional Magistrate (with first class powers) who passed the order, made a complaint under section 195(*1*)(*a*), alleging that the petitioner had disobeyed his order and had thereby committed an offence under section 188, Penal Code. The order under section 144 was, however, subsequently complied with, and the petitioner then applied to the Sessions Judge to withdraw the complaint made by the Subdivisional Magistrate. The Sessions Judge decided that had no jurisdiction to withdraw the complaint and that the application should have been made to the District Magistrate. *Held*, that, for the purposes of the Code of Criminal Procedure, unless it is shown that there is some provision to the contrary, the District Magistrate and not the Sessions Judge is the authority to whom a Subdivisional Magistrate is subordinate, and that as there is nothing in the Code to show that a Subdivisional Magistrate making a complaint under section 195(*1*)(*a*) is subordinate to the Sessions Judge, the authority to which such magistrate is subordinate within the meaning of section 195(*5*) is the District Magistrate.

Query.—Whether a complaint made under the provisions of section 195(*1*)(*a*) by a magistrate acting as a public servant is a judicial order.

Sub-section (*3*) of section 195 applies only where a complaint has been made under sub-section (*1*)(*b*) or (*c*) by a court and not when a complaint has been made under sub-section (*1*)(*a*) by a public servant. *Maini Missir* v. *King-Emperor* 39

10———*Section 208(2)(3)—right of accused to cross-examine after being furnished with copies of police diaries.* *See* no. 7, supra 329

11———*Section 215—Quashing of commitment on ground that accused was not given opportunity to cross-examine witnesses.* *See* no. 7, supra 329

12———*Section 224—unlawful assembly, charged "to assault" sufficient to cover hurt.* *See* Penal Code, 1860, no. 5 832

13———*Section 231—alteration of charge—rights of accused to recall witnesses for cross-examination even when alteration unnecessary.* *See* Penal Code, no. 5 832

14———*Sections 235, 269(3), 423(2) and 494—Joint trial of offences triable by jury and offences triable with the aid of assessors—acquittal on charges triable by jury—trial on other charges by some of the jurors as assessors—convictions—retrial ordered by appellate court—whether whole*

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case re-opened—re-trial only on charges triable with the aid of assessors—validity of re-trial. Out of nineteen persons accused in the present case one was charged under section 436, Penal Code, ten others were charged under section 380 and all under section 147. The offences under sections 436 and 480 are triable by jury, and the offence under section 147 by the Court of Sessions with the aid of assessors. The jury acquitted the accused of the charges under sections 436 and 380. Four of the five jurors were appointed by the Assistant Sessions Judge for trial of the charge under section 147 and they were of opinion that the accused were not guilty. With respect to twelve of the accused persons the Judge differed from his opinion and convicted them. In appeal the Sessions Judge held that the trial was illegal inasmuch as he was of opinion that under section 369(*3*), Criminal Procedure Code, all the five jurors should have been appointed as assessors; he ordered a re-trial of the twelve persons who had been convicted. The latter were re-tried on the charge under section 147, Penal Code, and the assessors were again of opinion that they were not guilty. The Assistant Sessions Judge differed from their opinion and convicted them. On appeal the Sessions Judge set-aside the convictions of five of them. Of the remaining seven, five had originally been convicted on charges triable by jury. All seven moved the High Court to order a re-trial on the ground, inter alia, that both the first and second trials were illegal.

Held, per *Ross, J.*, (*i*) that if the first trial was a nullity and if the accused persons considered that they were being prejudiced in the second trial by being tried only on the charge under section 147, Penal Code, they ought to have raised the objection before pleading to the charge; and that prejudice being a question of fact it was impossible to hold in revision that there had in fact been any prejudice;

(*ii*) that the order of the Sessions Judge, since it did not contain any express words of limitation, had to be construed with reference to the proceedings before him, and inasmuch as the appeal before him was only in respect of the convictions under section 147, the order, by necessary implication directed a re-trial of the charge under section 147 only, and such a limited order was not bad;

(*iii*) that where there has been the verdict of a jury acquitting the prisoners of certain charges, and that verdict has not been impugned by way of appeal by the Crown, it is opposed to principle that the prisoners should again be put on trial for the same offences.

Per *Kulwant Sahay, J.* (*i*) Where a joint trial is held under section 235, Criminal Procedure Code, and the accused is charged with offences some of which are triable by jury and some by the Sessions Judge with the aid of assessors

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CODE OF CRIMINAL PROCEDURE, 1898—*contd.*
the joint trial must be held as provided by section 269(3) (i.e., all the jurors must be appointed as assessors), otherwise the whole trial is illegal; (*ii*) that the re-trial ordered by the Sessions Judge re-opened the whole case and the accused could have been tried again for all the offences originally charged. But at the re-trial it was open to the Public Prosecutor to confine himself to some only of the charges; (*iii*) that the failure of the Public Prosecutor to obtain the sanction of the court under section 494, Criminal Procedure Code, to the withdrawal of a charge, is a mere irregularity. *Abdul Hamid* v. *King-Emperor* 209

15———*Section 235—joint trial of offences triable by jury, and offences triable with the aid of assessors—acquittal on charges triable by Jury—trial on other charges by some of the jurors as assessors—convictions—retrial by appellate court—whether whole case re-opened—re-trial only on charges triable with the aid of assessors—validity of re-trial. See* no. 14 208

16———*Section 239(f)—Receivers of stolen property, joint trial of—Penal Code*, 1860 (*Act XLV of* 1860), *section* 411. Where several articles stolen at one theft are received by different persons, all or any of the receivers are triable jointly for the offence of receiving stolen property. *Musammat Guljania* v. *King-Emperor* 583

17———*Sections 263(g), 342 and 364—Summary trial—examination of accused—questions and answers need not be recorded.* Although section 342, which requires the court trying an offence to examine the accused person after the witnesses for the prosecution have been examined, applies to the summary trial of a warrant case it is not necessary in such a trial for the court to record the questions put to the accused person or his answers. *Parsotim Das* v. *King-Emperor* 504

18———*Section 269(3)—joint trial of offences triable by jury and offences triable with the aid of assessors—all jurors should act as assessors. See* no. 15 208

19———*Section 307—submission of case to High Court, Judge's power discretionary—Non-interference by High Court. See* Trial by Jury, no. 1 817

20———*Section 342—summary trial—examination of accused—questions and answers need not be recorded. See* no. 17, supra 504

21———*Section 364—summary trial—examination of accused—questions and answers need not be recorded. See* no. 17, supra 504

22———*Sections 353, 530 and 537—witnesses not examined in presence of accused—trial vitiated.* Except in the cases mentioned in section 353 of the Code of Criminal Procedure, 1898, a trial is vitiated by failure to examine the witnesses in the presence of the accused person.

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Where, therefore, the witnesses were examined-in-chief in the absence of the accused persons, and the latter's legal representative did not object but at a later date cross-examined the witnesses in the presence of the accused, *held*, that the trial was vitiated by the irregularity. *Bigan Singh* v. *King-Emperor* 691

23———*Section 360—deposition not read over to witnesses —re-trial ordered—previous deposition whether admissible in evidence—Evidence Act*, 1872 (*Act I of* 1872), *section* 145. Where a trial was set aside and a re-trial ordered on the ground that the depositions of the witnesses had not been read over to them in the presence of the accused, *held*, that in the subsequent trial the depositions recorded in the first trial could be put to the witnesses under section 145 of the Evidence Act for the purpose of contradicting them. *Fazlur Rahman* v. *King-Emperor* 478

24———*Section 417—appeal under, where lies, in cases in Santal Parganas. See* Santal Parganas Justice Regulation, 1893 83

25———*Section 423—appeal, whether can be dismissed for default.* Under section 423, Code of Criminal Procedure, 1898, the court is bound to peruse the record, and to hear the appellant or his pleader if he appears, before disposing of the appeal.

Where, therefore, on the date fixed for hearing the appellant was not present and the court recorded the following order:—

"Appellant not present. Appeal dismissed."

Held, that the order contravened the requirements of section 423 and that the court was bound, even when the appellant was not present, to go through the record itself and to decide the appeal on its merits. *Kuldip Singh* v. *King-Emperor* 10

26———*Section 423(1)(b)—conviction altered by appellate court—High Court in revision may re-alter it—Legal Practitioner, duty of.* The petitioner having been charged and convicted of abetting an offence under section 205, Penal Code (false personation for doing any act for the purpose of a suit or prosecution), appealed to the Sessions Judge who was of opinion that upon the facts established the offence did not come within section 205/209, but within section 419 (cheating by personation) and altered the conviction to one under that section.

Held, that the petitioner had not been acquitted of the offence under section 205/109 and, therefore, that section 439(*4*), Code of Criminal Procedure, was not a bar to the High Court in revision from re-altering the conviction of the petitioner from one under section 419 to one under section 205/109.

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CODE OF CRIMINAL PROCEDURE, 1898—*concld.*

Per *Kulwant Sahay, J.* A legal practitioner should not draft and sign a petition of compromise and an affidavit in a case in which he was not engaged from before and in which he knows that other lawyers were engaged without consulting the latter. *Ganpat Lal* v. *King-Emperor* ... 217

27———*Section 439(4)—conviction altered by appellate court High Court in revision may re-alter it. See* no. 26 ... 217

28———*Section 494—withdrawal of charge without sanction—irregularity. See* no. 15, supra 208

29———*Section 498—grounds on which bail should be granted or refused. See* Bail 802

30———*Section 526(8)—dispute regarding possession of immovable property—application for transfer of proceedings—applicant not entitled to postponement. See* no. 6, supra 553

31———*Section 530—illegalities—section not exhaustive. See* no. 22 691

32———*Section 537—examination of witnesses in absence of accused is an illegality. See* no. 22 691

COMMITMENT.—*Quashing of, on ground that accused not given opportunity to cross-examine witnesses. See* Code of Criminal Procedure, 1898, no. 7 329

COMMON OBJECT. *See* Penal Code, sections 141 and 147.

COMPANIES ACT, 1913.—*Sections* 199, 200 *and* 201—*Order in winding-up proceedings—Transfer to court in another province for execution, whether should be to High Court or District Court.* The High Court at Allahabad having made an order in certain liquidation proceedings pending before it, transferred the order for execution to the Court of the District Judge at Gaya, in the province of Bihar and Orissa. The District Judge of Gaya held that he was not competent to deal with the case and struck off the execution.

Section 199, Companies Act, provides: "All orders made by a court under the Act may be enforced in the same manner in which decrees of such court made in any suit pending therein may be enforced." It is further provided by section 200 of that Act that "Any order made by a court for or in the course of a winding-up of a company shall be enforced in any place in British India other than that in which such court is situate by the court which would have had jurisdiction in respect of such company if the registered office of the company had been situated at such place". Section 201 requires the last-mentioned court to take the requisite steps in the matter.

Held, that the court described in sections 200 and 201 is the High Court and not the District Court. *Kayastha Trading and Banking Corporation, Gorakhpur* v. *Jai Karan Lal* 132

COMPROMISE.— Page.

1————*Omission to order record of, effect of. See* Code of Civil Procedure, 1908, no. 13 108

2————*Order setting aside, whether is a final order. See* Code of Civil Procedure, 1908, no. 27 282

CONSENT DECREE.—*Suit by minor to set aside, ground of fraud—maintainability of suit—order of court discharging guardian ad litem and declaring minor as adult whether is res judicata—minor, whether can impeach decree on the ground of gross negligence of guardian—duties of guardian—minor, remedies of—misrepresentation by minor, effect of—fraudulent misrepresentation, what constitutes—fraud, elements of —final decree; where neccessary—Code of Civil Procedure, 1908 (Act V of 1908), Order XXXIV, rules 4 and 5.* In a pending suit the guardian ad litem of a minor defendant applied to the court that her name might be struck out from the records of the suit as the minor had attained his majority and asked the court to pass a formal order of discharge. The court granted the application but the minor had no notice of the application or the order.

Held, that the order did not operate as res judicata and that, therefore, the minor was entitled to show in a subsequent suit brought for the purpose of impeaching the decree passed in the first suit, that he was in fact a minor at the date of the order.

Although a court has inherent power to correct its own proceeding when it is satisfied that in passing a particular order it was misled by one of the parties, a suit is the proper remedy where the case is one of fraud on a party to the litigation.

Held, therefore, that a suit by a minor to set aside a consent decree on the allegation that a fraud was practised not on the court but on himself is maintainable.

Even where a minor was represented in the record of the suit by a guardian ad litem not disqualified from so acting, he can in a subsequent suit impeach the decree passed in the previous suit on the ground that there was gross negligence on the part of the guardian.

It is the duty of a guardian ad litem to se as vigilant in guarding the interests of the minor as he would be expected to be if his own interests were involved; and the court will ordinarily relieve the minor from the effect of a consent decree and give him an opportunity to defend the suit if it is established that the guardian did no more than put his signature to a petition of compromise without considering for himself the question of benefit to the minor. But the rule being one of prudence, not one of law, the court will not allow a minor to avoid a consent decree if in the circumstances of the case it considers that the settlement was for the benefit for the minor.

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CONSENT DECREE.—*concld.*

A conset decree does not stand on a higher footing than a contract between the parties, and the court has jurisdiction to set aside a consent decree upon any ground which would invalidate an agreement between the parties. Therefore, a contract between a minor defendant and the plaintiff as contained in a petition of compromise is entirely void and cannot be given effect to in a court of law.

A minor is not bound in law by a contract into which he has entered even if he induced the other party to enter into the contract by a fraudulent misrepresentation that he was of age. But where an infant has obtained an advantage by falsely stating himself to be of full age, equity will restore his illgotten gains and release the party deceived from obligations or acts in law induced by the fraud.

The representation, however, must, in order to create the liability be express and fraudulent and will not be constituted by mere inference suggested by, or drawn from the infant's conduct.

Merely allowing another person to deal with him as if he were an adult, or doing acts which only an adult can in law properly do, is not sufficient to constitute a fraudulent misrepresentation.

Held, therefore, that where a person, who is a minor simply executes a vakalatnama and files a written statement without making any express representation that he is of age, this of itself does not amount to a fraudulent misrepresentation that he has attained majority.

A final decree under Order XXXIV, rule 5, Code of Civil Procedure, 1908, is only necessary where there is a preliminary decree in existence under Order XXXIV, rule 4, and the essence of a preliminary decree under the latter rule is that it shall contain an order for account to be taken between the parties as to what is due to the mortgage for principal and interest and for costs (if any) on the date fixed for payment, or a declaration as to the amount so due.

Where, therefore, in a mortgage suit, the court by its decree passed by consent merely declared the amount due to the decree-holder at the date of the decree, *held*, that the decree was not a preliminary decree under Order XXXIV, rule 4, but was capable of execution and that, in a subsequent suit brought for the purpose of impeaching the consent decree, the plaintiff was entitled to ignore the final decree (if any, and even if he was aware of it) and to ask the court to relieve him from the effect of the decree passed by consent.

Query.—Whether the doctrine of estoppel as embodied in section 115, Evidence Act, 1872, applies to infants. *Kumar Ganganand Singh* v. *Maharaja Sir Rameshwar Singh Bahadur* 888

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CONSEQUENTIAL RELIEF. *See* Court-fees Act, 1870 17

CONSTRUCTION OF DOCUMENT.—*Intention, whether extrinsic evidence of, is admissible. See* Minerals 1

CONTRACT ACT, 1872.—

1———*Section 79—oral agreement between client and mukhtiar—suit to recover fees. See* Legal Practitioners Act, 1879, no. 1 614

2———*Sections 151, 153 and 161—Railway company, general liability of, as bailees. See* Railways Act, 1890, no. 2 189

CO-SHARER LANDLORD.—*Purchase of occupancy right by—settlement with tenant—partition—part of holding allotted to purchaser and remainder to other co-sharer—status of purchaser in share allotted to other co-sharer. See* Bengal Tenancy Act, 1885 134

COSTS.—*Inclusion of, in valuation of appeal to Privy Council, not permissible. See* Code of Civil Procedure, 1908, no. 9 444

COURT-FEES.—

1———*Refund of—High Court, inherent power of—second appeal dismissed on the ground of non-maintainability—court-fee, whether should be refunded.* The High Court has inherent power to make an order directing the Taxing Officer to issue the necessary certificate to enable an appellant to apply to the revenue authorities to obtain a refund of an excess court-fee paid on a memorandum of appeal. But where, however, the High Court dismisses a second appeal on the ground that no second appeal lay from decision appealed against the court-fee paid on the memorandum of appeal cannot be refunded. *Jagdesh Chowdhury* v. *Radha Dubey* 599

2———*Appeal, dismissal of, on the ground of non-payment of deficit court-fee—fee already paid, whether can be refunded—sum of money paid in court, whether can be a court-fee.—Registrar, power of, to order deposit of money as condition precedent to the case being tried.* When an appeal has been dismissed on the ground that a deficit in the court-fee ordered to be paid has not been paid the amount of court-fee deposited with the memorandum of appeal or during the hearing of the appeal is not liable to be refunded.

A sum deposited in court as a court-fee is nevertheless a court-fee although it is not converted into the shape of a stamp. The Registrar of the High Court has no power to direct an appellant to deposit any sum of money in court as a condition precedent to having his case tried. *Janak Prasad* v. *Askaran Prasad* 603

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COURT-FEES ACT, 1870.—

1————*Sections 7(2), 7(4)(c) and Article 17, Schedule II—assessment of fair and equitable rent, suit for —prayer not in the nature of declaratory relief—ad valorem court-fee payable.* A suit for recovery of possession with mesne profits and in the alternative for assessment of fair and equitable rent upon adjudication of plaintiff's title is a suit for a declaration of title and for consequential relief, and court-fee is payable under section 7(4)(c), Court-fees Act, 1870.

The words " other sums payable periodically " in section 7(2) must be construed as implying sums payable in the nature of maintenance and annuities upon the rule of ejusdem generis and do not, therefore, cover a suit for assessment of fair rent.

Held, further, (*i*) that a prayer for assessment of rent is not in the nature of a declaratory relief and does not come under Article 17, Schedule II, Court-fees Act; (*ii*) that there being no provision in the Court-fees Act applicable to a suit for assessment of fair and equitable rent, ad valorem court-fee is payable under Schedule I of the Act, which provides for fees payable on plaints or written statements, etc., " not otherwise provided for in the Act ".

Where the plaintiff's claim was for assessment of rent at Rs. 10 per katha and the lower appellate court allowed him Rs. 3 per katha, thereby reducing the value of the plaintiff's claim in second appeal, *held*, that the court-fee on the memo. of appeal was payable on the reduced claim. *Pandit Dhanukdhari Tewari* v. *Mani Sonar* 17

2————*Section 8—suit, valuation of, whether can be enhanced for the purpose of jurisdiction.* Under section 8, Court-fees Act, 1870, the valuation for the purpose of jurisdiction and court-fee must be the same; and a party is not entitled, where the valuation of the suit can be correctly ascertained, to enhance it merely for the purpose of jurisdiction.

Plaintiffs sued the appellant for arrears of rent amounting to Rs. 3,503-10-9. In the same suit they claimed enhancement of rent. Under the Court-fees Act the valuation of such a claim is based upon the amount of one year's rent, which, in the present case, was Rs. 718-11-9. The value of the suit for the purpose of court-fee was Rs. 4,312-6-6. For the purposes of jurisdiction, however, the value of the suit was stated to be Rs. 5,100. The suit having been decreed, the defendants appealed to the District Judge, who returned the memorandum of appeal on the ground that he had no jurisdiction to hear the appeal. The defendants, therefore, presented the memorandum to the High Court.

Held, that the valuation of the suit for the purpose of jurisdiction should have been Rs. 4,312-6-6, and that the

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COURT-FEES ACT, 1870—*concld.*

proper forum was the court of the District Judge and not the High Court. *Dhaturi Singh* v. *Kedar Nath Goenka* 597

COURT OF WARDS ACT, 1875.—*Sections* 8, 6(*e*) *and* 51—*Loan by ward—suit for recovery against ward under guardianship of manager—whether suit properly framed—suit decreed—appeal by ward, whether competent—Rules of the Patna High Court, Chapter VI, rule* 5. The Court of Wards took charge of the defendant's estate under section 6(*e*) of the Bengal Court of Wards Act, 1879. Subsequently the defendant borrowed certain sums of money from the plaintiff on bahi-khata account. The plaintiff sued the defendant for recovery of the said sums of money and described him in the plaint as a ward of the court represented by his guardian, the Court of Wards' Manager. The suit was decreed but the decree stated that the decree-holder was not entitled to proceed against the properties of the defendant which were in charge of the Court of Wards. The defendant appealed to the High Court on the ground that the suit not having been instituted against him personally was not properly framed, with the result that he had had no opportunity of defending the suit inasmuch as he was represented in the suit by the manager of the Court of Wards.

Held, dismissing the appeal, that the suit was properly framed.

Query.—Whether in view of the provision of rule 5, Chapter VI, of the Rules of the Patna High Court, the defendant was entitled to prefer the appeal to the High Court. *Raja Brahasunder Deb* v. *Bhaban* 373

CRIMINAL TRESPASS. *See* Penal Code, 1860, section 441 ... 12

CRIMINAL TRIAL.—

1———*Burden of proof—counter case capable of precise proof but not supported by evidence—mere discrepancies insufficient to rebut evidence on oath—Penal Code, 1860 (Act XLV of 1860), section 304, 109—Order to beat—deceased assaulted with spear and killed.* Although, in a criminal trial, the burden of proof lies in the first instance upon the prosecution, yet when evidence has been given on oath by witnesses who profess to have seen the occurrence and who directly implicate the accused and ascribe particular acts to them, the evidence is not discredited merely by reason of a discrepancy here and a discrepancy there, or by reason of the absence of an adequate motive, or by showing that there may be exaggerations in the story told by the prosecution witnesses.

G and two others were charged under section 304 of the Penal Code. The evidence showed that one of *G*'s companions was armed with a spear and the other with a lathi; that *G* gave the order to " beat " *B* and that the two other thereupon assaulted *B* so that he died of his injuries. It

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CRIMINAL TRIAL—*concld.*
was contended that the order given by *G* did not include an order to assault *B* with a spear, and, therefore, that he could be convicted only of abetting the offence of causing hurt and not of abetting the offence under section 304.

Held, that *G* was rightly convicted under section 304/109 of the Penal Code. *Ghanshyam Singh* v. *King-Emperor* 627

2———*Burden of proof—persons present at a riot. See* Penal Code, 1860, no. 4 828

CROWN.—*Lease by,—whether registration necessary. See* Registration Act, 1908, no. 2 446

CROWN GRANTS ACT, 1895.—*Section 3—lease by Government, whether registration necessary. See* Registration Act, 1908, no. 2 446

DECLARATION, SUIT FOR.—*See* Court-fees Act, 1870, no. 1 ... 17

DECREE—*See* Code of Civil Procedure, 1908, no. 1 160

DEPOSITION—*not read over to witness—whether admissible in re-trial. See* Code of Criminal Procedure, 1898, no. 23 ... 478

DOCUMENT.—*See* Construction of Document.

DYING DECLARATION—*admissibility of, in charge of robbery. See* Evidence Act, 1872, no. 1 747

ESTATES PARTITION ACT, 1897.—*Section 119—land not being subject-matter of partition proceeding, allotted to one of the parties—objection, no adjudication on—suit for declaration of title and recovery of possession, whether barred—Limitation Act*, 1908 (*Act IX of* 1908), *Schedule I, Article* 14, *applicability of.* Where, during the partition of an estate, property not comprised in the estate is allotted to a person who is a party to the partition proceedings, the rightful owner of such property can, within twelve years from the date when his right of action accrues, sue for a declaration of his title, and if necessary, for recovery of possession of the property in question, irrespective of whether he was a party to the proceeding or not.

In a partition proceeding under the Estates Partition Act, certain lands belonging to the plaintiff and appertaining to a tauzi which was not the subject-matter of the proceeding were allocated to the defendant. The plaintiff filed a petition of objection of which no notice was taken by the Batwara Officer and consequently there was no adjudication of plaintiff's claim. Plaintiff brought the present suit for a declaration of his title to, and recovery of possession of the lands in dispute. The defence was, inter alia, that the suit having been brought more than a year after the partition award, was barred under Article 14, Schedule I, Limitation Act, 1908, and that it was also barred by section 119 of the Estates Partition Act.

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Held, (*i*) that the suit was not governed by Article 14 as there was no act or order which could bring the suit within the purview of that Article;

(*ii*) that the suit was not barred by section 119, Estates Partition Act.

Held, further, that if there had been any adjudication upon the question raised by the plaintiff during the course of the batwara proceedings the relative provisions of the Estates Partition Act would have adversely affected his position: but there having been no adjudication upon his petition the mere fact that there was, in the final partition award, an allocation of the land which the objector contended was not properly capable of inclusion in the estate which was being partitioned, could not operate to prevent the claimant from bringing a suit for a declaration of his title and recovery of possession. *Ajodhya Prasad* v. *Ramkhelawan Singh* 73

EVIDENCE ACT, 1872.—

1———*Sections* 8, 27 *and* 32(*i*)—*Dying declaration, admissibility of, in a charge of robbery and as part of the res gestae—statement to police leading to discovery, extent of admissibility of—Code of Criminal Procedure*, 1898 (*Act V of* 1898), *section* 164—*statement of accused not amounting to confession, admissibility of.* Where, in answer to the investigating police officer the accused states that he threw the weapon with which he assaulted the deceased at a certain place, and the weapon is discovered as the result of that disclosure, the statement consisting of the assertion that the weapon had been thrown at a particular place and that it was the weapon with which the offence was committed, is admissible in evidence under section 27 of the Evidence Act, 1872.

Where, during an investigation, the police sent the accused person to a Magistrate to have his confession recorded under section 164, Criminal Procedure Code, 1898, and the accused makes a statement to the magistrate which is not a confession, the statement is admissible as evidence of conduct.

A dying declaration is admissible under section 32(*i*) of the Evidence Act even when the offence charged is not homicide.

A statement made by a person who has been robbed and fatally assaulted, immediately after the robbery, is admissible under section 8 of the Evidence Act as part of the res gestae. *Lalji Dusadh* v. *King-Emperor* 747

2———*Section* 27—*statement to police leading to discovery, extent of admissibility of. See* no. 1, supra ... 747

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EVIDENCE ACT, 1872—*concld.*

3——*Section 27—confession to police—discovery of fact irrelevant to inquiry, whether makes confession admissible.* *G.* who was charged with having murdered *C* by administering poison to him, stated to the police officer investigating the case that he had administered to the deceased a drug in some gur and that he had applied some of the same drug to a sore on the leg of *H*. In pursuance of the statement the officer went to *H* and the latter produced some arsenic as the drug given him by the accused.

Held, that as the fact that the accused had applied arsenic to the leg of *H* was irrelevant to the present inquiry, the fact deposed to as discovered in consequence of the information given by the accused was inadmissible. *Gokul Chamar* v. *King-Emperor* 611

4——*Section 32(i)—dying declaration, admissibility of, in charge of robbery. See* no. 1 747

5——*Section 66—notice under, whether necessary where existence of document denied by opposite side—tender of mortgage money, whether a condition precedent to a suit for redemption—Transfer of Property Act*, 1882 (*Act IV of* 1882), *section* 60—*mortgagee, whether can acquire title by adverse possession.* Where the trial court dispensed with a notice under section 66, Evidence Act, and admitted in evidence a certified copy of a mortgage bond, the existence of which was denied by the other side, *held*, that the court rightly dispensed with the notice as on the pleadings it was unnecessary.

Section 60, Transfer of Property Act, 1882, merely defines the right to redeem and does not lay down that tender of the mortgage money is a condition precedent to the institution of a suit for redemption.

A mortgagee cannot acquire a title by adverse possession against his mortgagor. *Dinanath Rai* v. *Rama Rai*, 102

6——*Section 73—Thumb impression of accused, power of court to order taking of—refusal of accused to give thumb impression inference from—Identification of Prisoners Act*, 1920 (*Act XXXIII of* 1920), *section* 5. Where a person charged with having made a false claim on a handnote denied that he had filed the suit in question but declined to allow his thumb impression to be taken in court for comparison with the thumb impression upon the plaint in that suit, *held*, that the court was entitled to ask the accused to allow his thumb impression to be taken for the purpose of comparison and to draw an inference adverse to him on his refusal to give his thumb impression. *Zakuri Sahu* v. *King-Emperor* 623

7——*Section 145—deposition not read over to witness—whether admissible to contradict witness in a retrial. See* Code of Criminal Procedure, 1898, no. 23 478

EXECUTION OF DECREE.— Page.

1 ————*Application for—Succession certificate not filed—whether is a step-in-aid of execution—Limitation Act*, 1908 (*Act IX of* 1908), *Schedule I, Article* 182(5)—*Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXI, rules* 11 to 14. An application for execution was dismissed on the ground that some of the original decree-holders had died and their heirs, who were substituted in their place had not produced the succession certificate.

Held, that the application was nevertheless a step-in-aid of execution and, therefore, that another application made within three years of the former application was within time.

Where an application for execution contains all the particulars required by Order XXI, rules 11 to 14, it is a step-in-aid of execution even though it is otherwise defective.

An application for execution which satisfies the requirements of Order XXI, rules 11 to 14, but which is not accompanied by a succession certificate, where that is required, is in order, but no relief can be granted until the certificate is filed. *Mussammat Bibi Aisha* v. *Mahabir Prasad* 440

2————*Execution restrained by injunction—decree set aside and subsequently restored—limitation.* Some of the parties against whom a decree had been passed having instituted a suit to set aside the decree obtained an injunction restraining the decree-holder from executing it. The suit succeeded in the trial court and the decree was set aside on the 26th August, 1922. On the 6th April 1925, the decision in the second suit was reversed. On the 24th June, 1925, the decree-holder in the first suit made the present application to execute his decree. The last step-in-aid of execution of that decree had been taken on the 1st September 1921.

Held, that inasmuch as between 26th August, 1922, and the 6th April, 1925, there was no decree in existence, the present application was within time. *Ramgulam Singh* v. *Raj Kumar Rai* 695

3————*Application for, by transferee of rent decree, whether maintainable. See* Chota Nagpur Tenancy Act, 1908, no. 8 807

4————*Limitation—step-in-aid—Order to file written process and identifier's affidavit—written processes not filed—filing of affidavit alone not a step-in-aid—Limitation Act*, 1908 (*IX of* 1908), *Schedule* 1, *Art.* 182(5). An application for execution of a decree was made on the 1st August, 1921, and on the 5th January, 1922, the court directed

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EXECUTION OF DECREE—*concld.*

the decree-holder to file written processes and the identifier's affidavit as to service of notice under Order XXI, rule 22, of the Code of Civil Procedure, 1908, by the 12th January. On the latter date the affidavit was filed but not the written processes. The application for execution was dismissed. On the 2nd January, 1925, the decree-holder again applied for execution.

Held, that in the circumstances of the case the filing of the affidavit did not amount to a step-in-aid of execution and, therefore, that the second application for execution was barred by limitation. *Fatch Bahadur Singh* v. *Parmeshwar Prasad Sahu* 694

5———*Notice of sale, whether publication necessary in every mouza to be sold. See* Code of Civil Procedure, 1908, no. 18 588

EXECUTION SALE.—

1———*Notice of, whether publication necessary in every mouza to be sold. See* Code of Civil Procedure, 1908, no. 18 588

2———*Proceeding to set aside—question of valuation may be raised. See* Code of Civil Procedure, 1908, no. 18 ... 588

3———*Purchase by one of several decree-holders—decretal amount deposited in court by judgment-debtor—purchaser's application to withdraw the amount allowed—appeal by other decree-holders whether maintainable. See* Code of Civil Procedure, 1908, no. 1 880

EX-PARTE DECREE.—

1———*Decree passed in presence of defendant—represented by pleader—application to set aside decree not maintainable.* On the 9th June, 1925, the order sheet in a suit recorded that the parties were ready. On the application of the parties, however, the hearing of the suit was adjourned to allow the parties to settle out of court. Subsequently the suit was compromised between the plaintiff and all the defendants except defendants 2 and 3. The pleader for defendants 2 and 3 stated that he had no power to compromise. The plaintiff thereupon led evidence as against defendants 2 and 3 and the court on the 11th in its judgment purported to decree the suit ex-parte as against these defendants and in terms of the compromise as against the others. Defendants 2 and 3 applied to set aside the decree as against them.

Held, that as defendants 2 and 3 were represented by a pleader and the parties were ready on the 11th, the decree passed against defendants 2 and 3 was not an ex-parte decree and therefore, the application to set it aside was not maintainable. *Khedu Nack* v. *Rajib Ray* 383

2———*Suit to set aside on the ground of fraud—Court, whether can enter into the merits of the previous suit.*

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EX-PARTE DECREE—*concld.*

In a suit to set aside an ex-parte decree on the ground of fraud, it is open to the court, after non-service of the summons is proved, to enter into the merits of the previous suit with the object of determining whether there was any motive for the fraud and whether fraud was actually perpetrated or whether, if opportunity had been given to the defendant, he could have produced evidence which might have led the court to come to a different decision. *Ram Chandra Prasad* v. *Firm Parbhu Lal Ramratan* ... 458

3————*Application to set aside, dismissal of—whether appeal lies. See* Code of Civil Procedure, 1908, no. 14 458

FACTUM VALET.—*Doctrine of—application of to invalid adoption. See* Hindu Law, no. 1 506

FALSE EVIDENCE.—*See* Penal Code, 1860, section 193.

FALSE PERSONATION.—*See* Registration Act, 1908.

FINAL DECREE.—

1————*Mortgage suit—consent decree declaring amount due to decree-holder whether final decree necessary. See* Consent Decree 388

2————*Application for, in mortgage suit. See* Limitation Act, 1908, no. 12 780

FRAUD.—

1————*Suit by minor to set aside decree, maintainability of. See* Consent decree 388

2————*In obtaining compromise decree—suit to set aside, whether maintainable. See* Code of Civil Procedure, 1908, no. 3 108

GOVERNMENT.—*Lease by—whether registration necessary. See* Registration Act, 1908, no. 2 446

GUARDIAN AD LITEM.—*Duties of. See* Consent Decree ... 388

HINDU LAW.—

1————*Kayesthas of Bihar, whether belong to regenerate class—daughter's son, sister's son, mother's sister's son, adoption of, whether valid—factum valet, applicability of—plaintiff, whether can rely on general principle of prohibition, when point not specifically raised in pleadings—mere declaration, whether sufficient to create valid adoption—"giving and taking" essential—partition, claim for, after questioning an apparent adoption—limitation.* The Kayesthas of Bihar belong to one of the three regenerate classes and are not sudras.

Semble: The mere non-observance of the orthodox practices cannot take away the rights of a Kayestha in matters of inheritance, marriage and adoption.

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HINDU LAW—*contd.*

The adoption of a daughter's son, sister's son and mother's sister's son being expressly forbidden by the texts on Hindu law is void among the three regenerate classes, viz. Brahmins, Kshatriyas and Vaisyas; and such an adoption cannot be validated by application of the doctrine of factum valet.

But where, however, the plaintiffs did not specifically raise this legal objection to the validity of an adoption and the defendant was thus precluded from pleading custom varying the rule, and there was no issue raised upon the point, *held*, that the plaintiff could not rely upon the general principle of prohibition.

Where the plaintiffs brought a suit for partition of the ancestral properties and for recovery of possession of their shares therein after bringing into question the validity of an apparent adoption by virtue of which the defendant had been in possession of the properties, *held*, that the plaintiffs could not succeed without displacing the adoption and that inasmuch as a suit for setting aside the adoption was long barred by limitation the plaintiff's claim for partition was time-barred. *Ishwari Prashad* v. *Rai Hari Prashad Lal* 506

2————*Religious Endowment—Mortgage of Math Property—necessity—discharge of onerous debt—debt not for necessity—Receiver—Realization of Mahant's interest in Endowment.* The mahant of a math mortgaged certain of the endowed properties at 1 per cent. per mensem in order to discharge loans at 2 per cent. per mensem which were an accumulating burden upon the endowment; he also covenanted personally to pay. The original loans had been incurred mainly for the purpose of constructing pakka buildings for the accommodation of wealthy devotees visiting the math, and in part of the ordinary expenses of worship. In a suit to enforce the mortgage against the mahant personally and against the mortgaged property, in which suit the mahant failed to give evidence or to produce the books of the math;

Held, that the mortgage was for necessity so as to be within the power of the mahant, even if the original loans had been incurred recklessly and not for the benefit of the math, which, however, was not shown to have been the case.

Their Lordships advised that a decree be ordered for payment by the mahant personally, and that upon his failure to pay, a receiver should be appointed to realize in discharge of the mortgage debt the beneficial interest of the mahant in the endowed property, subject to an allowance for his maintenance. *Niladri Sahu* v. *Mahant Chaturbhuj Das* ... 139

HINDU LAW—*concld.* Page.

3———*Endorsement of part payment, on mortgage bond, by karta—effect of. See* Limitation Act, 1908, no. 1 ... 811

4———*Widow—Will by widow—no title conferred on legatee.* Although a transfer inter vivos by a Hindu widow, of property of which she is in possession as heir to her husband, confers upon the transferee the right to hold the property during the life of the widow, and even after her death unless the reversioners elect to treat the transferee as a trespasser after the widow's death, a Hindu widow cannot legally bequeath such property by will for a will takes effect only from the death of the testatrix, and from the moment of her death the widow ceases to have any interest in the property which reverts to her husband's heirs. *Jagdeo Singh* v. *Mussammat Raja Kuer* 788

IDENTIFICATION OF PRISONER'S ACT, 1920.—

1———*Section 5—Thumb impression of accused person, whether may be taken in court for purposes of comparison —Registration Act*, 1908 (*Act XVI of* 1908), *section* 82(*c*)—*Charge of false personation—conviction for doing "any other act in any proceeding under the Act"*. Where the accused was charged under section 82(*c*) of the Registration Act, 1908, with having falsely personated another and in such assumed character, with having presented a document purporting to have been executed by that other for registration.

Held, that in view of the provisions of the Identification of Prisoner's Act, 1920, it is not improper for the court to take finger prints of the accused in its presence and to have them compared by an expert with the disputed finger prints.

Probative value of the evidence of finger print experts discussed.

In the present case the High Court held that the evidence was insufficient to prove that the accused was guilty of personation, but found that he had in column 1 of the Thumb-impression Register kept under rule 53 of the Registration Rules, put his own thumb-impression as that of another and, therefore, that he was guilty under the latter part of section 82(*c*) of the Registration Act, of doing "any other act in any proceeding or inquiry under this Act".

The registration of a document is a proceeding under the Act and the giving of a thumb impression under rule 53 in the case of an illiterate is an act in a proceeding under the Act. *Basgit Singh* v. *King-Emperor* ... 305

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IDENTIFICATION OF PRISONER'S ACT, 1920—*cont'd.*
2———*Power of court to take thumb impression of accused.* See Evidence Act, 1872, no. 6 623

IDENTIFIER.—
1———*False affidavit by, whether punishable.* See Penal Code, 1860, no. 5 760

2———*Filing of affidavit of—whether amounts to a step-in-aid.* See Execution of Decree, no. 4 694

INCOME-TAX ACT 1922.—*Sections 8 and 12—"Interest on Securities"—Securities pledged with bank to secure overdraft—power-of-attorney given to bank authorizing them to transfer the securities to themselves—Interest collected by bank and credited to assessee—Interest on overdraft debited to assessee—Liability of the entire interest on the securities to tax—Nimak sair, whether taxable or not.* As security for an overdraft an assessee pledged with his bankers his investments in Government promissory notes and Municipal and Port Trust debentures. Some of the securities were endorsed by the assessee in favour of the bankers by a power-of-attorney which authorized them, inter alia, to transfer all or any of the securities to themselves or to others. A part of the overdraft had been utilized by the assessee in purchasing the securities. The bankers collected the income from the securities as it fell due and credited it to the assessee. The interest on the overdraft was periodically debited to the assessee. In assessing the assessee's income for the purpose of income-tax the income-tax authorities included in his income the whole of the income from the securities except such of it as was derived from securities issued free of income-tax, and also allowed a deduction in respect of that part of the interest on the overdraft which represented the interest on securities purchased out of the overdraft. The assessee claimed that the interest was not receivable by him but by the bankers, and, therefore, that he was not taxable in respect of it. He also claimed that in any event he was taxable only in respect of the difference between the income from the securities and the interest on the overdraft.

Held, (*i*) that although the bank as the assessee's attorney had a charge upon the income for the interest on the overdraft, it was none the less the income of the assessee, and that the latter had received it through his agent the bank; (*ii*) that the assessee's income from securities had been correctly assessed.

Income derived from nimak sair (i.e., income from the settlement of the right to collect a particular kind of earth in a particular area during a particular season, for the purpose of extracting salt-petre) is indistinguishable from the rents or royalties arising from the letting of coal or

INCOME-TAX ACT, 1922—*concld.* Page.

other minerals in the earth and, therefore, is income from "other sources" within the meaning of section 12 of the Act.

In a reference made to the High Court under section 66 of the Income-tax Act a finding of fact is binding on the Court unless it was come to by some improper process or by failure to give effect to some rule of law. *Maharaja Guru Mahadeo Ashram Prasad Sahi Bahadur* v. *The Commissioner of Income-tax, Bihar and Orissa* ... 29

INTENTION.—*Extrinsic evidence of, whether admissible in construing a grant. See* Minerals 638

INTERESSEE TERMINI.—*Whether doctrine of, applies in India. See* Transfer of Property Act, 1882, no. 1 94

JURY.—*See* Trial by Jury.

JOINT TRIAL.—*Some offences triable by jury and others with the aid of assessors—acquittal on former charges—trial on other charges by some of the jury as assessors, illegality of. See* Code of Criminal Procedure, no. 15, *supra* ... 208

KIDNAPPING.—*See* Penal Code, 1860, section 363.

KHORPOSH GRANT.—*Incident of—whether minerals pass. See* Minerals 638

LEASE—*by Crown, whether registration necessary. See* Registration Act, 1908, no. 2 446

LEGAL PRACTITIONER.—*Petition of compromise drafted by lawyer not engaged in the case—duty of practitioner. See* Code of Criminal Procedure, 1898, no. 26, *supra* 217

LEGAL PRACTITIONERS ACT, 1879.—

———*Section* 28—*agreement for payment of fees for work done in pending cases and in other cases—agreement not in writing and not filed in court—Remuneration not recoverable—Contract Act, 1872 (Act IX of 1872), section* 79. The plaintiff, a mukhtar, sued for the remuneration which he alleged was due to him under an agreement by which he was employed by the Court of Wards (*i*) to "build up" certain civil cases with a view to the Government Pleader drawing the pleadings in such cases, and (*ii*) to look after the cases in court after their institution, as a mukhtar. The agreement provided that the plaintiff should be remunerated for "building up" the cases by a certain percentage of the valuation of the suits and, for his work in court, in accordance with the ad valorem fees provided by the High Court's rules. The agreement was not in writing but was evidenced by a letter from the Court of Wards to the Deputy Commissioner of Hazaribagh containing a proposal to

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LEGAL PRACTITIONERS ACT, 1879—*concld.*

engage the plaintiff on the above terms and by a letter from the Board of Revenue sanctioning the proposal.

Held, that the agreement fell within the provisions of section 28 of the Legal Practitioners Act, 1879, and, those provisions not having been complied with, the plaintiff was not entitled to any remuneration for services rendered under the agreement.

It was argued for the plaintiff that in building up the cases he acted as a servant of the Court of Wards and not as a legal practitioner. On the evidence the High Court held that the plaintiff had not been employed as a servant of the Court of Wards for the purpose of building up the cases in respect of which he claimed to be remunerated.

The provisions of section 28 are wide enough to include services rendered in respect of business done by pleaders, mukhtars or revenue agents even in connection with cases not pending in court. *Kumar Kamakshya Narayan Singh* v. *Kalyan Singh* 614

2———*section* 36(*i*), *Explanation—Tout—evidence of general repute—resolution of a committee of Bar Association insufficient.* A resolution of a small committee appointed by a Bar Association declaring a person to be a tout is not evidence of the general repute of such person within the meaning of the *Explanation* to section 36(*i*) of the Legal Practitioners Act, 1879, as amended by the Legal Practitioners (Amendment) Act, 1926.

To bring a person within the definition of "tout" in section 3(*a*) of that Act it must be shown that a legal practitioner has either paid such person for his services in procuring work for him or that such person has proposed to the legal practitioner, or to some person interested in any legal business, to procure the employment of the legal practitioner on condition that the latter will pay him something as a reward for bringing him a client.

A person who frequents the precincts of courts, railway stations, etc., in order that he may persuade intending litigants to employ certain practitioners, is not a "tout" within the definition given in section 3(*b*) unless his purpose and intention is to exact remuneration from the legal practitioners who by his advice and persuasion are to be employed. *Ugam Prasad Pandey* v. *King-Emperor* ... 567

LEGAL PRACTITIONERS (AMENDMENT) ACT, 1926. *See* Legal Practitioners Act, 1879, no. 2 567

LESSEE.—*Suit by, for refund of salami. See* Limitation Act, 1908, no. 3 606

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LIMITATION ACT, 1908.—

1———*Section* 20—*mortgage—part payment—endorsement by karta of joint family—fresh period of limitation.* An endorsement of part payment by the karta of a Hindu joint family, in a mortgage bond, provides a fresh period of limitation for a suit against the family on the bond. *Bajrangi Prasad Singh* v. *Kesho Singh* 811

2———*Schedule* 1, *Article* 14. *See* Estates Partition Act, 1897 73

3———*Schedule* 1, *Articles* 62, 97 *and* 116—*Lease—possession not obtained by lessee—suit for refund of salami —Transfer of Property* Act, 1882 (*Act IV of* 1882), *section* 108. Where a lessor fails to put the lessee in possession of the property demised a suit by the latter for recovery of the salami paid for the lease is governed by Article 116 of the Limitation Act, 1908, if the lease is in writing registered. *Nabib Chandra Ganguli* v. *Munshi Mandar* ... 606

4———*Schedule* 1, *Article* 97—*suit by lessee for refund of salami. See* no. 3 606

5———*Schedule* 1, *Article* 116—*suit by lessee for refund of salami. See* no. 3 606

6———*Schedule I, Article* 132—*malikana, suit for the recovery of, after declaration of title—plaintiff entitled to recover although claim for declaration barred—* " *malikana* ", *meaning of—Article* 132—*suit on the basis of an instrument resisted in a former litigation—estoppel.* Plaintiff, who had in an earlier litigation resisted a certain rafanama, brought the present suit for the recovery of a certain sum as malikana in respect of a village, after a declaration of her right to receive the same, and pleaded on the basis of the same rafanama, that the village in question was a ghatwali village and that there had been disputes to settle which the rafanama had been drawn up. The defence was, inter alia, first, that the plaintiff was estopped from bringing the suit on the basis of the rafanama; secondly, that the right to recover the malikana was barred as the plaintiff could no longer claim a declaration of her right to receive malikana; thirdly, that the malikana claimed did not fall within the term " malikana " referred to in the *Explanation* to Article 132, Schedule I. Limitation Act, which referred only to malikana under the Bengal Regulations.

Held, (*i*) that there was no estoppel in the case inasmuch as the defendant was not prejudiced by the position adopted by the plaintiffs in the previous litigation;

(*ii*) that the claim for a declaration of right to receive the malikana was merely ancillary to the claim for malikana itself and that, therefore, the plaintiff was entitled under Article 132 to enforce payment for twelve years from the date when the money sued for became due;

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LIMITATION ACT, 1908—*contd.*

(*iii*) that the term " malikana " as used in Article 132 is not restricted to malikana under the Bengal Regulations, and that the allowance claimed in the present case was malikana within the meaning of that Article.

The intention of the parties to an instrument must be collected from the language of the instrument and may be elucidated by the conduct they have pursued. *Midnapore Zamindari Co., Ltd.*, v. *Muktakeshi Patrani* ... 51

7———*Schedule I, Article* 166—*non-applicability of, to application to set aside execution sale under Orissa Tenancy Act. See* Orissa Tenancy Act, 1913, no. 6 366

8———*Schedule I, Article* 181—*application to set aside execution sale under Orissa Tenancy Act. See* Orissa Tenancy Act, 1913, no. 6 366

9———*Schedule I, Article* 181—*Mortgage suit—final decree, application for—terminus a quo. See* Mortgage Decree, no. 1 24

10———*Schedule I, Articles* 181 *and* 182—*final decree in a mortgage suit, application to enforce, whether is an application for execution—proper article applicable—preliminary decree, appeal from—final decree, execution of—terminus a quo—Article* 182(2), *meaning of.* An application for enforcing a final decree for sale in a mortgage suit is an application for execution and is governed by Article 182, and not by Article 181 of the Limitation Act, 1908.

A preliminary decree in a mortgage suit was passed on 23rd August, 1921, and there was an appeal against this decree to the High Court. During the pendency of the appeal, the mortgagee decree-holder obtained a final decree for sale under Order XXXIV, rule 5, Code of Civil Procedure, 1908. The appeal to the High Court was dismissed on the 29th of October, 1925. The decree-holder filed the present application for execution of the final decree on 2nd February, 1926. The judgment-debtor contended that the application was barred by limitation.

Held, that limitation ran from the date of the final disposal of the appeal by the High Court, and therefore, that the application for execution was within time.

Held, further, that the words " where there has been an appeal " in clause (2) of Article 182 do not mean that the appeal must be against the decree sought to be executed, but imply that if there has been an appeal which in any way imperils the decree sought to be executed then the date of the final disposal of the appeal should be the date from which the period of limitation ought to be computed. *Somar Singh* v. *Deonandan Prasad Singh* 780

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LIMITATION ACT, 1908—*concld.*

11———*Schedule I, Article* 182(5)—*Step-in-aid of execution—service of notice under Order XXI, rule* 22, *Code of Civil Procedure*, 1908 (*Act V of* 1908), *and attachment of judgment-debtor's properties.* Although the mere service on the judgment-debtor of a notice under Order XXI, rule 22, of the Code of Civil Procedure, 1908, is not sufficient to save an application for execution from the bar of limitation, yet, where, after such notice, an order is made for attachment of the properties of the judgment-debtor and attachment is effected, a subsequent application for execution is saved thereby. *Raja Biswambhar Nath Sahi* v. *Mahesh Sahi* 277

12———*Schedule I, Article* 182(5)—*Step-in-aid of execution—appearance on an application under Order XXI, rule* 90, *Code of Civil Procedure*, 1908 (*Act V of* 1908), The mere appearance of the decree-holder in a proceeding under Order XXI, rule 90, of the Code of Civil Procedure, 1908, which is dismissed for default, does not amount to an application to take a step-in-aid of execution within the meaning of Article 182(5), Schedule I, of the Limitation Act, 1908. *Baldeo Thathwari Konhorai* v. *Lachman Lall Pathak* 280

13———*Schedule I, Article* 182—*application for final mortgage decree. See* no. 12 780

14———*Schedule I, Article* 182(5)—*Execution of decree—order to file written processes and identifier's affidavit—processes not filed—filing of affidavit alone not a step-in-aid of execution. See* Execution of Decree, no. 4 ... 780

15———*Schedule I, Article* 182(5)—*succession certificate not filed with application for execution—whether is a step-in-aid of execution. See* Execution of Decree ... 440

MAINTENANCE GRANT—*whether passes minerals. See* Minerals 688

MALICE.—*Inference as to, whether is a question of law. See* Penal Code, no. 16 224

MALIKANAS—*Suit for—limitation. See* Limitation Act, 1908, no. 6 51

MATH.—*See* Religious Endowment.

MINERALS.—*Right to, in a maintenance grant, whether passes to grantee—absence of words of express grant and clear implication, effect of—khorposh grant, incidents of—Extrinsic evidence of intention, inadmissible where no ambiguity in document of grant—feudal laws of England, principles underlying, whether applicable to India. Held,* (Per *Dawson Miller, C. J.*): That in the case of a maintenance grant (khorposh) heritable in the male line, where the reversion remains in the grantor the mineral rights do not pass without words of express grant or by clear implication.

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MINERALS—*concld.*

Where, therefore the grant recited as follows:

"……I have granted the entire pargana…… original with dependency……(together with) jalkar bankar, trees, parjapur (tenant's houses), four boundaries all included (sab sudha) in brit jagir to……for his maintenance,"

held, on a construction of the grant, that there was no intention to pass the subsoil rights.

The right of the junior members of the family to maintenance out of an impartible estate does not arise out of co-ownership but out of custom which is a modification of the ordinary Mitakshara law. A khorposh grant, therefore, does not, on the failure of male descendants in the male line of the grantee, go back by survivorship, but reverts to the parent estate.

Where a document of grant is produced in evidence and contains no latent ambiguity, extrinsic evidence of intention is inadmissible.

The feudal laws of England are no guide to the principles affecting land tenures in Bengal.

Per *Kulwant Sahay, J.*—In an impartible raj the junior members of the family have not the ordinary coparcenary rights which members of a joint Hindu family have; and a grant of maintenance by the holder of the raj to the junior members of the family does not amount to a partition, and such grants do not by themselves amount to a conveyance of full proprietary rights including rights to minerals and subsoil rights. *Maharaja Udai Pratap Nath Sahi Deo* v. *Maharaja Kumar Jagat Mohan Nath Sahi Deo*, (1927) I. L. R. 6 Pat 638

MINOR.—

1————*Guardian of—duties of guardian in a suit. See* Consent Decree 388

2————*Misrepresentation by, as to age, effect of. See* Consent Decree 388

3————*Suit by, to set aside decree on ground fraud, maintainability of. See* Consent Decree 388

MISDIRECTION.—

1————*When non-direction amounts to. See* Trial by Jury, no. 1 817

2————*Suggestion by Judge of alternative aspect of the case. See* Trial by Jury, no. 2 572

3————*Addition to common object originally charged—jury not asked which object proved—whether amounts to misdirection. See* Trial by Jury, no. 2 572

MORTGAGE DECREE.—

1————*Final decree—Limitation for application—time from which period runs—appeals from preliminary decree—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXXIV, rules* 4, 5—*Limitation Act*, 1908 (*Act IX of* 1908), *Schedule I, Article* 181.

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MORTGAGE DECREE—*concld.*

Where there has been an appeal from a preliminary mortgage decree under Order XXXIV, rule 4, sub-rule (*1*), and the appellate court has not extended the time for payment, the period of three years within which under the Indian Limitation Act, 1908, Schedule I, Article 181, an application for a final decree under Order XXXIV, rule 5, sub-rule (*2*), must be made runs from the date of the decree of the appellate court, not from the expiry of the time for payment fixed by the preliminary decree. The above is the case, although the appeal is by the mortgagee and questions merely the amount for which the preliminary decree is made and although the appeal is dismissed. *Jowad Hussain* v. *Gendan Singh* 24

2————*application for final—limitation. See* Limitation Act, 1908, no. 12 780

MORTGAGEE.—*Adverse possession, whether title by, can be acquired by mortgagee. See* Evidence Act, 1872, no. 5 ... 102

MORTGAGE SUIT.—*Consent decree declaring amount due to decree-holder—whether final decree necessary. See* Consent Decree

MUHAMMADAN LAW.—*Wakf—Shia Law—transfer of possession—wakif to be Mutawalli—mutation of names—reservation of excessive salary for wakif.* Under Shia Muhammadan law a deed of wakf is not valid unless possession has been given under it; further, the property must be entirely taken out of the wakif.

The possession given must be such as the case admits. Thus, where the wakif is to be the first mutawalli, but there has been no mutation of the property into the name of the wakif as mutawalli, the wakf is wholly void.

A wakf can validly provide that the wakif while holding the office of mutawallis shall enjoy the salary which the deed properly assigns for the mutawallis generally. But a wakif cannot under the guise of salary, reserve to himself a life-interest in a portion of the income far in excess of what is assigned to future mutawallis and could reasonably have been assigned to them.

Semble, that a wakf containing such reservation is wholly void, and not void only as to the reservation. *Abadi Begum* v. *Kaniz Zainab* 259

NIMAK SAIR.—*Income from, whether liable to income-tax. See* Income-tax Act, 1922 29

NON-DIRECTION—*When amounts to misdirection. See* Trial by Jury, no. 1 817

NON-TRANSFERABLE TENURE.—*Transfer of—suit to eject transferee, whether maintainable in civil court in Orissa. See* Orissa Tenancy Act, 1913, no. 2 358

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OCCUPANCY HOLDING.—
1———*Right of transfer of, in Orissa. See* Orissa Tenancy Act, 1913, no. 3 350

2———*Non-transferable holding—whether mortgage of, is an incumbrance. See* Bengal Tenancy Act, 1885, no. 5 235

OCCUPANCY RIGHT.—*Purchase of, by co-sharer landlord—settlement with tenant—partition—part of holding allotted to purchaser and remainder of other co-sharers—status of purchaser in share allotted to other co-sharer. See* Bengal Tenancy Act, 1885, no. 1 134

ORDER-IN-COUNCIL—*Copy of, not filed with application for restitution but filed later, effect of. See* Code of Civil Procedure, 1908, no. 10 252

ORISSA TENANCY ACT, 1913.—
1———*Sections* 5(5), 31 *and* 117(3), *Bengal Tenancy Act*, 1885, (*Bengal Act VIII of* 1885)—*rafa-tankidar, status of—entries in record-of-rights, correctness of, whether can be rebutted by previous settlement report published before enactment of the Act—landlord's right to have transfer of occupancy holding registered, whether based on custom—Section* 5(5), *presumption under, whether applies to interest created before the Act—onus to disprove one grant lies on the person who wants to displace the presumption—error or defect in procedure—where second appeal lies—Code of Civil Procedure*, 1908 (*Act VIII of* 1908), *section* 100. A settlement report prepared before the enactment of the Bengal Tenancy Act, 1885, cannot rebut the presumption of correctness of a record-of-rights prepared at a later date under the Bengal Tenancy Act, 1885.

Where, therefore, the status of the rafa-tankidars of the Khurda estate in Orissa was recorded to be that of tenure-holders in the record-of-rights prepared under the Bengal Tenancy Act, 1885, but they were described as occupancy raiyats in a previous settlement report published before the Bengal Tenancy Act had come into force, *held*, that the presumption in favour of the correctness of the record-of-rights enacted by the Bengal Tenancy Act, 1885, and by the corresponding section 117(3) of the Orissa Tenancy Act, 1913, was not rebutted, and that in the absence of any evidence to the contrary the rafa-tankidars were tenure-holders.

Where the lower appellate court came to a finding of fact, not upon the evidence before it, but on the authority of a previous finding of a court of superior jurisdiction upon similar facts in a case between different parties, *held*, that the court committed a substantial error or defect in procedure which might possibly have produced error or defect in the decision of the case upon the merits and therefore, that its decision was revisable in second appeal under section 100, Code of Civil Procedure, 1908.

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ORISSA TENANCY ACT, 1913—*contd.*

The landlord's right to have the transfer of an occupancy holding registered and the fee paid under the Orissa Tenancy Act, 1913, is based on section 31 of the Act and not upon custom.

The presumption arising under section 5(5) of the Bengal Tenancy Act, 1885, and the corresponding section of the Orissa Tenancy Act, 1913, applies to all cases, whether the interest was created before or after the Act was passed.

Per *Jwala Prasad, J.*—The presumption under section 5(5) of the Act arises merely from the area held by a tenant being over 33 acres or 100 bighas and it is for those who want to displace the presumption to show that the lands were not held under one grant or to show that the purpose for which the right of tenancy was acquired was not such as would make the tenant a tenure-holder as defined in section 5(1). *Balunki Rout* v. *Sri Kunja Behari Deb* 693

2——*Sections* 11, 13 *and* 193—*Transfer of non-transferable tenure without landlord's consent—suit by landlord to eject transferee, whether maintainable in civil court—Permanent tenure-holder, transfer of part of tenure at a nominal rent, nature of transaction.* A suit by a landlord to eject a person who has purchased a non-transferable tenure without the landlord's consent is not governed by section 193 of the Orissa Tenancy Act, 1913, and, therefore, is maintainable in the civil court.

The ancestor of defendant no. 2 obtained from Government a grant of land in perpetuity at half-rent, the grantee being entitled to hold the land during good behaviour. In the settlement khatians of 1905 and 1920 the defendant was described as a tenure-holder. The Secretary of State sued for khas possession on the grounds (*1*) that defendant no. 2 had forfeited the grant by his misbehaviour and (*2*) that he had sold a part of the land to defendant no. 1 without the consent of the grantor.

Held, (*i*) that the suit as against defendant no. 1 was cognizable by the civil court; (*ii*) but that, the defendant no. 2 being a tenure-holder, the suit against him was cognizable by the Collector and not by the civil court; (*iii*) that the civil court in which the suit had been instituted should not have dismissed the suit as against defendant no. 2 on the ground of its want of jurisdiction but should have returned the plaint under Order VII, rule 10, of the Code of Civil Procedure, 1908, for presentation to the Collector.

Where a permanent tenure-holder purports to lease in perpetuity a part of his tenure in consideration of a nominal rent which in fact represents a proportionate amount of the rent which he himself pays in respect of the tenure, the transaction amounts in effect to an out and out sale although it purports to be a lease. *Secretary of State for India in Council* v. *Natabar Mangraj* 853

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ORISSA TENANCY ACT, 1931—*concld.*

3————*Sections* 16, 31 and 250(*c*)—Occupancy holding, *transfer of, not binding on landlord unless consent obtained—Purchaser at private sale, ejectment of by fractional co-sharer landlords.* Under the Orissa Tenancy Act, 1913, where an occupancy holding or a portion thereof, situated outside a permanently-settled estate, is transferred by private sale, the transfer is not binding on the landlord, and the transferee is a trespasser, unless the landlord has consented, or is deemed under the statute to have consented to the sale.

Such a transferee is liable to be ejected at the instance of some of the co-sharer landlords to the extent of their share even though he may, subsequently to his purchase of the raiyati interest, have purchased some interest of another co-sharer landlord. *Uchhab Jena* v. *Upendra Naik* 350

4————*Section* 117, *Proviso—Record-of-rights—Rebuttal of presumption as to accuracy of, by previous Record or by repudiation by parties. See* Bengal Tenancy Act, 1885, no. 2. 342

5————*Section* 117 (3)—*Record-of-rights, presumption as to correctness of, not rebutted by previous settlement record. See* no. 1 698

6————*Section* 227(3)—*application to set aside sale—Limitation Act,* 1908 (*Act IX of* 1908), *Schedule I, Articles* 166 *and* 181. An application under section 227(3) of the Orissa Tenancy Act, 1913, to set aside a sale held in execution of a decree, is not governed by Article 166 of the Limitation Act, 1908, which applies to an application " under the Code of Civil Procedure, 1908, to set aside a sale in execution of a decree ", but by Article 181 which applies to " applications for which no period of limitation is provided elsewhere in this schedule (I to the Act) or by section 48 of the Code of Civil Procedure, 1908 ".

An application under section 227(3) of the Orissa Tenancy Act or under section 173 of the Bengal Tenancy Act, 1885, cannot be considered to be an application under section 47 of the Code of Civil Procedure. *Ananta Charan Padhan* v. *Nimai Bahubalendra* 366

PAUPER.—

1————*Application for leave to appeal as, admitted, effect of. See* Code of Civil Procedure, 1908, no. 26 687

2————*Order refusing leave to appeal to Privy Council as —whether final. See* Code of Civil Procedure, 1908, no. 8 67

PENAL CODE, 1860.—

1————*Sections* 109 *and* 304—*order to beat—deceased assaulted with spear—liability of person giving the order. See* Criminal Trial no. 1 627

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PENAL CODE, 1860—*contd.*

2————*Section* 141—*common object, addition to—jury not asked which object proved, whether amounts to misdirection. See* Trial by Jury 572

3————*Sections* 141 ,441 *and* 452—*Criminal trespass—unlawfully remaining on property unlawfully entered—resisting attempts of rightful owner to re-enter—liability for resistance distinct from liability for original entry.* Where a person in possession of property is forcibly ousted therefrom by a trespasser, then, unless the former acquiesces in the dispossession, the intruder does not acquire such possession as he is entitled to defend against the person ejected.

Where the true owner has not so acquired, the continuance in possession of the trespasser is a recurring wrong and constitutes a new entry every time that the true owner goes upon the property or as near to it as he dare to make a claim for it.

Under section 441 of the Penal Code a person who unlawfully continues in occupation of property upon which he has unlawfully entered is as liable to punishment as a person who remains unlawfully on property which he has entered lawfully, provided he is actuated by one of the intentions mentioned in that section: and he is liable to be convicted in respect of such unlawful continuance even though he has already been convicted in respect of the original unlawful entry inasmuch as each time that the true owner goes upon the property or makes a claim under circumstances sufficient in law to constitute re-entry, and the trespasser opposes him with the intention required by section 441, a new offence is omitted and a new liability arises.

Where a person forcibly enters upon property in the possession of another and others, under his order or directions assemble to resist by criminal force or show of criminal force the attempt of the rightful owner to re-enter, then, if they are five or more in number, they constitute an unlawful assembly within the meaning of section 141, the common object being to enforce their supposed right to possession. *King-Emperor* v. *Bandhu Singh* 794

4————*Sections* 142, 147 *and* 353—*unlawful assembly, liability of members of—Burden of proof—separate convictions under sections* 147 *and* 353. A person who intentionally joins or continues in an unlawful assembly is liable to conviction under section 142 of the Penal Code, and if he pleads that he was there innocently, or merely as a harmless spectator he must prove that he was there owing to no fault of his own and that he could not get out of the crowd.

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PENAL CODE, 1860—*contd.*

Where the common object of the members of an unlawful assembly was to compel Excise officers to abandon the search of certain houses and after this object was achieved, some of the members proceeded to assault the officers, *held*, that there could be no doubt that the assault was made in furtherance of the common intention of the assailants and, therefore, that they were liable to be convicted not only under section 147 but also under section 353/34. *Gendo Uraon* v. *King-Emperor* ... 828

5———*Sections* 147 *and* 351—*Unlawful assembly—common object charged "to assault" certain persons—whether the charge covers hurt—Code of Criminal Procedure*, 1898 (*Act V of* 1898), *sections* 224 *and* 231—*alteration of charge—right of accused to have prosecution witnesses re-called for cross-examination.* Where the offence alleged to have been committed by the members of an unlawful assembly in furtherance of their common object is hurt, whether simple or grievous, it is sufficient to state in the charge that the common object of the members of the unlawful assembly was "to assault" the persons to whom hurt was caused. It is not necessary to state that the common object was to cause simple or grievous hurt, as the case may be.

Where a charge is altered or added to, however unnecessary and misconceived the alteration may be, the court is bound to recall any witness whom the prosecution or the accused desires to examine with reference to the alteration or addition. *Chhanka Dhanuk* v. *King-Emperor* 892

6———*Sections* 147 *and* 353—*separate conviction and sentence under, legality of. See* no. 4, *supra* 828

7———*Sections* 191 *and* 193—*application for substitution of parties—false verification. See* Substitution of Parties 184

8———*Sections* 193 *and* 199—*false affidavit by identifier, whether deponent punishable—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XIX—service of summons, proof of, by identifiers, affidavit.* Under Order XIX of the Code of Civil Procedure, 1908, and under the General Rules and Circular Order of the Patna High Court the court issuing a summons has authority to receive an affidavit from an identifier as evidence of the fact of service of summons.

Held, that a false statement in an affidavit by identifier is punishable under section 193 of the Penal Code if the intention of the deponent was that it should be used in a judicial proceeding.

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PENAL CODE, 1860—*contd.*

Held, further, that the making of a false affidavit by an identifier is also punishable under section 199 which is wider than 192 and applies to any affidavit which the court is bound or authorised to receive. *Kari Gope* v. *Mahanth Manmohan Das* 760

9———*Section* 199—*false affidavit by identifier. See* no. 8 760

10———*Section* 304—*abatement—order to beat—assault with spear. See* Criminal Trial, no. 1 627

11———*Section* 351—*unlawful assembly—common object charged "to assault"—whether covers hurt. See* no. 5 832

12———*Sections* 353 *and* 147—*separate conviction and sentences under. See* no. 4 828

13———*Section* 363—*kidnapping, whether is a continuous offence—question of fact.* Whether the offence of kidnapping under section 363, Penal Code, is complete as soon as the minor is removed from the custody of the guardian is a question of fact to be determined according to the circumstances of each case.

When *L* enticed a minor girl to come out of a gachhi to the road and then to the motor car in which *R* was sitting, so that the latter might drive away with her, *held*, that the offence of kidnapping was complete only when *R* drove away with her. *Rekha Rai* v. *King-Emperor* ... 475

14———*Section* 411, *receivers of stolen property—joint trial. See* Code of Criminal Procedure, 1898 583

15———*Section* 441—*unlawfully remaining on property, unlawfully entered—resisting attempts of owner to re-enter—liability for resistance distinct from liability for original entry. See* no. 5 794

16———*Sections* 499 *and* 500—*defamation—Advocate—privilege of, whether absolute or qualified—Crown, onus on, to prove malice—inference as to malice, whether question of law.* The liability of an advocate charged with defamation in respect of words spoken or written in the performance of his professional duty depends on the provisions of section 499, Penal Code, 1860; the court will presume good faith unless there is cogent proof to the contrary.

The privilege is not absolute but qualified, but the burden is cast upon the prosecution to prove absence of good faith.

Per Kulwant Sahay, J. The common law of England, under which an Advocate can claim absolute privilege for words uttered in the course of his professional duty, is not applicable to India.

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PENAL CODE, 1860—*concld.*

An Advocate in this country, therefore, is not entitled to claim absolute privilege, and, in cases of prosecution for defamation, his liability must be determined on reference to the provisions of section 499, Penal Code, 1860.

The question whether upon the facts found or proved malice has been established is a question of law. *Nirsu Narayan Singh* v. *King-Emperor* 224

PERJURY.—*See* Penal Code, 1860, section 193.

PERMANENT TENURE.—*Transfer of part of a nominal rent, whether amounts to sale. See* Orissa Tenancy Act, 1913, no. 2 358

POLICE ACT, 1861—*Sections* 30, 30A *and* 32—*License for procession subject to conditions—breach of conditions by processionists—liability of licensee.* When an application for a license to take a procession through the town of Patna was granted subject to the condition that no member of the procession carried a lathi or sword,

Held that it was the duty of the licensee to see not only that no member of the procession was carrying a lathi at the time when the procession started but also that no one subsequently joined the procession with a lathi.

The mere fact that section 30A confers upon certain officers the power to stop a procession which violates the condition of a license does not relieve the licensee from his duty of strictly complying with the terms of the license. *Mahanth Babu Badri Das* v. *King-Emperor* 763

POLICE DIARIES.—*Right of accused to cross-examine after being supplied with copies of. See* Code of Criminal Procedure, 1908, no. 7 329

PRIVY COUNCIL.—

1————*Appeal to, whether lies from order setting aside compromise. See* Code of Civil Procedure, 1908, no. 7 ... 282

2————*Order of, not filed with application for restitution—Order filed later, effect of.* See Code of Civil Procedure, 1908, no. 10 252

3————*Appeal to—Valuation under Rs.* 10,000, *whether costs may be included. See* Code of Civil Procedure, 1908, no. 9 444

PUJAPAT.—*Partibility of right to perform—custom, existence of—transfer in favour of non-Brahman—validity of—turn of worship, sale of, whether must be by registered instrument.* A transfer or partition of the right to perform pujapat and take the offerings may be made where there is a custom of transferability and partibility provided the transferee belongs to the class to which the custom applies.

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PUJAPAT—*concld.*

Where, by custom the right of performing pujapat and receiving the offerings was shared by a number of Brahman Pandas only, *held*, that a transfer of the office in favour of a non-Brahman was invalid, and that, the transferee being incompetent by reason of his caste to share in the performance of the pujapat he could not claim a share in the offering.

A turn of worship not being an interest in immoveable property it is not necessary that a sale of the right should be by a registered instrument. A purchaser, therefore, is not debarred from adducing oral evidence of the sale alleged by him. *Jagdeo Singh* v. *Ram Saran Pande* ... 245

PRE-EMPTION.—*Sale of house in a city—owner of adjoining vacant plot, whether entitled to pre-empt—"hait" and "akar", meaning of.* Defendant no. 1 having sold to appellant a house situate in Patna City, plaintiff, who was the owner of a plot of homestead land adjoining the house, claimed the right of pre-emption on the ground of vicinage;

Held, that the plaintiff was entitled to pre-empt. *Mussammat Sheoratni* v. *Munshi Lal* 154

RAFA-TANKIDAR.—*Status of. See* Orissa Tenancy Act, 1913, no. 1 166

RAILWAYS ACT, 1890.—

1———*Risk Note B—loss of part of consignment—wilful neglect—theft from a running train, whether covered by Risk Note B.* Seventeen bags of sugar out of a consignment of 126 bags not having been delivered to the plaintiff who had consigned them to the East Indian Railway for delivery, the plaintiff sued the company for damages for non-delivery. The company admitted that the bags had been lost while in their custody but, relying on Risk Note B, pleaded that the loss was not due to their wilful neglect or to that of their servants.

The guard in charge of the train testified that he had seen the bags falling out of the wagon in which they had been locked when the train was travelling between ten to fifteen miles an hour between two stations. He deposed that he thought the case was one of a "moving train theft" and that he had been unable to communicate with the driver and that he dared not stop the train for fear of an accident.

Held, that the company was liable for if the guard could have communicated with the driver or have stopped the train, his omission to do so amounted to wilful neglect on his part; if he could not have done so then there was wilful neglect on the part of the company.

Under the terms of Risk Note B a railway company is not exempt from liability for loss occasioned by their

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RAILWAYS ACT, 1890—*contd.*
wilful neglect: "Provided the term wilful neglect be not held to include fire, robbery from a running train or any other unforeseen event."

Held, that the proviso does not apply to theft from a running train. *Kashi Ram Karoo Ram* v. *East Indian Railway* 168

2———*Section 72—Risk Note B, scope of—railway company, whether bound to plead and prove "loss"—loss, destruction or deterioration—railway company, general liability of, as bailee—Contract Act*, 1872, (*Act IX of* 1872), *sections* 151, 152 *and* 161. When a railway company relies on Risk Note B, it must at least admit loss in its pleadings and then the onus will be on the plaintiff to prove that the loss was due to wilful neglect of the company or its servants.

Query, per *Bucknill, J*:—Whether, when the railway company admits loss in its pleadings, such an admission is a good answer to the plaintiff's suit unless such admission is accompanied by evidence adduced by the company of a character showing how the goods had disappeared whilst in the company's custody?

Per *Jwala Prasad, J.*—(*i*) The agreement absolving the railway company from the liability under certain circumstances set forth in the risk note being an exception to the general liability of the railway company as a bailee under sections 151, 152 and 161, Contract Act, 1872, and section 72(1) of the Railways Act, the risk note must be proved by the railway company to have been duly executed;

(*ii*) the words "loss, destruction or deterioration" used in Risk Note B do not cover the case of "non-delivery". Therefore in a case of a claim against a railway company based on non-delivery of the goods consigned, it is in the first instance for the company to plead and prove loss, destruction or deterioration, and, when this is done, the onus then shifts upon the claimant to show that the loss, destruction or deterioration was due to the wilful negligence of the company. *Ganesh Dass Bisheshwar Lal* v. *East Indian Railway Company* 189

3———*Section 72—Risk Note B—"loss" onus rests primarily with the company—admission of loss in plaint, whether exonerates the defendant company—"non-delivery", whether included in "loss"*. Risk note, Form B, under which the goods in question were carried holds the railway administration "harmless and free from all responsibility for any loss, detention, or deterioration of, or damage to the said consignment from any cause whatever except for the loss.....due to the wilful neglect of its servants....."

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Held, that the onus of proving that the goods were lost within the meaning of the risk note rests primarily upon the railway company which seeks to exempt itself from liability to deliver by reason of the exemption contained in the contract.

Where, however, the plaintiff's allegation in the plaint was that he had come to know that the goods had been "lost" owing to negligence on the part of the servants of the defendant company and averred that on account of "non-delivery" he had suffered a loss of Rs. 963-14-0 and the defendants while not admitting the allegations in the plaint, relied upon the provisions of the risk note which exonerated the company from liability and pleaded that there was no negligence on the part of the servants of the company.

Held (*Jwala Prasad*, *dissentiente*) that it being admitted in the plaint that there was a loss of the goods, the onus no longer lay upon the defendants to call evidence upon the point which was admitted in the pleadings, and that, therefore, in the absence of proof that there was any wilful neglect on the part of the company's servants, the defendants were not liable.

The question whether "non-delivery" is included in the word "loss" within the meaning of the risk note Form B does not arise.

Per *Jwala Prasad*, J:—The risk note applies only when the goods are lost by the railway company and have gone out of its possession or where the company cannot trace them so as to be able to deliver the same to the consignor. It does not include "loss" to the owner on account of the "non-delivery" of the article by the railway company in breach of its contract.

Held (*per Jwala Prasad*, J. on a construction of the pleadings) that the case made out by the plaintiff was one of "non-delivery" and that therefore in the absence of proof of loss within the meaning of the risk note, the defendant company was liable. *Puran Das* v. *East Indian Railway Company* 718

———*Sections* 77 *and* 140—*posting of registered letter within time, whether proper service of notice—section* 140, *meaning of*. Section 77, Railways Act, 1890, lays down: "A person shall not be entitled to..... compensation for the loss .....of goods..... unless his claim to.....compensation has been preferred in writing by him or on his behalf to the Railway Administration within six months from the date of the delivery of.....goods for carriage by railway".

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RAILWAYS ACT, 1890—*concld.*

Section 140 provides that "Any notice.....may be served—

"(c) by forwarding it by post in a prepaid letter addressed to the Manager or Agent at his office and registered....."

Held, that the posting of a registered letter containing a notice of claim, within six months, is a proper service of notice as contemplated by section 77 read with section 140(c), Railways Act, 1890, and that the fact that it is not received by the Agent until after that time expired does not bar the institution of a suit. *Ram Gopal Marwari* v. *Bengal and North-Western Railway Company* 256

——————*Section* 80, *scope of—suit against two defendant companies—appeal against one only—competency of appeal.* Plaintiff consigned a bale of cloth under contract with the Great Indian Peninsular Railway Company but the goods were never delivered to the consignee. Part of the route having laid over the East Indian Railway, plaintiff sued both the companies for non-delivery of the goods. The suit was dismissed and the plaintiff preferred an appeal but failed to join the Great Indian Peninsular Railway Company as a respondent.

Held, that the contract being with the Great Indian Peninsular Railway Company and there being no allegation or finding that the bale was in fact lost in course of transit on the East Indian Railway, the suit and the appeal should have been brought against the Great Indian Peninsular Railway Company. *East Indian Railway Co., Ltd.*, v. *Kedarnath Seth* 105

RAILWAY COMPANY.—*Risk Note B—part of consignment lost by theft—strike of railway servants, whether amounts to wilful neglect.* Under the terms of Risk Note B a railway company is liable for wilful neglect either on their own part or on the part of their servants. A strike of the railway's employees in breach of their contract is evidence of wilful neglect on the part of such employees.

Such evidence, in the absence of proof that the company took adequate precautions to protect their wagons against the risks created by the strike, is sufficient to establish the liability of the company for the loss of goods consigned under Risk Note B, and stolen from the wagons. *Great Indian Peninsular Railway Company* v. *Firm Gurdayal* 369

RAIYATI LANDS.—*Settlement of, by zarpeshgidar, effect of. See* Zarpeshgi Lands 129

RECEIVER OF STOLEN PROPERTY.—*Joint trial of. See* Code of Criminal Procedure, 1898, no. 16 583

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RECORD-OF-RIGHTS.—
1————*Rebuttal of presumption as to accuracy of, by previous Record or by repudiation by parties. See* Bengal Tenancy Act, 1885, no. 2 342

2————*Presumption as to not rebutted by previous settlement record. See* Orissa Tenancy Act, 1913, no. 1 ... 698

REDEMPTION SUIT.—*Tender of mortgage money, whether a necessary condition precedent. See* Evidence Act, 1872, no. 5 102

REGISTERED LETTER.—*Posting of, within time, whether is a proper service of notice on Railway Administration. See* Railways Act, 1890, no. 3 256

REGISTRATION ACT, 1908.—
1————*Section* 82(*c*)—*charge of false personation—conviction for doing—"any other act in any proceeding under the Act". See* Identification of Prisoner's Act, 1920, no. 1 105

2————*Section* 90(1)—*lease of land by Government, whether exempted from registration—ejusdem generis, rule of, whether applicable to section* 90(1)(*d*)—Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 107, *whether applies to leases granted by Crown—Crown Grants Act,* 1895 (*Act XV of* 1895), *section* 2. Section 17(1), Registration Act, 1908, requires the following documents to be registered:

"(*d*) leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent."

Section 90 (1) (*d*), however, exempts from registration, inter alia,

"Sanads, inam, title deeds and other documents purporting to be or to evidence grants or assignments by Government of land or any interest in land."

Held, that a lease of land by Government is covered by section 90(1)(*d*) and is exempt from registration.

Held, further, that the words "other documents purporting to be or to evidence grants or assignments by Government of land or any interest in land" are not words of such general import in themselves as to afford any scope for the application of the rule of ejusdem generis. Section 2, Crown Grants Act, 1895, provides

"Nothing in the Transfer of Property Act, 1882, contained shall apply.....to any grant or other transfer of land or of any interest therein.....by or on behalf of Her Majesty.....or by or on behalf of the Secretary of State for India in Council to, or in favour of, any person whomsoever;....."

Held, that leases granted by the Crown are outside the operation of section 107, Transfer of Property Act, 1882, which provides that a lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent can be made only by a registered instrument. *Secretary of State for India in Council* v. *Nistarini Annie Mitter* 446

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REGULATION.—

1————1825—*XI*. *See* Alluvion and Diluvion Regulation, 1825.

2————1872—*III*. *See* Santal Parganas Settlement Regulation, 1872.

3————1893—*V*. *See* Santal Parganas Justice Regulation, 1893.

RELIGIOUS ENDOWMENT.—*Mortgage of math property—necessity—discharge of onerous debt—debt not for necessity—Receiver—realisation of mahant's interest in endowment.* *See* Hindu Law, no. 2 139

REMAND.—*Inherent powers—remand of whole case by appellate court, whether appealable—Code of Civil Procedure*, 1908 (*Act V of* 1908), *section* 2(2).

Held, that where an order of remand made in exercise of a court's inherent powers merely sets aside the decree of the trial court and does not itself decide any of the points raised for determination and does not determine the rights of the parties with regard to the matters in controversy in the suit, it is not a decree within the meaning of section 2(2) of the Code of Civil Procedure, 1908, and, therefore, no appeal lies from such an order. *Permanand Kumar* v. *Bhon Lohar* 160

2————*Issues framed by appellate court and case remanded—appeal, whether maintainable.* *See* Code of Civil Procedure, 1908, no. 1 380

RENT DECREE.—

1————*Whether decree for cess operates as.* *See* Chota Nagpur Tenancy Act, 1908, no. 1 317

2————*Execution of—application dismissed—subsequent application whether in continuation of former application.* *See* Bengal Tenancy Act, 1885, no. 8 274

3————*Application for execution of, by transfer, whether maintainable.* *See* Chota Nagpur Tenancy Act, 1908, no. 8 807

RES JUDICATA.—*Order of court discharging guardian ad litem and declaring minor as adult, whether operates as res judicata.* *See* Consent Decree 388

RESTITUTION.—*Application for, Order in Council not filed with —Order filed later—effect of.* *See* Code of Civil Procedure, 1908, no. 10 252

REVENUE SALE. *See* Bengal Land-revenue Sales Act, 1859.

RIOTING. *See* Penal Code, 1860, section 147.

RIPARIAN OWNERS.—*Alluvion—gradual accretion—reformation in situ.* *See* Alluvion 481

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RULES OF THE PATNA HIGH COURT.—*Chapter VI, rule 5, application of. See* Court of Wards Act, 1879 373

SALAMI.—*Suit for refund of, by lessees. See* Limitation Act, 1908, no. 3 606

SANTAL PARGANAS JUSTICE REGULATION, 1893.—*Section 4—Commissioner, powers of, as the High Court of the Santal Parganas—acquittal, power to set aside in revision, whether exercisable by the High Court—"appeal under section 417", whether includes applications in revision—section 4, I(ii)(a)—Code of Criminal Procedure,* 1898 *(Act V of* 1898), *sections* 417, 439. Under the first part of section 4 of the Santal Parganas Justice Regulation, 1893, " High Court " means—

(*i*) in reference to proceedings against European subjects or persons charged jointly with European British subjects, the High Court of Judicature at Fort William in Bengal (now the High Court at Patna); and

(*ii*) in reference to proceedings against other persons—

(*a*) In cases tried by the Court of Session and in appeals under section 417, Code of Criminal Procedure, from original or appellate orders of acquittal, the High Court of Judicature at Fort William in Bengal (now the High Court at Patna); and

(*b*) In other cases, the Commissioner [*i.e.*, the Commissioner of the Bhagalpur Division, section 3(*i*)].

Held, that the words " appeals under section 417 " in clause (*ii*)(*a*) do not include an application in revision, under section 439, Code of Criminal Procedure, 1898, to set aside an order of acquittal: such an application can be dealt with only by the Commissioner as the High Court of the Santal Parganas under clause (*ii*) (*b*).

Where, therefore, the Commissioner, acting in revisional jurisdiction, set aside an order of acquittal passed by a Subordinate Magistrate, and the complainant moved the High Court under section 439, Code of Criminal Procedure, 1898, against that order, *held*, that the Commissioner was the final authority under clause (*ii*)(*a*) as the High Court of the Santal Parganas to deal with the matter in revision and that the High Court at Patna had no jurisdiction to interfere.

Per *Macpherson, J.*—Jurisdiction in respect of setting aside an acquittal is in fact distributed between the two High Courts, the High Court at Patna possessing it on appeal by Government and the Commissioner on application by a private party in revision. In sections 435 to 439, Code of Criminal Procedure, 1898, as in other provisions of the Code " High Court " means in the Santal Parganas, the Commissioner, except where clause (*ii*)(*a*), section 4 of the Regulation operates. *Anwar Ali* v. *The Chairman, Deoghar Municipality* ... ...

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SANTAL PARGANAS SETTLEMENT REGULATION, 1872.—*Section 5—civil court, whether can take cognizance of an administration suit—suit for removal of executor, whether is a suit for land—section 5, bar imposed by.* Section 5, Santal Parganas Settlement Regulation, 1872, provides:

"From the date on which.....the Lieutenant-Governor declares.....that a settlement shall be made of the whole or any part of the Santal Parganas, until the date on which such settlement is declared.....to have been completed, no suit shall lie in any civil court.....in regard to—

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

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

(c) any village headship or other office connected with any land, in the area covered by such firstmentioned notification;.....".

Held, that a suit for the removal of an executor and for vesting the estate in a receiver pending the disposal of the suit is not a suit for land, and is not, therefore, barred by section 5.s *Kumar Jogendra Narain Sinha* v. *Kali Kinker Sinha* 347

SECOND APPEAL.—*Dismissal of, on ground of non-maintainability—whether court-fee should be refunded. See* Court-fee, no. 1 599

SERVICE OF SUMMONS. *See* Summons.

SPECIFIC PERFORMANCE.—*Amendment of claim—claim for return of earnest money. See* Amendment of Plaint ... 328

STAMP ACT, 1899.—*Section 36—document admitted after objection, whether admissibility can be challenged subsequently.* Section 36 of the Stamp Act, 1899, which enacts —Where an instrument has been admitted in evidence such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped, applies whether the document was admitted with or without objection. *Jagdip Singh* v. *Firangi Singh* 705

STEP-IN-AID OF EXECUTION. *See* Limitation Act, 1908, Schedule 1, Article 182(5).

SUBDIVISIONAL MAGISTRATE.—*Subordination of, to District Magistrate. See* Code of Criminal Procedure, 1898, no. 9... 39

SUBSTITUTION OF PARTIES.—*Application for—verification not necessary—false verification—Penal Code, 1860 (Act XLV of 1860), sections 191 and 193.* Under section 191, Penal Code, whoever being legally bound.....by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false.....is said to give false evidence. The offence of giving false evidence is punishable under section 193.

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SUBSTITUTION OF PARTIES—*concld.*

Held, that the law does not require a petition for substitution of parties to be verified, and therefore, that the person who presents to a court a verified petition for substitution containing a false statement of the death of the defendant is not punishable under section 193 of the Penal Code. *Purendar Jha* v. *Nunulal Jha* 184

SUCCESSION CERTIFICATE.—*Omission to file with application for execution of decree, effect of. See* Execution of Decree, no. 1 440

SUITS VALUATION ACT, 1887.—*Section* 8—*suit valued at a sum below Rs.* 5,000—*appeal to High Court on increased valuation, whether maintainable—plaintiff whether can alter valuation—forum, determination of Bengal, United Provinces and Assam Civil Courts Act*, 1887 (*Act XII of* 1887), *section* 21(1). Plaintiff brought a suit in the court of the Subordinate Judge for a declaration that the properties in suit were wakf properties and paid the fixed court-fee under Schedule II, Article 17, Court-Fees Act, after having valued the suit for the purpose of jurisdiction at a sum below Rs. 5,000. The suit was dismissed. Under section 21(1) of the Bengal, United Provinces and Assam Civil Courts Act, 1887, an appeal lay to the court of the District Judge but the plaintiff preferred an appeal to the High Court on the allegation that the real value of the properties in suit exceeded Rs. 5,000. The defendant accepted the increased valuation but contended that the plaintiff could not change the valuation and that the procedure adopted was illegal.

Held (1) that the plaintiff was not debarred from showing what the real value of the subject-matter of the suit was, and that the forum of appeal was to be determined not by the valuation as stated in the plaint, but by the real value of the subject-matter of the suit:

(2) that the procedure adopted by the plaintiff in preferring the appeal directly to the High Court, without first appealing to the court of the District Judge, was proper. *Syed Amir Nawab* v. *Mussammat Wajda Begum* 420

SUMMONS.—*False affidavit of service of, by identifier, whether punishable. See* Penal Code, no. 8 760

THUMB IMPRESSION.—

1———*Refusal by accused to give—inference to be drawn from. See* Evidence Act, 1872, no. 11 623

2———*Power of court to take accused persons'. See* Evidence Act, 1872, no. 11 628

3———*Accused's may be taken in court. See* Identification of Prisoner's Act, 1920, no. 1 305

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TOUT.—*Evidence of general repute. See* Legal Practitioners Act, 1879, no. 2 567

TRANSFER OF PROPERTY ACT, 1882.—

1———*Interesse termini—Common law doctrine, whether applicable to leases in India—Lease reserving annual rent—lessee out of possession, whether can maintain action for damages against lessor.* The common law doctrine of England which is founded on the view that before actual entry by the lessee he has merely an interesse termini, livery of seizin being necessary to complete his title, is not applicable to leases in India which are governed by the Transfer of Property Act, 1882.

Held, therefore, that in the case of a lease reserving an annual rent delivery of possession not being essential to the vesting of the interest, a lessee who has been out of possession of the demised lands can maintain an action for damages for keeping him out of possession. *Mussammat Razia Begum* v. *Shaikh Muhammad Daud* 94

2———*Section 66—tender of mortgage money, whether is a condition precedent to suit for redemption. See* Evidence Act, 1872, no. 5 102

3———*Section 107—Lease by Crown, whether registration necessary. See* Registration Act, 1908, no. 2 ... 446

4———*Section 108—suit by lessee for refund of salami—limitation. See* Limitation Act, 1908, no. 3 606

TRESPASS. *See* Penal Code, 1860, section 441.

TRIAL BY JURY.—

1———*Non-direction, when amounts to misdirection—Code of Criminal Procedure, 1898 (Act V of 1898), section 307—submission of case to High Court, Judge's power discretionary—Non-interference by High Court.* Non-direction amounts to misdirection only when it is such that there are grounds for thinking that the jury by reason of it may have been put on the wrong track and made to arrive at a wrong conclusion.

Whether a case tried by jury should or should not be referred to the High Court under section 307 of the Code of Criminal Procedure, 1898, is a matter entirely within the discretion of the Judge.

It is only when the Judge is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, that he should submit it. Where he is not clearly of that opinion and does not submit it, the High Court will not in appeal interfere with his decision. *Bajit Mian* v. *King-Emperor* 817

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TRIAL BY JURY—*concld.*

2———————*Charge to jury—misdirection—suggestion by Judge of an alternative aspect of the case not put forward by prosecution or defence—charge—addition to common object originally stated—jury not asked which object proved, whether amounts to misdirection.* Where the petitioners were charged with rioting with the common object of looting the paddy stored in the khalian in a certain basti and this was denied by the accused persons, one of whom had lodged a saneha at the thana from which it appeared that the complainant's party might have attacked the party of the petitioners in a khesari khet belonging to the petitioners and situated a quarter of a mile from the khalian, *held*, that it was not a misdirection on the part of the Judge to suggest for the jury's consideration, as a third alternative, an intermediate state of facts, namely, that the party of the accused having been worsted by the complainant's party at the khesari khet fled into the basti, and, having reinforced themselves there, advanced to meet the other side near the khalian.

Where the common object of the unlawful assembly of which the petitioners were members was originally stated in the charge to be " to loot the paddy crops lying in the khalian " and, after some of the witnesses for the prosecution had been examined, the Judge added to the charge the words " and to assault the landlords' man Karu Gope and others ", *held*, that the charge as amended did not state two alternative common objects and, therefore, it was not necessary for the Judge to ascertain from the jury as to which part of the common object they found the petitioners guilty. *Nathuni Nonia* v. *King-Emperor* ... 572

UNDER-TENANT.—*Suit of ejectment of, maintainability of, in Chota Nagpur.* *See* Chota Nagpur Tenancy Act, 1908, no. 2 69

WAKF.—*Transfer of possession necessary.* *See* Muhammadan Law 259

WORSHIP.—*Turn of, whether sale of, must be by registered instrument.* *See* Pujapat 245

ZARPESHGI LEASE.—*Bona fide settlement of raiyati lands by zarpeshgidar, whether binding on lessor.* In the absence of a covenant in the zarpeshgi lease restricting the powers of the zarpeshgidars as regards the settlement of raiyati lands, the lessees are entitled, in the ordinary course of management, to induct tenants upon raiyati lands, and such bona fide settlement of land by the zarpeshgidars is binding upon the proprietor or the person who had granted the zarpeshgi. *Bhairo Nath Roy* v. *Shanke Pahan* ... 129

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